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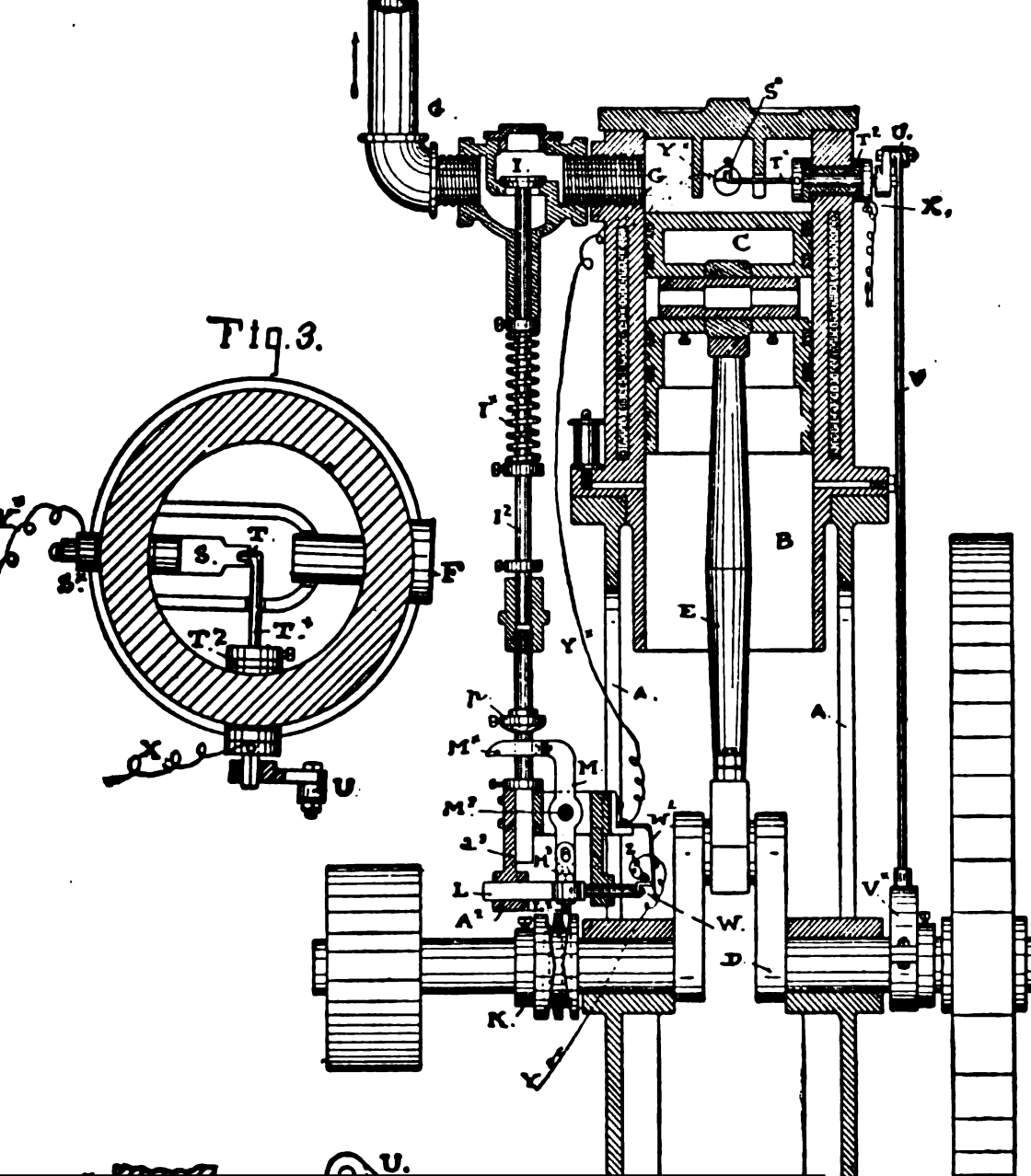
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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

AUGUST—OCTOBER, 1898.

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JURISPRUDENCE

RULES OF COURT.

UNITED STATES CIRCUIT COURTS OF APPEALS.

Table of Fees for Circuit Courts of Appeals.

Supreme Court of the United States, October Term, 1897.

Order.

February 28, 1898.

Ordered, that the table of fees and costs in the circuit courts of appeals, established in pursuance of the act of congress of February 19, 1897, by order of January 10, 1898, be, and the same is hereby, amended as to the item for "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, .15," by substituting twenty-five cents in place of fifteen cents, for each printed page, so that said order as amended shall read as follows:

Ordered, in pursuance of the act of congress of February 19, 1897 (29 Stat. 536, c. 263), that the following table of fees and costs in the circuit courts of appeals be, and the same is hereby, established, to take effect on the first day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record.....	\$ 5 00
Entering an appearance.....	25
Transferring a case to the printed calendar.....	1 00
Entering a continuance.....	25
Filing a motion, order, or other paper.....	25
Entering any rule, or making or copying any record or other paper, for each one hundred words.....	20
Entering a judgment or decree.....	1 00
Every search of the records of the court and certifying the same....	1 00
Affixing a certificate and a seal to any paper.....	1 00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent. on the amount so received, kept and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index.....	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00
Filing briefs, for each party appearing.....	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy).....	1 00
Attorney's docket fee.....	20 00

I, James H. McKenney, clerk of the supreme court of the United States, do hereby certify that the foregoing is a true copy of the order

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of said supreme court entered on February 28, 1898, in pursuance of the act of congress of February 19, 1897, as the same remains upon the files and records of said supreme court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said supreme court, at the city of Washington, this 11th day of March, A. D. 1898.

[Seal.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Eighth Circuit.

APPENDIX TO RULE 35.¹

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know All Men by These Presents,

That we, — as principal, and — as sureties, are held and firmly bound unto the United States of America in the full and just sum of — Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this — day of — in the year of our Lord, One Thousand Eight Hundred and Ninety- —.

Whereas, lately at the — Term, A. D. 189—, of the — Court of the United States for the — District of —, in a suit depending in said Court between the United States of America, plaintiff, and —, defendant—, a judgment and sentence was rendered against the said — and the said — ha— obtained a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said — shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the — Court of the United States for the — District of — on such day or days as may be appointed for a retrial by said — Court, and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

____ [Seal.]
____ [Seal.]
____ [Seal.]

Approved:—

Judge of the —.

¹ For appendix to rule 35, as originally adopted in the Eighth circuit, see 22 C. C. A. vi., 78 Fed. cxxx.

FEDERAL REPORTER, VOLUME 88.

JUDGES

OF THE

**UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.**

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Hon. HORACE GRAY, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Bristol, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. NATHAN WEBB, District Judge, Maine.....Portland, Me.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts.....Boston, Mass.
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Hon. HOYT H. WHEELER, District Judge, Vermont.....Brattleboro, Vt.

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 Hon. JOHN B. RECTOR, District Judge, N. D. Texas.¹.....Dallas, Tex.
 Hon. EDWARD R. MEEK, District Judge, N. D. Texas.².....Ft. Worth, Tex.
 Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

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 Hon. HORACE H. LUTON, Circuit Judge.....Nashville, Tenn.
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 Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
 Hon. HENRY F. SEVERENS, District Judge, W. D. Michigan.....Kalamazoo, Mich.
 Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio.....Cleveland, Ohio.
 Hon. GEORGE R. SAGE, District Judge, S. D. Ohio.³.....Cincinnati, Ohio.
 Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio.⁴.....Cincinnati, Ohio.
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 Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee.....Memphis, Tenn.

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 Hon. JOHN W. SHOWALTER, Circuit Judge.....Chicago, Ill.
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 Hon. JOHN H. BAKER, District Judge, Indiana.....Goshen, Ind.
 Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.....Sheboygan, Wis.
 Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.....Madison, Wis.

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 Hon. HENRY C. CALDWELL, Circuit Judge.....Little Rock, Ark.
 Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.

¹ Deceased April 9, 1898.

² Commissioned July 13, 1898.

³ Resigned, to take effect on appointment of successor.

⁴ Commissioned Sept. 23, 1898.

Hon. AMOS M. THAYER, Circuit Judge.....	St. Louis, Mo.
Hon. JOHN A. WILLIAMS, District Judge, E. D. Arkansas.....	Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....	Ft. Smith, Ark.
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Hon. JOHN A. RINER, District Judge, Wyoming.....	Cheyenne, Wyo.

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Hon. JAMES H. BEATTY, District Judge, Idaho.....	Boise City, Idaho.
Hon. CHARLES S. JOHNSON, District Judge, Alaska.....	Sitka.

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†

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

CREAGH v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES et al.

(Circuit Court, D. Washington, N. D. June 25, 1898.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—ALIENAGE OF PLAINTIFF.
One of several defendants, who is a citizen of one of the United States, cannot remove the cause on the ground of a separable controversy between himself and an alien plaintiff.

2. SAME—ALIENS—NATURALIZATION.

A declaration of intention to become a citizen of the United States does not make one a naturalized citizen, nor entitle him to the rights or privileges of citizenship in the state of Washington; and he is, therefore, not a citizen of that state in the meaning of the removal acts.

3. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—ACTION FOR LIBEL.

An action to recover damages for a libel alleged to have been written and published by certain of the defendants, acting as agents of their co-defendant, contains no separable controversy which will enable such co-defendant to remove the case.

This is an action to recover damages for an alleged libel, and was brought by John Creagh against the Equitable Life Assurance Society of the United States, a New York corporation, and Frank Waterhouse and William P. Pritchard, co-partners doing business under the firm name and style of Waterhouse & Pritchard.

Upton, Arthur & Wheeler, for plaintiff.

Burke, Shepard & McGilvra, for defendants.

HANFORD, District Judge. This action was commenced in the superior court of the state of Washington for King county, to recover damages for an alleged libelous letter, injurious to the plaintiff, alleged to have been written and published by the defendants Waterhouse & Pritchard, acting in that behalf as agents of their co-defendant, the Equitable Life Assurance Society, and in the transaction of business within the scope of their agency, as well as in behalf of themselves. The Equitable Life Assurance Society filed in the state court a petition and bond for removal of the case into this court, alleging in

its petition as the ground for removal that there is a separable controversy, which is wholly between the plaintiff and said petitioning defendant; that the amount in controversy exceeds \$2,000; and that the plaintiff is an alien, and said defendant is a corporation organized under the laws of the state of New York, and is a citizen of the state of New York, and not a resident of the state of Washington. The plaintiff filed in the state court an affidavit in opposition to the petition for removal, in which he controverted certain allegations of the petition, and alleged affirmatively that at and prior to the time of commencing this action he was and had been a resident and citizen of Seattle, in the state of Washington, and that he had declared his intentions to become a citizen of the United States, and had taken and subscribed the oath prescribed by the laws of the United States to be taken by an alien at the time of making such declaration. The defendants have caused a transcript of the record of the state court to be filed in this court, and the case has been regularly docketed, and a date set for the trial, although there has been no appearance by or on behalf of the plaintiff. From the facts appearing by the record, a question of jurisdiction arises, which it is the duty of the court to notice and pass upon, notwithstanding the failure of the plaintiff to present the question by any motion or pleading. I hold that the case is not removable, and this court is without jurisdiction, for two reasons: In the first place, the only ground for removing the case alleged by the petitioning defendant is a separable controversy, but the law does not permit one or more of several defendants to remove a cause into a United States circuit court on this ground, unless there be a controversy which is wholly between citizens of different states. An alien who is a party to a separable controversy is not given the right to remove a cause. *King v. Cornell*, 106 U. S. 395-399, 1 Sup. Ct. 312. And the converse of this proposition must be equally true; that is to say, one of several defendants, who is a citizen of one of the United States, is not authorized to remove a cause on the ground that there is a separable controversy between himself and an alien plaintiff. Now, the plaintiff in this case is still an alien. His declaration to become a citizen of the United States does not make him a naturalized citizen, nor entitle him to the rights or privileges of citizenship in the state of Washington. It is true that this case is one of which this court might have had original jurisdiction on the ground of diversity of citizenship of the parties, but still the case is not removable, because some of the defendants, being citizens and residents of the state of Washington, are precluded from joining in the petition for removal, and the one defendant who is a nonresident of the state of Washington is barred of the right of removal on the ground of a separable controversy by the fact that the other party to the alleged separable controversy is not a citizen of any one of the states of the Union. The second fatal objection to the jurisdiction of this court is found in the rule, now well established by repeated decisions of the supreme court, that an action of tort which is brought in a state court against several defendants jointly contains no separable controversy which will authorize its removal by some of the defendants into a circuit court of the United States, even if they

file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separable one; for, as the supreme court has often said: "A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to a final decision in his own way." *Pirie v. Tvedt*, 115 U. S. 41-43, 5 Sup. Ct. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730; *Little v. Giles*, 118 U. S. 596-601, 7 Sup. Ct. 32; *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203; *Torrence v. Shedd*, 144 U. S. 527-530, 12 Sup. Ct. 726; *Connell v. Smiley*, 156 U. S. 335-340, 15 Sup. Ct. 353; *Powers v. Railway Co.*, 169 U. S. 92-103, 18 Sup. Ct. 264. This court has heretofore ruled differently in one or two instances, adopting the rule, which I now consider to be sound, and well supported by authorities, that when a master is made liable for a negligent or wrongful act of his servant, solely upon the ground of the relationship between them, and the application of the rule of respondeat superior, and not by reason of any personal participation in the negligent or wrongful act, he is liable severally, and not jointly with the servant. I have considered it a logical sequence from this rule that, although the master and his delinquent servant be named as co-defendants in such an action, the complaint shows affirmatively that there is no joint liability, and that either defendant may properly claim that there is a separable controversy between himself and the plaintiff. In the cases cited, the supreme court does not question the rule, and seems to take it for granted that it may be successfully interposed as a defense, but it denies the sequence, and holds to the idea that an action against several defendants jointly, where by the plaintiff's own showing there is no joint liability, may not be split into several controversies, but must necessarily fail entirely. This court must follow the decisions of the supreme court, rather than its own previous practice. An order will be entered on the court's own motion, remanding this case to the superior court for want of jurisdiction in this court to entertain it.

GREGORY v. BOSTON SAFE-DEPOSIT & TRUST CO.

(Circuit Court, D. Massachusetts. May 18, 1898.)

No. 948.

REMOVAL OF CAUSES—TIME FOR REMOVAL.

Under the act of 1887 (24 Stat. 554) it is too late to file a petition for removal after the answer day in the state court has passed.

This was an action commenced in a state court by Charles A. Gregory against the Boston Safe-Deposit & Trust Company, and subsequently removed to this court by the defendant. The case has now been heard on a motion to remand.

Francis A. Brooks, for complainant.

Solomon Lincoln and Thomas H. Talbot, for defendant.

COLT, Circuit Judge. The bill of complaint in this case was filed in the state court on March 22, 1895. By the eighth rule of chancery practice of the state court, a defendant is required to file his answer, plea, or demurrer within one month after the day of appearance, the day of the appearance being the return day of the subpoena. A subpoena was issued in this case returnable at the May rules, 1895, and was duly served on the defendants. The defendants appeared, and answered to the bill, and on July 3, 1895, the plaintiff filed his replication. The bill was subsequently dismissed as to all the defendants except the Boston Safe-Deposit & Trust Company. On April 10, 1897, the plaintiff obtained leave of court to amend his bill of complaint. The petition of the trust company for removal was filed June 14, 1897.

The act of congress of 1887 (24 Stat. 554) provides that any party entitled to remove a suit from a state court into the circuit court of the United States "may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." In construing this statute, the supreme court has repeatedly held that the defendant's right of removal can only be exercised before the time he is required to plead in the state court. In *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 687, 14 Sup. Ct. 533, 538, the court, speaking through Mr. Justice Gray, observes:

"Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States."

See, also, *Goldey v. Morning News*, 156 U. S. 518, 524, 15 Sup. Ct. 559; *Railway v. Brow*, 164 U. S. 271, 277, 17 Sup. Ct. 126; *Manley v. Olney*, 32 Fed. 708. Motion to remand is granted.

UNITED STATES v. EISENBEIS et al. (HOGG, Intervener).

(District Court, D. Washington, N. D. June 18, 1898.)

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Whether a mere equitable interest in lands becomes impressed with the lien of a judgment against the owner of such interest is a question of local law, in regard to which the federal courts will follow the state decisions.

2. JUDGMENT LIENS—EQUITABLE INTERESTS IN LANDS.

The equitable interest of one who has conveyed the legal title in his lands to third parties, for the purpose of defrauding his creditors, does not, in the state of Washington, become impressed with the lien of a judgment thereafter rendered against him.

3. DEPOSITS IN COURT—CONDEMNATION PROCEEDINGS—RIGHTS OF CREDITORS.

Money in court awaiting distribution to those in whose favor awards have been made in condemnation proceedings instituted by the govern-

ment cannot be intercepted by means of a creditors' bill, or intervening petition in the nature thereof. Such a proceeding would be, in effect, a suit against the government and the clerk of court, to make them liable as garnishees.

John E. Humphries, for intervener.
Allen Weir, for respondents.

HANFORD, District Judge. This suit was instituted by the government of the United States against the several owners of a tract of land for condemnation of said land for the use of the government as a site for the Point Wilson fortifications. All persons who, by the public records, appear to have been owners of any part of the tract required, or of any interest therein, or having liens thereon, were made defendants. The list includes Henry Bash and his wife, and their son, Francis L. Bash, and their daughter, Clementine B. Long, and her husband, B. M. Long. By the judgment of the court it was determined that said Francis L. Bash and B. M. Long were the owners of undivided interests of part of the tract condemned, and compensation therefor was awarded to them. After the trial and final adjudication of the rights of the parties, J. B. Hogg, as administrator of the estate of George E. Hogg, deceased, by leave of the court, filed a petition, as an intervener, for the purpose of contesting the right of said Francis L. Bash and B. M. Long to receive the money awarded to them as compensation for their interests in said land, and in his petition the intervener prays to have said money paid to him, and applied in satisfaction of a judgment rendered by the superior court of the state of Washington for Jefferson county, in the month of April, 1893, in favor of George E. Hogg and against Henry Bash. The amended petition avers that on and prior to the 30th day of May, 1892, said Henry Bash and Charles Eisenbeis were the owners as tenants in common of part of said tract of land described in the amended petition; and on said day, for the purpose of defrauding the creditors of said Henry Bash, he conveyed the legal title to his interest in said property to said Francis L. Bash and B. M. Long, without consideration, and his said grantees took the title, and have since held the same, merely as trustees for said Henry Bash, who has been ever since and is the real owner thereof, and by reason of his ownership the said judgment in favor of George E. Hogg became a lien upon said property, and continued to be a lien, up to and including the time of the condemnation proceedings herein. The amended petition also avers that the debt for which said judgment was rendered was a community debt of said Henry Bash and his wife, and that said Henry Bash at all times since the date of said judgment has been insolvent, having no property upon which an execution could be levied, except his interest in said land, and that said judgment remains wholly unsatisfied. The case has been argued and submitted upon a demurrer to said amended petition.

In the argument the attorney for the intervener has expressly disclaimed intention to attack the validity of the conveyance from Henry Bash and wife to Francis L. Bash and B. M. Long, on the ground that the same was executed on Memorial Day, and in the amended

petition it is averred explicitly that the legal title was conveyed to, and became fully vested in, said Francis L. Bash and B. M. Long. The main question in the case, therefore, is whether, under the laws of this state, a mere equitable interest in real estate becomes impressed with the lien of a judgment against the owner of such equitable interest. This is a question of local law, because a judgment of a state court in a personal action becomes a lien upon real estate of the judgment debtor only by force of the statutes of the state; and the supreme court of this state having passed upon the question, and rendered a decision declaratory of the law of this state, it becomes the duty of this court to accept that decision as conclusive, and follow it. In the case of *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101, the question now under consideration was considered and decided by the supreme court of this state. In that case a judgment creditor claimed a lien upon real estate, which prior to the date of the judgment had been conveyed by the judgment debtor to his wife, without consideration, and thereafter transferred by the husband and wife to other near relatives in payment of existing debts. In the opinion by Mr. Justice Gordon, the court said that, at the date of entry of the judgment, the legal title to the premises in question was in Margaret E. Weymouth, the wife of the judgment debtor. "Hence no lien attached to the land as a consequence of said judgment or of the filing of the transcript, and the subsequent conveyances by the respondent Margaret E. Weymouth and her husband to De Lanty and Strong, for value, prior to any proceedings taken by said creditor, attacking the transfer from the husband to the wife, were sufficient, and would be upheld." In this case the legal title was conveyed by the judgment debtor prior to the date of the judgment. No proceedings were commenced by the intervener or his testator attacking the validity of the transfer of title from Henry Bash and wife to their son and son-in-law until after the trial and determination of the issues in the condemnation proceedings by which the land was appropriated by the United States government. In effect, the legal title and the interest of all the parties named as defendants was, by the final judgment herein, conveyed to the government, so that the case comes fairly within the rule laid down by the supreme court of this state in the case above cited. The judgment set forth in the intervener's petition never became a lien upon any part of the land appropriated by these proceedings. Therefore the petition fails to show that the intervener has any just or legal claim to any part of the money paid into the registry, or any standing to contest the right of the parties to whom said money has been awarded to receive the same.

The intervener's amended petition cannot be treated as a creditors' bill, and he cannot be permitted to intercept the passage of money from the government of the United States to the persons to whom compensation was awarded, while that money remains in the custody of this court, for two reasons: First. Such a proceeding would be, in effect, a suit against the government of the United States, and, the clerk of this court having legal custody of the funds, to make them liable to the intervener, as garnishee. Proceedings of

this nature, to reach funds in legal custody, are not tolerated. Second. The intervener's amended petition is insufficient as a creditors' bill for the reason that it does not aver that an execution has been issued upon the judgment, and returned nulla bona, nor that the legal remedies for enforcing the judgment have been exhausted. Demurrer sustained.

EASTERN BUILDING & LOAN ASS'N V. BEDFORD.

(Circuit Court, W. D. Tennessee, W. D. May 31, 1898.)

No. 487.

1. FOREIGN CORPORATIONS—STATE REGULATION—"DOING BUSINESS."

Complainant, a New York corporation, loaned money to defendant in Tennessee, taking as security a mortgage upon land in the latter state, without having complied with the conditions prescribed by the Tennessee statutes for foreign corporations doing business within the state. The negotiations were all carried on by mail, through agents in Tennessee, the loan being approved at the company's home office in New York, and all notes being payable at that office. *Held*, that the contract was made in New York, and to be performed there, and that the company was not doing business in Tennessee within the meaning of the statutes.

2. CONTRACTS—NONENFORCEABLE IN STATE COURTS—POWER OF FEDERAL COURTS.

A federal court will not refuse to enforce a valid contract, harmless in itself, which is nonenforceable in the state courts merely on account of noncompliance with state administrative regulations.

3. USURY—LEX LOCI CONTRACTUS GOVERNS.

A contract which would be usurious in the state where it is sought to be enforced is not subject to the usury penalties of that state if it is not usurious under the law of the state where it was made.

4. CONTRACTS—ENFORCEABILITY—CURING DEFECTS.

Where a contract is nonenforceable simply by reason of noncompliance with administrative regulations of the state, and not because of any vice inherent in the contract itself, the defect is cured, and the contract rendered enforceable, by subsequent compliance with such regulations.

In Equity. Bill to foreclose a mortgage.

By an act of the legislature of the state of Tennessee of March 28, 1891 (chapter 2), entitled "An act to regulate the business of building and loan associations," it was required that no building and loan association organized under the laws of another state should do business in Tennessee unless said association should deposit, and continually thereafter keep deposited, in trust for all its members and creditors, mortgages amounting to not less than \$25,000 or more than \$50,000, at the discretion of the treasurer. They were also required, before commencing to do business, to file with the treasurer of the state a duly-authenticated copy of their charter or articles of incorporation, and a certificate of deposit of the valid securities required. By another section the officers, directors, or agents of foreign building and loan associations were forbidden to solicit subscriptions to their stock in that state, or to sell or knowingly cause to be issued to a resident of the state any stock of the association, unless a deposit had been made in accordance with the terms of the act, and it had otherwise complied with its provisions. Agents were required to be licensed by the treasurer, for which they were to pay a fee of \$2, and he was also to receive a fee of \$25 for filing the papers mentioned in the act. Any violation of the prohibition against the sale of stock without a compliance with the act was made a misdemeanor, and punished as such by fixed penalties. By another act of March 17, 1891 (chapter 95), chapter 31 of the acts of the legislature of Tennessee for the year 1877, being sections 1992 to 2003 of Milliken & Vertrees' Code, was amended so as

to apply that act to corporations, chartered under the laws of other states, known as "building and loan associations," and other specifically enumerated corporations. The act of 1877, carried into Milliken & Vertrees' Code was an act for the encouragement of mining and manufacturing corporations, which were required, if desiring to carry on their business in this state, to file in the office of the secretary of state a copy of their charters or articles of incorporation, and such corporations were to be deemed and taken to be corporations of this state, subject to its jurisdiction, to sue and be sued therein in the mode and manner directed by law in the case of corporations created and organized within the state. Then the act conferred the privilege of acquiring and holding real property, which was made liable for its debts. The act gave resident creditors priority. Taxation was regulated. Rights of way were given for the maintenance of roads, bridges, canals, tramways, telegraph lines, etc.; but they were required to begin business within a year, it being declared to be the object of that act to secure the opening and development of the mineral resources of the state, to facilitate the introduction of foreign capital, etc.; and such corporations were authorized to establish villages and settlements for the use and residence of its employes and others; and the sale of liquor was prohibited within a radius of five miles of such villages and settlements. Subsequently, by an act of March 28, 1891 (chapter 122), this act (chapter 31, 1877) was extended to all corporations chartered or organized under the laws of other states or countries for any purpose whatsoever, which may desire to do any kind of business within the state of Tennessee. This last act further required that a copy of the charter should be filed with the secretary of state, and an abstract thereof in every county in which a foreign corporation desired to do business. And then, by section 3, it was enacted that "It shall be unlawful for any foreign corporation to do or attempt to do any business or own or acquire any property in this state without first having complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the jury trying the case." And by section 4, when the corporation had complied with the provisions of the act, it should be to all intents and purposes a domestic corporation of the state, and if it had no agent in the state upon whom process could be served, it was liable to attachment, to be levied upon any property owned by the corporation. The last section of the act re-enacted the provisions of chapter 31 of the Acts of 1877, thus extending all the privileges of that original act to all corporations whatever coming into the state to do business. The plaintiff is a building and loan association of the state of New York, having its location at the city of Syracuse, which has never complied or attempted to comply, except as hereinafter stated, with any of the foregoing acts, nor with a subsequent act known in the legislation of the state as the "Curative Act" of May 10, 1895 (chapter 119), which authorized corporations that had been doing business in the state contrary to the provisions of the former act to file their charters as required, and be relieved of the penalties and forfeitures incurred, but with the important provision that no suit should be instituted upon any contract thus made valid until after two years from the passage of the act.

By the charter of the plaintiff company it was authorized to establish a local board anywhere, to be composed of its members in that locality, to assist in carrying on its business, it being a mutual company. It had a firm of agents in Memphis, Shelby county, Tenn., and also a local board, composed of members thereabouts. On the 23d day of January, 1891, before the passage of any of the foregoing acts except that of 1877, the defendant signed in Shelby county, Tenn., a written application for shares in the plaintiff association in the form prescribed for the purpose, and customary in doing its business. This application was forwarded by mail through the above agents to the plaintiff company at its home office in Syracuse, N. Y. The application was granted by the board of directors at the home office, and on February 2, 1891, a certificate for 46 shares of the stock, amounting to \$4,600, was issued to the defendant, being sent to him by mail through the Memphis agents. According to the scheme of the company, this stock was

to mature by the payment of its dues and assessments on the 1st of August, 1897. These dues and assessments were payable at its home office in Syracuse, N. Y., but a by-law authorized them to be paid to the local board or agent where the stockholder resided, if the stockholder so desired. On March 20, 1891, the defendant made a written application for a loan, which, according to the custom of the company, was sworn to, and appraisers appointed by the local board indorsed on the application a sworn appraisal of the property which was offered as security. In this application for a loan of \$4,600 for 6½ years it was stated that the loan was to bear interest at the rate of 5 per cent. per annum, and a premium of 5 per cent. per annum, payable annually on or before the last Saturday of each month, "all payments to be made as the lender may direct," and to secure the same the defendant agreed to give a mortgage upon the property offered as security. This application and appraisal, like the application for stock, was sent by the agents, through the mail, to the home office at Syracuse, N. Y.; and on the 18th of May, 1891, the board of directors at Syracuse, in the state of New York, recommended and approved the loan. Subsequently Bedford made a written application, again sent through the mails for what is called "an advance of loan," and referred to the resolution of the board of directors of May 18, 1891, allowing the advance at "a premium of ten per cent.," attached to which written application was the affidavit of one of the agents, which was again forwarded to the board of directors by mail. The defendant and his wife then executed a mortgage upon real estate situated in Shelby county, Tenn., dated May 1, 1891, duly and properly acknowledged June 18, 1891, filed for record June 20, 1891, and duly recorded in the register's office of Shelby county. This mortgage acknowledged the receipt of \$4,600, and secured the sum of \$5,683.08, "the same being the principal, interest, and premium of the loan, evidenced by 78 notes, dated Memphis, Tenn., May 1, 1891, payable to said association at its office in Syracuse, monthly." Having signed these notes at Memphis, and recorded this mortgage, they were again forwarded by these agents, through the mail, to the home office, in the city of Syracuse, N. Y., and thereupon the plaintiff company drew its draft on the Bank of Onondaga at Syracuse, N. Y., in favor of the defendant, for the sum of \$4,140, which in due course of business was paid to him, or to his order, at Syracuse, N. Y. The shares of stock were withdrawn, duly receipted for, according to the customary method of doing business. The plaintiff company did file a copy of its charter with the secretary of state on August 11, 1893, and an abstract thereof in Shelby county on August 15, 1893, more than two years after the completion of this transaction, and before the passage of the curative act. The 78 notes executed were all dated May 1, 1891. Each was for \$72.86, except the last three, which were each for the sum of \$38.36. They were all payable to the order of the plaintiff company at its office in Syracuse, N. Y., the first on or before the last Saturday of May, 1891, and each successive one on the last Saturday of every month thereafter up to and including the last Saturday of November, 1897. These notes represented the amount of dues estimated to mature and become payable on the shares of stock which the defendant held until the same should mature and reach their par value from the payment of the dues, together with the earnings thereon, and the interest and premium advance during that period. The shares of stock were also pledged as collateral security in addition to the mortgage. The mortgage itself contained stipulations to pay the principal, interest, and premiums, and to conform to the constitution and by-laws of the order, pay the fines and penalties prescribed thereby according to the intent and meaning of the articles of association, keep the buildings on the premises insured against loss by fire, to pay all taxes, and to perform all other necessary things relative to said premises which were imposed by the contract and by-laws of the association. The defendant further agreed to pay the monthly installment dues of 75 cents on each share. There was also a provision that if he should fail to pay any of the notes, shares, or dues, the whole should become fully due and payable; that the shares of stock should be forfeited, and the mortgage and contract should be immediately enforced. The notes were all paid up to and including the last Saturday of June, 1893, since which time none of the notes, assessments, or dues have

been paid. This bill was filed to enforce the contract and foreclose the mortgage, on the 24th of June, 1895, a little more than 30 days after the passage of the curative act, and before the 2-years limitation thereof had expired.

Buchanon & Minor, for plaintiff.

Froysier & Heath, for defendant.

HAMMOND, J. (after stating the facts). The defense in this case is without a particle of merit, the defendant having received nearly \$5,000 of the plaintiff's money upon a loan secured by a mortgage upon his property in the ordinary way of such transactions. There is no reason why he should not pay the money back, and no defense is offered except that the plaintiff, being a foreign corporation, had no right to make the loan until it had complied with certain administrative rules and regulations of the state of Tennessee concerning foreign corporations. Naturally, repudiation of a debt admitted to be just finds its protest at the bar from the plaintiff's counsel. That protest also must find response in judicial judgment, unless the courts are compelled to sustain the defense upon some inexorable principle of law having its only justification in the maxim, "*Ita lex scripta est.*" For my part, I am not prepared to concede to state legislation that unrestrained absolutism of power over foreign corporations which is being built up by the usurpation and enlargement of the recognized right to regulate foreign corporations doing business in the state. Those corporations are not outlaws from all constitutional protection because of this power to regulate them, nor because of a power to prohibit them from doing business in the state. That power of regulation or prohibition does not necessarily mean a power to forbid their home contracts with citizens of a foreign state, and about property in that state. It is not more imperious than the equally vaunted police power of a state, which it was said by the supreme court "cannot be put forward as an excuse for oppressive and unjust legislation." Per Mr. Justice Brown in *Holden v. Hardy* (Feb. 28, 1898) 18 Sup. Ct. 383; *Davidson v. New Orleans*, 96 U. S. 97; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064. And, as in the case of the police power, the exaggerated claim of absolute power over foreign corporations has received its check, first in the dissenting opinion in *Hooper v. California*, 155 U. S. 648, 657, 15 Sup. Ct. 207, and now in the judgment of the full court in *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427; and that, too, in relation to legislation similar to that set up by this defense. What may be called the constitutional freedom of trade or right of contract as against such legislation has been fully sustained by the latest of these decisions, both as against the police power, where the public health, morals, or safety is not involved, and this power to regulate or prohibit the business of foreign corporations. "The question in each case," says Mr. Justice Brown in *Holden v. Hardy*, *supra*, "is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

When asked what public policy was at the back of the legislation of 1891 forbidding foreign corporations to do business in the state

without having first registered their charters in every county in the state in which they proposed to do business and acquire property, counsel for the defendant replied that it was to prevent irresponsible corporations from getting a footing in the state, and to advise the people as to the charter rights and privileges of the companies. Plainly, this is only administrative in its character, and is in no sense at all a policy which affects the health, morals, or general safety of the public; and, as applied to a contract like that we have under consideration, there is no effect of the policy that in any sense disparages the contract. It is as harmless as it was before, and in the nature of the public policy there is nothing to invoke that kind of protection which usually falls within the police power; and it is somewhat misleading, therefore, to attack the contract as being against public policy. The statute makes no distinction between responsible companies. Either may establish themselves by registering their charters.

As to the matter of information, the defense has rather a flimsy foundation, for it is far more likely that any one dealing with the corporation would depend upon the abundantly printed and circulated forms of the charter, which in this day of cheap printing and rapid communication is all-sufficient for the purpose of information, without the trouble of going to the county seat to inspect the records. There does not seem to be much in this suggestion to invoke the principle of public safety, or even the public welfare, as a foundation for the policy stated. It is not to be presumed that the object of the legislature was to make repudiation easy by furnishing a defense like this to the vast number of people who have resorted to the loan and mortgage companies to borrow money which they could not get at home, and could get abroad at cheaper rates. Possibly, the oft-reiterated charge that the real purpose of the legislation was to make fees for the registration officers in the different counties may furnish a clue to the kind of public policy which is the foundation of the legislation; but, evidently, forfeitures of contracts are not to be enforced by the courts in aid of a public policy like that unless it must be done in loyal obedience to the command of the legislature. Certainly, however, it does not fall within the class of cases mentioned by Mr. Justice Brown in *Holden v. Hardy*, where the legislature may impose limitations upon the right of contract to prevent detriment to the well-being and safety of the people or their property. It cannot be denied, nevertheless, that the legislature of Tennessee had the right, and the courts must enforce it, to require foreign corporations to comply with these regulations, and might affix any pains and penalties for that purpose which the legislature might choose,—and that has been done by this act; so that, if we had the malefactors against its prohibitions, and this were a case to enforce those penalties, as in *Hooper v. California*, *supra*, we might be compelled to do it. But when it is claimed that this act makes the contract between the borrower and the lender void or nonenforceable in the courts, it is another matter, which requires the strictest scrutiny before such a penalty can be invoked against the natural justice and the greater public policy of encouraging the enforcement of fair con-

tracts and compelling borrowers to repay the money which they have borrowed. It seemed to be conceded in the argument by the plaintiff's counsel that the supreme court of Tennessee does not recognize any distinction between statutes which, in their terms, declare a contract shall be void as one of the penalties imposed, and those which do no more than prohibit the doing of a thing, and impose a penalty; that by our Tennessee law, if the thing is prohibited any contract concerning it is void without any explicit declaration of the statute to that effect, and without reference to the fact whether the statute imposes other penalties or not. *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230; *State v. Phoenix Ins. Co.*, 92 Tenn. 420, 21 S. W. 893; *Haworth v. Montgomery*, 91 Tenn. 16, 18 S. W. 399; *Anderson v. Railroad Co.*, 91 Tenn. 46, 17 S. W. 803; *Railroad Co. v. Evans*, 14 C. C. A. 116, 66 Fed. 809. It is not necessary in this case to go into a critical examination of the Tennessee cases to determine whether or not they go to the extent of declaring the contract void, or only to that of declaring that the courts of Tennessee will not enforce them, which, be it remembered, are two distinct results, the difference being all-important. If the contracts be void, they should not be enforced anywhere; but, if there be only a prohibition on the courts of the state from enforcing them, they might be enforced elsewhere, and as well, probably, in the federal courts sitting in the state of Tennessee, which are not subject to the prohibitions of the Tennessee legislature relating to the state courts. We are relieved from any considerations like these from the fact that this contract, in our judgment, was one over which the state of Tennessee had no power whatever, except possibly to deny its enforcement by the courts of Tennessee, though even that may be very doubtful. This was a New York contract, made in New York, to be performed there, and not in any sense a Tennessee contract. The making of such a contract is not doing business in Tennessee, and does not fall within the prohibitions of the statute. Essentially, it is not different in respect of this from the contract in the case of *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427; nor *Loan Co. v. Cannon*, 96 Tenn. 599, 36 S. W. 386; nor *Lauter v. Trust Co.*, 29 C. C. A. 473, 85 Fed. 894; nor *Cæsar v. Capell*, 83 Fed. 403; nor *Trust Co. v. Willhoit*, 84 Fed. 514.

It is contended that the case of *Association v. Cannon* (Knoxville, Sept., 1897; Tenn. Sup.) 41 S. W. 1054, has authoritatively settled that the contract is void, and that the federal courts are bound by that decision. It does not appear from the report of that case whether the notes were payable in New York or Tennessee, though an inference that they were payable in New York is insisted upon by counsel for the defendant. It is true that in that case it was decided that the building and loan association was doing business in Tennessee contrary to the prohibitions of the statute, citing *Lumber Co. v. Thomas*, 92 Tenn. 589, 22 S. W. 743; *Manufacturing Co. v. Gorten*, 93 Tenn. 597, 27 S. W. 971. But it is to be particularly noted that the court does not decide that the contract was void, no matter whether it was a New York or a Tennessee contract, but only that "the court of chancery appeals was correct in holding that the contract was

illegal, and could not be enforced by the court, and in refusing to foreclose the mortgage of the building and loan association." If that be true of the Tennessee state courts, it is not necessarily true of the federal courts, as before intimated. It is a familiar principle that the federal courts do not follow the penal statutes imposing penalties of prohibition that relate only to matters of procedure and practice or to matters of jurisdiction. The legislature of a state cannot shut up the federal courts, nor deny parties access thereto. They may prescribe rules of property, and declare contracts within their jurisdiction null and void, and thereupon the federal courts will enforce the rules of property and refuse to enforce the void contracts; but, if the legislature leaves the contract valid, enabling the parties to enforce it within jurisdictions that are not amenable to the legislature of the state of Tennessee, I see no reason why the federal courts may not enforce such contracts, although their enforcement is prohibited to the courts of the state. This is not, however, to be misunderstood, as applying to those cases where the legislation is the exercise of a police power based upon a public policy appertaining to the health, morals, or safety of the state, to use again the language of Mr. Justice Brown in the case above cited. That class of cases is very near akin to those constituting rules of property. At all events, the federal courts will not enforce contracts that are vicious because they are contrary to the declared will of the legislature exercising that care for the health, morals, or safety of the public to which we have adverted. But it does not follow from this that they will refuse to enforce valid contracts that are harmless in themselves, and nonenforceable in the state courts, only because they are not in conformity to certain prescribed preliminary rules and regulations of an administrative character, necessary to be complied with before suit can be brought upon them in the state courts. I do not stop to support this enunciation by the citation of authorities, for the reason that it is not depended upon in favor of this judgment.

Whatever respect we may and should have for the adjudications of the supreme court of Tennessee in construing state statutes, it is not imperative that we shall follow a decision which is contrary to our own federal decisions above cited, and one which has been made long after this contract was entered into, and after the rights of the parties therein had fully attached. In such cases it is open to us to follow our own decisions and exercise our own independent judgment as to the validity of these statutes. The rule upon this subject is nowhere so well expressed as in the case of *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 334, 76 Fed. 296, in which case Judge Lurton was careful to collate the cases on the subject, and to declare the correct rule for our guidance. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10.

Another observation upon the case of *Association v. Cannon*, supra, is worthy to be noted here, and that is that, although the contract was declared illegal, and not enforceable in the state of Tennessee, the result was so shocking to the sense of justice of that court that it resorted to the well-known principle that one asking equitable relief must himself do equity, and compelled the debtor to repay the money

borrowed out of the funds realized by the sale of the property, notwithstanding the so-called illegality of the contract, thereby substantially enforcing it notwithstanding the prohibitions of the statute. But, conceding all that may be claimed for that case, and admitting that it is a fair inference from the statement of facts that that contract, like this, was to be performed in the state of New York, and not in the state of Tennessee, the final and all-sufficient answer to it is that, if the supreme court of Tennessee has properly construed the statute, it has been, in our judgment, declared unconstitutional by the supreme court of the United States in the above-cited case of *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, just as a similar statute of Louisiana similarly construed by the supreme court of that state was declared unconstitutional.

In *Cæsar v. Capell*, supra, this court had occasion to examine the authorities upon which the ruling is based that a promissory note payable in the state of New York is a New York contract, to which the giving of a mortgage in Tennessee is only as incident, and not a part, of the contract; and it is only necessary to refer to the reasoning and treatment of the cases found in that opinion. I adhere to that opinion, and hold that the facts in this case, which are not unlike the facts in that case, do not change the rule there laid down. It is true that there is much more ground on the facts of this case for the contention that the business was done in Tennessee than there was in the Case of *Allgeyer*, above cited, but this is only a superficial view of the subject. In the *Allgeyer* Case the property insured was in the state of Louisiana. The owner making the contract of insurance was in Louisiana. That which he did to put the contract into being was done in Louisiana, by writing and depositing a letter in the post office at New Orleans. The agency which he used in his business was the telegraph and its operators or the post office and its officials. They were all in Louisiana, and necessary agencies in the completion of the contract; and yet it was held that this was not doing business in the state of Louisiana, because the contract was to be performed in New York, the premiums were to be paid there, the losses, if any, were to be paid there, which made it a New York contract; and the supreme court say that, if the supreme court of Louisiana was correct in holding that the Louisiana statute forbade the doing of those things in Louisiana because the company had not complied with statutes of prohibition similar to this we have in this case, the statute was in violation of the fourteenth amendment to the federal constitution by depriving the parties of their liberty without due process of law,—that is to say, the freedom to make a contract of insurance to be performed in the state of New York. We must not be misled by the suggestion of counsel for the plaintiffs that in the *Allgeyer* Case it was especially noted that the defendant had no agent in Louisiana, thereby inferring that, if the company had had an agent in Louisiana, the decision would have been otherwise. That is a mistaken reading of the case. The constitution of Louisiana contained a provision that no foreign corporation should do business in the state without having one or more known places of business and an authorized agent or agents in the state upon whom process might

be served, and the court adverted to the fact that there was no known place of business and no agent in the state as a circumstance to show that the company was not doing business in the state, and as an indication of what was meant by that phraseology in the legislation then under consideration. It is not at all to be inferred from this that, if the insurance company had made this contract through the agency of some solicitor, who performed the function of mailing the correspondence by which it was effectuated, instead of that correspondence being mailed by the insured himself, the decision would have been otherwise than it was; and that is all the difference there is in this case. There Allgeyer wrote and mailed his own letters, which were necessary to complete the contract. Here the defendant's application and subsequent acceptance were also transmitted through the mails, albeit by the instrumentality of his own agents or fellow members of the building and loan association acting in the city of Memphis. These were only his messengers or agents to put his letters in the mails. The essential facts are that he applied in the state of New York by mail for a loan, and the acceptance of his offer was had in the state of New York, and transmitted to him by mail through the same agents as before. The contract was that he would pay the money, principal and interest, in New York, which made it a New York contract; and the fact that the creditor gave him the privilege of paying it here in Memphis if he chose to do so does not at all affect that circumstance. The most that can be said upon the facts of this case is that the preliminary negotiations for the contract took place in Tennessee. It may be that the agents through whom they were carried on were, in the sense of the Tennessee statute, as to those negotiations, doing business in that state contrary to the statute; and it may be that the supreme court will refuse to hold that the fourteenth amendment protects the defendant in his right to borrow money in the state of New York, and to mortgage his Tennessee land as security for it, if he does the business through such agencies, and may confine that valuable constitutional protection to the bare use of the mails; but I do not see why any such distinction should be made. If it be a sound distinction, the utmost that can be claimed is that the preliminary negotiations themselves were illegal, and subjected the offending parties to the penalties of the statute, as in *Hooper v. California*, *supra*; but this does not change the ultimate fact that the defendant here and the plaintiff there entered into a contract in the city of Syracuse, N. Y., for the loan of the money and the mortgage of the property. It was there in Syracuse that their minds came together through whatever agencies may have been used for that purpose, and the contract of lending or borrowing and mortgaging was done in the city of Syracuse, N. Y., and not in the city of Memphis, and therefore the statute of Tennessee has no application to it. That part of the business was not done in Tennessee, and it is only that part with which we are dealing in this case.

I understand the case of *Allgeyer v. Louisiana* to settle that it is not within the competency of the legislature to prohibit a citizen of Tennessee from borrowing money in New York from a citizen of New

York and giving a mortgage upon his property in Tennessee to secure it, and the fact that the lender is a New York corporation does not at all alter the right both of the defendant to make the contract of borrowing and of the corporation in New York to make the contract of lending according to its capacities in that state. The law of New York is the *lex loci contractus* in such cases, and not that of the state where the borrower resides. That is both the business and the legal status of the transaction. It is only a question of how the parties shall get together to make their contract. It seems to me quite preposterous to say, as was suggested in the argument, that the borrower must physically leave the state of Tennessee, and be physically present in the state of New York, in order to make such a contract valid. It seems to be agreed by the defendant's counsel that, if such physical presence in New York had occurred, this contract could be enforced. It is decided in *Allgeyer's Case* that it can be enforced if the contract is made through the agency of the mails; that is to say, through the functions of the postmasters. I suppose it would be agreed that if the defendant had made the same contract through the agency of the express company that it would not have been illegal; or if he had put a messenger on the cars, and sent him with a power of attorney to the city of New York, it would not have been illegal. Now, why is it any more illegal to negotiate through persons in Tennessee who are willing to take the burden of attending to the details, and transmitting their correspondence through the mails? For my part, I do not see any distinction that can be fairly drawn, upon the circumstances, between the two cases. We have, then, the broad principle that a contract of borrowing and lending to be performed in the state of New York is the doing of that business within the state of New York, and not within the state of Tennessee, no matter how or what agencies are used for the purpose, and no matter what punishments may be inflicted upon those who dare to accept such agencies within the state of Tennessee. And, moreover, we have in the *Allgeyer Case* the broad principle that the right of the citizen of Tennessee to make such a contract of borrowing, and of the New York corporation such contract of lending, cannot be prohibited by the legislature of the state of Tennessee; and it is a misapplication of the power of the state of Tennessee over foreign corporations to assume that it can exercise any such prohibitions upon the freedom of contracts. The whole argument in behalf of this defense proceeds upon the false assumption, in my judgment, that it was a contract made within the state of Tennessee.

It may be that this will very much narrow and limit the operation of this act of Tennessee, but I cannot see that that is any objection to the ruling here made. It may be that, if the foreign corporations can thus "do business" in Tennessee, we emasculate the power of the state of Tennessee to prevent their "doing business" in that state; but all this is a mere play upon the words, as the only effect of the ruling is to confine the power of the state to that class of prohibitions which prevent the foreign companies from becoming *pro hac* Tennessee corporations. That is the privilege given them by the original statute and all the later statutes, that if they will comply with

their provisions they shall, in effect, become domestic corporations. Indeed, the conception of the original statute was one of encouragement and indulgence, and not prohibition. And the fallacy of the defense is that unless they accept the benefit, and thus become domestic corporations, they shall not be allowed to make contracts with the citizens of Tennessee at all. How far they may go in that direction we need not decide, but we have now the authority of the supreme court of the United States for saying that the legislature cannot go to the extent of prohibiting the making of a contract to be performed in the state of New York. There is no anomaly in this position, for, in the former opinion upon this question I cited the case of a Scottish railroad company which built its tracks within the territory of England, and ran its traffic trains every day over that territory, kept its station houses and station agents there, and yet that was held not to be "doing business" within the territory of England. *Cæsar v. Capell*, supra; *Hazelton v. Insurance Co.*, 55 Fed. 743, 750.

Reference has been made in the argument to a Tennessee process act of March 29, 1887 (chapter 226), defining, for the purpose of serving process in suits brought against foreign corporations in Tennessee, what is to be, in the purview of that act, held to be "doing business" within the state. That is a special statutory definition for a special purpose, and cannot be perverted to the purposes of an interpretation of another act where only a similar phraseology is used for an entirely different purpose. The truth is, this phrase, "doing business" within the state, or "engaged in business" within the state, is of such an indefinite and uncertain meaning, so vague and ambiguous, so elastic in its quality, that an act of the legislature which uses it without defining it is almost nugatory for want of certainty as to its meaning; and, following the well-known and cardinal rules of construction, such phraseology will not be construed by the courts to prohibit harmless contracts, or to secure formidable forfeitures upon the mere literalism of the words used. If one should undertake to define the phrase by specific or particular designations of the things prohibited, he might be expected to encounter difficulties in doing what penal acts should do in respect of explicit definitions of the offenses created; and as well some lack of power to extend the prohibitions beyond the territorial limits of the state. It is not possible to build a Chinese wall around a state, so that a citizen of it shall make no contracts with a foreign corporation except by permission of the state. The *Allgeyer Case* settles that the mails, at least, will break through such a prohibitory contrivance.

The defense of usury is untenable. The contract is not usurious under the laws of the state of New York, and in that respect the case certainly is governed by the above-cited case of *Loan Co. v. Cannon*, 96 Tenn. 599, 36 S. W. 386, which holds that the usury laws of Tennessee can have no extraterritorial effect. It has always seemed to me that that case also is almost a direct judgment in favor of the ruling here that this was a New York contract. It decided under very similar circumstances that it was a Minnesota contract, and therefore not subject to the usury penalties of the Tennessee

statutes. If it was a Minnesota contract for the purposes of usury, it was a Minnesota contract for the purposes of the prohibitions of the act of 1891.

This view of the case makes it unnecessary to consider the contention of the plaintiff that the defendant is estopped to contest the validity of the contract, upon the ground that he is himself particeps criminis, and acting in violation of whatever state law there may have been; that he is taking advantage of his own wrong and his own turpitude as a violation of the statute, as a defense to a debt voluntarily contracted, and for which he has received full consideration. Also upon the ground that, having received and used plaintiff's money with full knowledge, necessarily implied, if not actually existing, of the plaintiff's alleged incapacity to contract in Tennessee, he is estopped to set up that incapacity as a defense upon much the same ground that one who deals with a corporation is estopped to deny the corporate character of the party with whom he deals. And, lastly, that the defendant was himself a member of this company at the time the act was passed, at the time he solicited the loan, and at the time he made the contract; that it was a mutual company, for which he is as much responsible as the other members, and therefore he will not be allowed to set up that its contract was illegal and void, but must leave it to the state to enforce whatever penalties and forfeitures may arise to him and his fellows because of his own illegal conduct in joining a mutual company acting in the state in violation of the law, or, what is the same thing, remaining in the company after the act was passed. It is possible that this is a good defense, but we need not decide the point. *Gold-Mining Co. v. National Bank*, 96 U. S. 640, was a case where a defendant sued by a national bank which had loaned him money was not allowed to plead as a bar that the bank had violated the act of congress in lending a larger amount of its capital stock than had been actually paid in. There the court says: "We do not think that public policy requires, or that the act of congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him." In *Cowell v. Springs Co.*, 100 U. S. 55, upon a breach of a condition in a deed that intoxicating liquors should not be manufactured or sold upon the premises, the grantee was not allowed to set up the invalidity of the title in defense of a suit to enforce the terms of the condition. In *Williams v. Gideon*, 7 Heisk, 621, the principle is well settled that the creditor who has confirmed a fraudulent deed by receiving a benefit under it, or becoming a party to it, is estopped from impeaching it. And there are many other cases holding that corporations acting ultra vires and making invalid contracts may nevertheless enforce them against persons who have received the benefit, upon the doctrine that they are estopped to deny the binding effect of that which they have done voluntarily, and with full knowledge of the facts. *Railway Co. v. McCarthy*, 96 U. S. 258; *Bank v. Matthews*, 98 U. S. 621, where the court quotes with approval Mr. Sedgwick's statement that "where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power con-

ferred by the charter, the party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains." Sedg. St. & Const. Law, 73; *Arms Co. v. Barlow*, 63 N. Y. 62; *Sherwood v. Alvis*, 83 Ala. 115, 3 South. 307; *Ray v. Agency Co.*, 98 Ga. 132, 26 S. E. 56; *Macon & A. R. Co. v. Georgia R. Co.*, 63 Ga. 103; *Poock v. Association*, 71 Ind. 357; *Pancoast v. Insurance Co.*, 79 Ind. 172; *Navigation Co. v. Weed*, 17 Barb. 378. It must be conceded that this doctrine does not apply to contracts involving moral turpitude on the part of both contracting parties, or those which have some infirmity that arises out of a violation of public policy and public law, constituted and maintained for the safeguard of the public against dangers threatening the health, morals, and safety of the people; but this power of regulating foreign corporations and the methods of doing their business within the state, or prohibiting them from doing business within the state at all, has no such foundation as that. The laws are purely administrative, and more directory than mandatory in their character. At all events, if there are any cases involving the state's power over foreign corporations to which the doctrine of estoppel does apply, this case must fall within that class.

What has been said about the acts of 1891 applicable to all foreign corporations is equally applicable to the special act relating to building and loan associations of March 28, 1891 (chapter 2, p. 17, Acts 1891). That act is purely directory in its provisions. It does not impose any penalties for its violation, nor does it contain anything prohibiting the doing of business within the state without a compliance with its directions. Much less than the other acts can it be said to declare the contracts made by foreign building and loan associations without compliance with it void, or to forbid their enforcement in the state courts. Its seventh section prohibits the officers, directors, or agents from soliciting subscriptions of stock in this state, or selling or knowingly causing to be sold or issued to a resident of this state any stock of the association, without having deposited the securities required with the state treasurer; and it also requires the agents to have a license, for which, as always, a fee is charged, and it punishes violation of this provision by making it a misdemeanor. Some penalties are imposed upon domestic corporations for a violation of the directions requiring them to keep deposits with the treasurer, but there is not one line, word, or syllable of the whole act which makes the contracts void. However, since the act of March 17, 1891 (chapter 95), and the act of March 26, 1891 (chapter 122), in their terms apply to building and loan as well as to all other corporations, the whole legislation may be taken as standing together, *pari passu*, upon the same footing one with another, and, taken all together, it may be said that contracts falling within the prohibitions are not enforceable by the state courts of Tennessee, and perhaps not by the federal courts sitting within the state, though, as before remarked, that may be doubtful. Yet the fact remains that a contract by any of these corporations, to be performed in another state,

does not fall within the denunciations and prohibitions of the statute. These acts comprehend every foreign corporation whatever, and, if they are to be construed and enforced in the manner suggested by this defense, they would make void and nonenforceable every ordinary loan of money by a banking corporation in another state to a citizen of Tennessee carried on by correspondence through the mails or through the agency of local banks and loan brokers, as well as every other commercial contract which can possibly be conceived, made with foreign corporations. It is inconceivable that the legislature had any intention to give the statute such effect as that, and the true spirit and meaning of the act is, in my judgment, found in the fourth section of the act of March 26, 1891 (chapter 122), and also of the original act of 1877 (Mill. & V. Code, § 1994), as follows:

"Sec. 4. That when any corporation complies with the provisions of this act it shall then be to all intents and purposes a domestic corporation, and may sue and be sued in the courts of this state, and subject to the jurisdiction of the courts of this state just as if it were created under the laws of this state."

This means that foreign corporations may have the privilege of becoming Tennessee corporations by compliance with these statutes, and their domestication was the real purpose of all the acts. Foreign corporations that desire such domestication must comply with the provisions of these statutes, and if they carry on their business in the same manner that domestic corporations do, and make their contracts to be performed within the state of Tennessee without compliance with these acts, then they are within the pains and penalties of the statutes. But if they confine their business to their own home places, make their contracts there, to be performed there, as was done in this case, they are not within the pains and penalties of the acts, and such contracts are not affected by them. As to such contracts, it is not within the power of the state to discharge or suspend their obligations. It may be within the power of the state by judicial construction of the act to close the courts of Tennessee to their enforcement, but they cannot close the courts of the United States to suitors who resort to those tribunals for enforcement of the contract. Says Mr. Justice Clifford, in *Green v. Collins*, 3 Cliff. 494, Fed. Cas. No. 5,755:

"Doubts may at one time have existed upon the subject, but it is now well settled that a state law cannot discharge or suspend the obligation of a contract made in another state if it was legal where it was made, and was a contract with a citizen of another state; not even if it was to be performed in the state whose law is invoked to defeat the remedy."

He cites *Baldwin v. Bank*, 1 Wall. 236; *Suydam v. Broadnax*, 14 Pet. 74; *Union Bank v. Jolly*, 18 How. 503; *Watson v. Tarpley*, Id. 520; *Hyde v. Stone*, 20 How. 175; *Demeritt v. Bank*, 1 Brunner, Col. Cas. 598, Fed. Cas. No. 3,780; *Hunt v. Danforth*, 2 Curt. 592, Fed. Cas. No. 6,887, in which Mr. Justice Curtis remarks, "No state law can, *proprio vigore*, deprive this court of jurisdiction conferred by the constitution and laws of the United States," applying the doctrine to the effect of the insolvency laws of a state. See, also, *Cowles v. Mercer Co.*, 7 Wall. 118; *Railway Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44.

It is sufficient to refer to the case of *Cæsar v. Capell*, 83 Fed. 403, to the judgment of the court upon the effect of the filing of the charter with the secretary of state and the abstract thereof on August 11, 1893, subsequently to the making of the contract, and prior to the passage of the curative act of May 10, 1895. We there held that a compliance with the statute prior to the act of 1895 was, in itself, a sufficient filing, which removed whatever infirmity there was in the contract; and therefore it might be enforced by the courts without regard to the act of 1895 subsequently passed. It was there said:

"The infirmity which existed before that time was that the courts of Tennessee, state and federal, if you please, would not enforce a contract made in disobedience of the statute; but whenever that disobedience was removed, and the parties complied with the conditions, there was no longer any substantial reason why the courts should not enforce it. Any reason that might be assigned for not enforcing it would be neither within the mischiefs to be remedied by the statute nor within the enforcement of any policy declared by it, but purely and entirely sentimental; the sentiment being that the contract, having been originally made in disrespect of the statute, should be forever disfavored by the courts and repelled from their precincts, until the legislature had granted a statutory pardon. We think it will be found that courts do not proceed upon any such theory unless the infirmity inheres in the vicious, immoral, or criminal nature of the act itself."

This still seems to me quite a substantial answer to the defense that has been set up in this suit. The result is that the plaintiff is entitled to a decree for the collection of its debt and the foreclosure of its mortgage, and the usual decree for that purpose will be drawn and entered. Decree accordingly.

THE META.

(District Court, E. D. New York. June 21, 1898.)

NEGLIGENCE—PERSONAL INJURIES—PRESUMPTIONS.

In a libel in admiralty to recover for personal injuries, where the evidence is such as to leave the circumstances and cause of the injury so uncertain that the court can give no logical reason for determining the issue in libellant's favor, the presumption that the person charged with the tort is not guilty must be maintained.

This was a libel in rem by Thomas Hanson against the steam tug *Meta* to recover damages for personal injuries.

Foley & Wray, for libellant.

Carpenter & Park, for claimant.

THOMAS, District Judge. The libellant, the master of the barge *Kaiser*, lying between piers 18 and 19, East river, New York, with her bow towards the bulkhead, was on May 1, 1893, as he claims, injured by the tug *Meta*. The *Kaiser* was housed along her full length, excepting a short space on the bow and stern. There was a rail or string piece, about six inches wide, on the outside of the house, around the vessel, and about even with her deck. A large ship was lying alongside the dock on the upper side of the slip, with her stern near the end of the pier, occupying the dock for nearly its

whole length; and against this ship the Kaiser was lying. On the lower side of the slip were one or more vessels, and among them the scow Middlesex, which was attempting to get out of the slip, and in this attempt swung one end up against the side of the Kaiser, while the other end was lying against a vessel at the lower side of the slip. The steam tug Meta, passing along the East river, was called by the libelant to tow the Kaiser out of the slip, and take her to her destination. The tug came alongside of the port quarter of the barge as she lay in the slip, and made her towing line fast to a cleat on the Kaiser's port quarter. This cleat was about 11 feet from the Kaiser's stern, and the towing line passed around the corner of the Pennsylvania scow, there being about 15 feet between the cleat and the tugboat's niggerhead, to which the line was made fast. Thereupon the tug started to back out, pulling the Kaiser from the slip, but shortly a loose and projecting guard iron on the side of the Kaiser's port rail struck the corner of the Middlesex, preventing, for the moment, any further operation. Thereupon the tug stopped, slackened its line, and the tug's stem was brought up to within three feet of the Kaiser's side. The libelant claims that thereupon he left the stern of the Kaiser, where he had been standing, while the tug was pulling, and went out on the guard rail to disengage the corner of the scow from the side of the barge; that when he reached this point he held on to the hand rail along the top of the house with his right hand, having his back towards the tug, and with his left hand pushed on the scow, in an attempt to swing her back, and allow the Kaiser to pass by her; that while so engaged, and without any warning to him, the tugboat pushed her bow in between the scow and the barge in such a way as to shove the scow away from the Kaiser's side, and at the same time struck the libelant on the right foot, either with the niggerhead of the tug or the fender on the tug, in such a way as to press his ankle against the side of the Kaiser's house, and thereby fracture the bone in his right leg near the joint. That the libelant's leg was broken at this time is beyond doubt, but the burden is upon him to establish that it was broken in substantially the manner described by him, by the fault of the tug. Although there is corroborative evidence that the libelant was engaged in somewhat the manner described by him, yet no one observed the alleged collision from which the injury is claimed to have arisen. On the part of the tug it is claimed that she came forward and pressed her stem against the side of the barge, but that the libelant was not in the vicinity of contact, and that she did not force her stem between the barge and the Middlesex in the way claimed by the libelant; and her evidence is quite as credible as that of the libelant on this issue. It must be remembered that the libelant has the burden of proof, and the object of such proof is to carry conviction to the mind of the court that the right of one person has been invaded by the fault of another. Such a conviction does not result in the present case. While there is no question of an injury, there is decided doubt as to the manner of its happening, and such doubt is by no means favorable to the libelant. Where the evidence is left in such condition that the court can give no logical reason for determining

the issue in favor of the libelant, it is just that the presumption that the person charged with tort is not guilty should be maintained. It must be confessed that the explanation given as to the manner in which the tug would naturally detach the barge from the Middlesex, as presented by the libelant's advocate, seems the more plausible, although the captain of the tug strenuously asserts that such a course was not necessary, and was not employed, in the present instance. Did the question turn upon which method was the more suitable to loose the barge, there would be no hesitation on the part of the court in determining in favor of the libelant; but the quality and strength of the evidence as to what was actually done are at least as favorable to the claimant as the libelant, and, in view of the burden that rests upon the libelant to make definite his right to recover, it is considered that the decree should be in favor of the claimant. Let such a decree be entered, with costs to the claimant.

WEISS v. BETHLEHEM IRON CO.

(Circuit Court of Appeals, Third Circuit. June 18, 1898.)

No. 7.

1. **TRIAL—MISLEADING INSTRUCTIONS.**

Instructions which, taken as a whole, are calculated to mislead the jury as to the character of the evidence necessary to prove the issue on one side, are erroneous.

2. **SAME—FAILURE TO SUBMIT MATERIAL EVIDENCE.**

Reversible error exists if the general effect of a charge tends to withdraw from the consideration of the jury material evidence, or fails to present with sufficient distinctness a material fact which may have a controlling effect.

3. **SAME.**

It is error for the court to submit the evidence and theory of one party prominently and fully to the jury, and not call their attention to the main points of the opposite party's case.

4. **MASTER AND SERVANT—PRIVATE RAILWAY—EMPLOYEE CROSSING TRACK.**

The rule requiring a traveler on a highway to stop, look, and listen before crossing a railroad track, is not the criterion by which to determine the degree of care required by an employé about to cross a private railway operated as part of his employer's rolling-mill plant. In such case the employer is bound not to expose its servant, conducting its business, to unnecessary peril against which it might have guarded with reasonable diligence; and the servant has a right to assume that his employer will not subject him to needless danger. The servant is therefore bound only to observe reasonable care to avoid danger which is obvious, or which is known to him, or of which he might have acquired knowledge by the exercise of proper attention.

Dallas, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Geo. Demming and M. Hampton Todd, for plaintiff in error.

John G. Johnson, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. This is an action brought by John Weiss against the Bethlehem Iron Company to recover damages for bodily injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant. The plaintiff went into the employment of the defendant company at its steel works on the evening of April 27, 1896. He worked at night from 6 o'clock in the evening to 6 o'clock in the morning, and his duties were to wheel fire brick and clay in a wheel barrow to a place in the defendant's mill, where new furnaces were in course of erection, and to wheel therefrom old fire brick, and dump them at a refuse pile in the defendant's adjoining mold yard. While engaged in this latter work, shortly after 9 o'clock on the night of April 30, 1896,—the fourth night of his employment,—the plaintiff was struck by a moving car which crossed his pathway, and was badly maimed, under the circumstances and in the manner about to be related. In wheeling away the old fire brick in his barrow, the plaintiff pursued, as he was directed to do, a wheelbarrow runway which passed through an opening in the wall of the mill out into the mold yard, and proceeded through the yard to a right angle of the wall of the mill, and thence, turning to the left on a line parallel with the wall, and a few feet distant therefrom, to the refuse pile. The last-mentioned part of this wheelbarrow runway at one point crossed a narrow-gauge railway track, 2½ feet wide, upon which ran a "dinkey engine" and its "buggies" (a small locomotive and small cars), used in transporting molds from and into the mill. In coming out of the mill into the mold yard, this dinkey engine and its cars emerged through a doorway in the wall, which doorway was 11 feet, less 4 inches, wide. The distance from the outside of the wall to the middle of the wheelbarrow runway crossing was 7 feet. Immediately inside the doorway, within the mill, the railway track made a sharp curve, so that a person standing in the middle of the wheelbarrow crossing and looking into the mill through the doorway could see along the railway track only the distance of 19½ feet. Therefore, if the head of the engine were on the track inside the doorway, and 12½ feet distant therefrom, it would be invisible to a person at the wheelbarrow crossing under all circumstances. The dinkey engine was 19 feet long, and the length of one of its buggies or cars was 11½ feet. In coming out of the mill through the doorway, the engine sometimes pulled a car, and sometimes pushed a car ahead. Its ordinary rate of speed was from four to six miles an hour. Its usual signal before it emerged outside was its whistle, sounded a short distance—about 25 feet—inside the mill as it came around the curve already mentioned towards the doorway. Usually, however, there were three dinkey engines in constant use in the mill at the same time, moving upon several narrow-gauge railway tracks laid in various directions through the mill; and these three engines, it was testified, were giving signal whistles every few minutes all day and all night. A disinterested witness (Julien), speaking of these moving dinkey engines, said: "They always whistle; they are always going; never stop." It also appeared that there were several stationary engines in the mill near this locomotive doorway, whose whistles were sounding from time to time, and that

other loud noises at that place were constantly made by the Bessemer blowers and otherwise. The plaintiff was 31 years of age. He was a German, who had only been in this country a few months before he went into the defendant's service. He had not previously worked in such an establishment, and had never been in the defendant's works before his hiring.

There was evidence tending to show that it was a rule at the defendant's works for the foreman to warn new men in regard to the danger from locomotives, but that no such warning was given to the plaintiff. The defendant's general foreman, Charles G. Barnes, who hired the plaintiff, testified: "As a rule, I generally caution the men about the tracks to be crossed, and the locomotive coming out on the tracks; but I don't know whether I told him [plaintiff] or not. I know I told the foreman of the bottom makers to tell him about it; to take him out and show him the tracks." It was not shown that any one had given such caution to the plaintiff. To the contrary, speaking of the dinkey engine which came out of the doorway into the mold yard and crossed the wheelbarrow runway, the plaintiff testified, "No one told me anything about that locomotive." The plaintiff testified that during each of the three nights he had worked before the night on which he was hurt he had wheeled six loads of old fire brick to the refuse pile, and, counting both his goings and returns, had thus crossed the railway track 12 times each of these three nights. He had wheeled, it seems, three loads on the fourth night before the trip on which the accident occurred. Thus, as he stated, he had crossed the track with his wheelbarrow altogether 42 times, computing both his going and returning. The plaintiff testified that only on one occasion had he seen the locomotive come out of the doorway into the mold yard, and this on the first or second night of his service; and that on that occasion a man came to the doorway, looked out, and beckoned with his hand for the engine to come on, and that this man came out, and the engine followed him. No part of this testimony was contradicted. In one particular it was corroborated, as we shall more fully see hereafter.

On the occasion when the plaintiff was run down, the locomotive, it would seem, was moving at its usual speed, and blew its usual signal whistle inside the mill at the customary place, but no other precaution was observed. The engine was pushing a car ahead. The car was loaded with molds, which, it was testified, would show a "cherry red" in the dark. There was no light on the car, nor was any person on it. The engineer, speaking of the plaintiff, testified, "I couldn't see him; there were molds on the top of the buggy." Presumably, then, the plaintiff could not see the engineer or the head of the engine. In the mold yard there was an electric arc light perhaps 150 feet from the crossing. As to the effectiveness of this light at the place of the accident there was some conflict of evidence.

With reference to the accident the plaintiff testified in substance as follows: That as he approached near to the railway track, and before starting to cross it, he listened and looked, and he heard nothing and saw nothing; that he then went straight ahead, without stopping, and shoved his wheelbarrow over the track; that he himself had

reached the middle of the railway track when he was struck by the car, and dragged by it seven or eight yards. In response to the question asked by the court, "Why did you do that [listen and look] if you had never seen an engine pass along that track but once in all your experience?" the plaintiff answered: "I looked and listened, and when that man came out before to see whether everything was right—that was the reason I looked and listened. I looked for the man to come." The plaintiff stated that while he was upon this trip, and after he had started from the mill, he heard the whistle of a locomotive inside, but that the locomotives were constantly whistling inside the mill as he passed along the wheelbarrow runway.

The counsel for the defendant insist "that as a matter of law the plaintiff, upon the evidence in this case, cannot recover." But this proposition is wholly inadmissible. The supreme court of the United States has declared that it is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court. *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679; *Railway Co. v. Gentry*, 163 U. S. 353, 365, 368, 16 Sup. Ct. 1104. And the court there made observations which we do well to bear in mind here:

"What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions of the court. It is their province to note the special circumstances and surroundings of such particular case, and then to say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs."

As was said in *Railway Co. v. Gentry*, *supra*, so we say of the present case that it was "one peculiarly for the jury under appropriate instructions as to the principles of law by which they were to be guided in reaching a conclusion." The evidence, we think, fairly justified a finding that the crossing at which the plaintiff was injured was a place of special danger. As we have seen, the wheelbarrow runway crossed the railway track in front of and only seven feet from a comparatively narrow doorway out of which a dinkey engine and its cars emerged. A sharp curvature of the railway track inside the doorway prevented a sight of an approaching locomotive or car until it was within 20 feet of the crossing. It was no unusual thing—as happened in the instance under investigation—for the engine to push ahead a car without outlook or light upon it. The only signal of approach usually given—and the one given on this occasion—was a whistle from the locomotive while it was inside the mill, and not visible from the crossing. There was evidence tending to show that the defendant's superintendent and foreman regarded this crossing as particularly dangerous, and that the habit was to warn new and inexperienced employes against this danger. The plaintiff testified that no such warning was given to him, and in this statement he was thoroughly corroborated. Under the evidence a finding that he was so cautioned could not have been sustained. The plaintiff was entirely inexperienced when he entered the defendant's service. This was known to the defendant's foreman when the plaintiff was hired. The plaintiff worked at night. He was in-

jured in the early part of the fourth night of his service. He testified that only once had he seen the locomotive come out through this doorway, and that then a man came before, apparently to give warning of its approach.

Whether, with respect to evidence tending to establish the recited state of facts, the instructions which the court gave to the jury were appropriate and adequate, let us now consider. The court substantially affirmed the plaintiff's fourth point, which was to the effect that, if the jury found that the plaintiff had received no special instructions in regard to the mode in which the engine came out of the doorway, and his personal observation justly led him to believe that every time it came out some one preceded it to warn him and his fellow workmen off the track, and the plaintiff had no other reasonable way of better informing himself, the jury should find that the defendant failed in its duty to give him instructions; but, after so charging the court, immediately added:

"The plaintiff, in presenting his case through his counsel, has laid a good deal of stress on the position stated in the point just read to you, and if you render a verdict for him it is not at all improbable that it will be based upon this point. I therefore call your attention to the fact that the only evidence that the plaintiff had any justification for supposing the engine when it approached the crossing was preceded by a man to give warning is to be found in his own testimony, which is to the effect that upon the only occasion when he saw an engine come out of the doorway and approach the crossing it was preceded by such an individual. So that the fact upon which this point is predicated is testified to by the plaintiff alone. Now, if the case is put upon that point, you must bear in mind that the point is predicated and supported by the testimony of the plaintiff alone. That may be sufficient, if it satisfies your mind fully, in view of the other evidence, it is. But you must not overlook the fact that this is the testimony of the plaintiff; that he is interested to the extent of all involved here, and must remember that other witnesses who have been called, who are disinterested, and who spoke upon this subject, said that it was not the practice so to warn persons of the approach of an engine to that crossing; that they never knew it to be done in all their experience; that the method of giving such warning was by means of a whistle, and no other. It is for you to say whether this occurred as the plaintiff has testified, or whether he was mistaken respecting it."

The proposition embodied in the plaintiff's fourth point had a most important relation to the case. The court, indeed, went so far as to say to the jury that, if they rendered a verdict for the plaintiff, "it is not at all improbable that it will be based upon this point." It was, therefore, a matter of great moment to the plaintiff that the instructions of the court should be accurate. The plaintiff's statement as to what he saw on the first or second night of his service in respect to a man preceding the locomotive as it issued through the doorway was circumstantial. It was either a truthful statement or a fabrication. If true, it was a great fact in the case, to which the jury should have given the most serious consideration in connection with the evidence bearing upon the defendant's alleged neglect of duty to the plaintiff in failing to give him warning against a danger which was not obvious. As we have seen, the court said that "the point is predicated and supported by the testimony of the plaintiff alone," and that he was "interested to the extent of all involved here," and that other witnesses "who are disinterested," and who had spoken upon this subject, said "that it

was not the practice so to warn persons of the approach of the engine to that crossing; that they never knew it to be done in all their experience; that the method of giving such warning was by means of a whistle, and no other." Evidently these instructions were calculated to discredit the plaintiff with the jury. Now, in so charging the learned judge had overlooked the testimony of the brakeman (Julien), who, upon cross-examination by the defendant's counsel, had testified thus:

"Q. Had you ever known anybody to run ahead of the locomotive? A. When they are in there loading molds off the front of the foundry, the brakeman always walks out there. Q. Repeat that again. A. I say when there is molds come out of the foundry, and get put off at the other crane, the engine lays there at the dump empty, and the brakeman runs ahead."

This testimony, we think, tended to corroborate the plaintiff in his statement as to what he had observed. In view of this evidence, there certainly was error in the above instructions. Moreover, the erroneous statements of the court upon this subject were extremely hurtful to the plaintiff, and perhaps fatal to his case. The bill of exceptions, indeed, shows that in a supplemental charge to the jury the court, among other things, said:

"And you have been sent for to be informed that the plaintiff's counsel has called the attention of the court to a few lines of testimony of the witness Julien, called by him, which he desires you to hear read. I told you that I did not see any testimony corroborative of the plaintiff's statement that the only time he saw the engine leave the building and cross the track it was preceded by a man to ascertain whether the track was clear. The plaintiff's counsel thinks there is such corroboration in the lines which he will now read to you. [The lines were then read.] After reading, the court said, this testimony had not impressed it as it had the counsel, but that its effect and value was for the jury, to whom it was submitted."

Was this a sufficient correction of the error into which the court had fallen? We are constrained to answer negatively. The plaintiff was justly entitled to an unequivocal withdrawal of the previous erroneous statements of the court. The jury may well have understood that no retraction whatever was intended, but that the court adhered to the views it had previously expressed.

We now turn to the charge of the court upon the subject of the defendant's alleged negligence. Here it will be necessary for us to quote the major part of the instructions. We give all that are here material. The court said:

"In the case before us the plaintiff charges that the place where he was put to work was dangerous, and unnecessarily so. The only cause of danger pointed out which we are called upon to consider is that arising from the railroad crossing where he was injured. If any other cause of danger existed, it is not important, because it did not contribute to the injury. The precaution taken by the defendants to guard against danger at this crossing was the sounding of a whistle as the engine approached as notice of the approach. This is the usual signal adopted for such purpose. Unless, therefore, the circumstances existing at this crossing were such as to render this method of giving warning insufficient, you should find the defendants not to have been careless in this respect. I repeat: Unless the circumstances existing at this crossing were such as to render this method of signaling by whistling insufficient, you cannot properly find the defendants to have been careless in this respect. What else or more was it reasonable to expect or require of the defendants? You have heard the evidence on the subject,—a description

of the situation and surrounding circumstances; you have heard the discussion of it by counsel on one side and on the other, and I will not dwell upon the question. Were the circumstances at this crossing such as to require any other signal than that established by the rules of the company? Was it insufficient? Does the evidence show it to have been insufficient? It is the usual signal, and, so far as appears, the universal signal at railroad crossings generally. Was there anything here to require a different signal, or an additional signal. To the court it seems that the sounding of the whistle was sufficient to render the crossing reasonably safe, with the exercise of proper care by the plaintiff, with knowledge on his part of the situation. The case, however, is submitted to you, and you have the responsibility of deciding it. Had the plaintiff knowledge of the situation, or was the defendant remiss in failing to impart such knowledge to him? You have heard the testimony on that subject,—his own and that of defendant's witnesses. He had been repeatedly over the route, back and forth, on which he worked. He had seen the railroad, and the engine and cars upon it, upon one occasion at least. Would or not his eyes of themselves inform him fully in respect to the situation? * * * With these observations, and in view of the very thorough discussion of the subject by counsel, I submit to you the question, were the defendants guilty, of negligence in the respects stated as complained of; that is, in not providing for safety at that crossing, or by withholding, or failing to give proper information respecting the method of operating the cars upon the road at that point? I feel it to be my duty to say to you that I do not think the evidence justifies a conclusion that the defendants failed in their duty in this particular. I do not take the question from you. I submit it to you. The responsibility will be upon you of deciding it justly. But you ought not to reach a conclusion on the subject without exercise of great care and the best judgment you possess. You cannot undertake to say how an establishment like this shall be constructed, how its railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary to enable you to form a reliable judgment. The real question here in this respect is whether or not proper warning was given to this man at that crossing, or whether he was misled respecting it for want of proper information. These are the questions, and the only questions, that the court sees, as respects this branch of the case; and I repeat what I have said, that in the judgment of the court the evidence on one side and the other, properly considered, does not justify a conclusion that the defendant omitted or failed in any part of its duty in this matter. I repeat, however, so that you will not misunderstand me, that the question is one of fact, which is submitted to you."

Touching these instructions, our first observation is that no reference is here made by the court to the highly important evidence tending to show that this crossing was considered by the defendant itself a place of peculiar danger, and that it was customary to give particular warning of that danger to new and inexperienced workmen. We find no allusion whatever to this evidence in any part of the charge. This omission is the more to be regretted because the proof was that the plaintiff had not been warned. Again, the attention of the jury was not here directed to the fact that the plaintiff was a new and inexperienced hand, whose term of service had been very brief, extending only into the fourth night. Indeed, the charge assumed that the plaintiff had acquired full knowledge by observation. Furthermore, the court made no mention in detail of the unusual facts relating to the crossing and the manner of its use, which we have recited. Yet, without close attention to the special circumstances, the jury could not rightly determine whether the defendant had acted with due prudence, and with reasonable regard to the

safety of the plaintiff. In all these particulars we are obliged to say that the instructions of the court were incomplete and inadequate.

Then, again, the court, in effect, charged the jury that the defendant had performed its whole duty when it sounded a whistle in approaching the crossing, although the uncontradicted proof was that such signal was given when the locomotive was invisible to one approaching the crossing, and was given inside the mill, where other locomotives were continually giving like signals. In view of the exceptional facts, the instructions upon this point, we think, were too favorable to the defendant.

Still further, the court said: "You cannot undertake to say how an establishment like this shall be constructed, how its railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary for you to form a reliable judgment." This instruction, it seems to us, was calculated to mislead the jury. It might not have misled a trained lawyer, but its effect on a jury might well be to unduly restrict legitimate inquiry. As we have already said, the determination of the facts of this case was peculiarly for the jury, and it was their province to consider all the circumstances and surroundings.

Instructions which, taken as a whole, are calculated to mislead the jury as to the character of the evidence necessary to prove the issue on one side, are erroneous. *Rea v. Missouri*, 17 Wall. 532, 543. Reversible error exists if the general effect of a charge tends to withdraw from the consideration of the jury material evidence. *Hall v. Weare*, 92 U. S. 728. If an instruction fails to present with sufficient distinction a material fact which may have a controlling effect, there is ground for reversal. *Ayres v. Watson*, 113 U. S. 594, 609, 5 Sup. Ct. 641. It is error for the court to submit the evidence and theory of one party prominently and fully to the jury and not call their attention to the main points of the opposite party's case. *Canal Co. v. Harris*, 101 Pa. St. 80; *Reichenbach v. Ruddach*, 127 Pa. St. 564, 595, 18 Atl. 432; *Young v. Merkel*, 163 Pa. St. 513, 520, 30 Atl. 196.

Upon the subject of alleged contributory negligence on the part of the plaintiff the court charged the jury as follows:

"Aside altogether from the questions whether the defendant was guilty of fault or negligence, could the plaintiff, by the exercise of such care as a man should exercise under such circumstances where there is danger, by the exercise of such care have seen or heard the engine? One of the witnesses called, who appears to be entirely disinterested,—though you will say how much confidence should be reposed in his testimony,—says that he saw the plaintiff approach the railroad on this occasion, saying that he saw him back some distance from the track, describing the situation. He says he heard the whistle of the engine, and knew that it was coming; that he watched the man come steadily on, apparently without looking, and certainly without stopping, passed directly on the track in front of the engine, and was struck. Now, is that so? If it is, there can be no question about his negligence. In a situation like that it was his duty to be on his guard. There is nothing in the case that excuses him from the exercise of proper care. If he did pass steadily on from the point where this witness saw him, as the witness says he did, without taking any precaution to guard himself against the danger of coming into collision with the engine, there cannot, in the judgment of the court, be any room for doubt that he was guilty of contributory negli-

gence. He says that he stopped and looked and listened. It is for you to say whether that is the case. The witness to whom I refer says that he did not, and he is apparently disinterested. * * *

We here note, first, that the court made an inadvertent mistake in saying that the plaintiff had testified that he had stopped before crossing the railway track. The plaintiff did not so testify, but stated the reverse. In consequence of this misapprehension, the court submitted to the jury a question of veracity as between the plaintiff and the witness Jacoby. No such issue, however, could be raised properly, for the supposed discrepancy in the testimony of the plaintiff and that of the other witness did not exist. But, aside altogether from this inaccurate statement, we are not able to concur in the views of the court upon the question of the plaintiff's alleged contributory negligence in not stopping before he attempted to cross the railway track. In substance and effect the court charged the jury that, if the plaintiff did not stop, he was guilty of contributory negligence. Now, the "stop, look, and listen" rule regulating the conduct of a traveler upon a highway when about to cross a railroad track is not the criterion by which to determine the degree of care which was incumbent upon the plaintiff. The difference between an ordinary railroad traversed by trains running at high rates of speed and the defendant's private railway in structure, equipment, location, and use is so great that the general rule governing the crossing of the former is not applicable to the latter. Again, the relation between the plaintiff and the defendant was very different from that which exists between a railroad company and a traveler upon a highway crossing the railroad. The defendant set the plaintiff to work upon its wheelbarrow runway, which crossed its railway track, and the plaintiff, in the performance of his work, necessarily crossed the railway, not upon the implied invitation of the defendant simply, but by its direction. The defendant was under a legal obligation not to expose its servant, when conducting its business, to unnecessary peril against which he might have been guarded by reasonable diligence on the part of the defendant. *Hough v. Railway Co.*, 100 U. S. 213, 217. The plaintiff had a right to assume that the defendant would not subject him to needless danger, and hence his watchfulness would naturally be diminished. The plaintiff was bound only to observe reasonable care to avoid danger which was obvious, or which was known to him, or of which he might have acquired knowledge by the exercise of proper attention. Whether the plaintiff was guilty of contributory negligence was a question for the determination of the jury upon a consideration of the peculiar circumstances surrounding the case and in the light of all the evidence.

We find support for these views in the opinion of the supreme court of the United States in the recent case of *Warner v. Railroad Co.*, 168 U. S. 339, 347, 18 Sup. Ct. 68, where it was held that the rule requiring a traveler upon a highway in crossing a railroad to stop and use his eyes and ears to ascertain whether a train is approaching did not apply to a person who was crossing a track at a station to get on a train. The court said that the person so cross-

ing the railroad did so upon the implied invitation of the railroad company, and that, while such implied invitation would not absolve him from the duty to exercise care and caution in avoiding danger, "nevertheless it certainly would justify him in assuming that, in holding out the invitation to board the train, the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution." The court added that the railroad company, in giving the invitation, must be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation; and the court held that it was a question for the jury, under all the circumstances, whether the plaintiff's intestate was chargeable with contributory negligence.

The judgment is reversed, and the cause is remanded to the circuit court with direction to set aside the verdict and grant a new trial.

DALLAS, Circuit Judge, dissents.

BRADFORD, District Judge (concurring). I fully concur in the conclusion reached by the presiding judge that the judgment below be reversed, the verdict set aside and a new trial granted. There is, however, one feature of the case not particularly dealt with in his opinion, which has impressed me with great force, and, as much as any other consideration, has convinced me that there was reversible error in the charge delivered to the jury in the court below. There was no evidence showing or tending to show that the defendant had, at or prior to the time the plaintiff was injured, either adopted or promulgated any rule requiring any person, at the time when a locomotive, with or without cars attached to it, was about to emerge from the defendant's mill and cross the wheelbarrow runway where the plaintiff was injured, to be stationed at the doorway or to precede the locomotive or cars in order to give warning to such persons as might be engaged in wheeling brick or other material along the runway path. The evidence does not disclose any such practice in relation to this subject as to permit a legitimate inference that such a rule existed; and the witnesses Tomaney and Julien testified that there was no such rule. Nor was there any evidence showing or tending to show the existence of any rule requiring a locomotive or car, about to pass from the mill and cross the runway, to stop at the doorway before proceeding further. The runway, together with other paths in the mould yard, was maintained by the defendant for the use of its operatives in performing the work for which they were employed. The doorway through which the car passed and struck the plaintiff was ten feet and eight inches wide in the clear. From the plane of the outside of the wall, where the doorway was situated, to a point in the middle of the runway as it crossed the narrow gauge railway track, was a distance of seven feet and one inch. The evidence shows that the rate of speed of locomotives emerging from the doorway and crossing the runway was from four to six miles an hour. If the speed of a locomotive or car coming out of the doorway be taken at

an average of five miles an hour, the distance between the doorway and the center of the runway crossing would be traversed in less than one second. At the time the plaintiff was injured the locomotive came out of the doorway at its usual rate of speed. Wooley, the superintendent of the mill, testified that the locomotive, which came through the doorway at the time of the plaintiff's injury, was nineteen feet and four and one-half inches long, and that in his judgment, at the rate of speed at which such engines move, namely, from four to six miles an hour, they could be stopped in about their own length, and that that would be a very quick stop. He further testified to the effect that about the time the plaintiff was injured a locomotive would come out of and return through the doorway about seventy one times in the course of one night; that in the course of twenty-four hours about eight hundred crossings of the narrow gauge track where the plaintiff was injured were made by operatives of the defendant; and that nearly as many crossings were made at that point at night as in day time. He further testified: "Q. I have understood you to say, in answer to Mr. Demming, that there were new and old men among these men who wheel the barrows? A. Yes, sir. Q. Can you give any idea of the proportion you always have of new men on these jobs? A. I could hardly say that. There is hardly a day passes that we have not a new man or two or three or four." He further testified to the effect that it was the custom to put new men at such work as would compel them to use the runway and crossing in question, and that he, the witness, was in the habit of so putting new men at work at that place. There is evidence to the effect that sometimes a locomotive pulled a car or cars and at other times pushed a car or cars through the doorway in question across the runway. When the plaintiff was injured the locomotive was pushing a car laden with moulds. No person was on the car, nor did it carry a light. Wooley testified that the moulds carried out in the cars were "hot; a very dull red and dark." Such cars pushed by the locomotive, in so far as they intervened between the vision of a person standing at the point where the plaintiff was injured and a locomotive pushing such car, of course, rendered the locomotive invisible to him. It appears from the evidence that the mould yard was used principally for the purpose of cooling the hot moulds which were taken from the mill; water being turned on the moulds for that purpose. The cooling of the moulds in this manner resulted in large quantities of steam which either hung over the yard or was carried in one direction or another by the wind. Tomaney testified to the effect that the steam from the moulds obscured the electric light hung in the mould yard. There was some conflict of testimony as to the extent to which the light was thus obscured. It appears from the evidence that the customary means of warning persons in the mould yard of the approach of locomotives or cars from the mill was blowing the whistle of the locomotives while within the mill and some twenty five feet from the doorway. While two such locomotives called dinkey engines were employed in and about the mill and mould yard of the defendant at the time the plaintiff met with his injury, usually three such locomotives were used. The operations carried on in the mill

were of such nature as to produce a confusion and mingling of loud noises of various kinds incident to a mill of that character. To-maney testified that there were noises in the mill from stationary engines and bessemer cupolas. Julien testified to the effect that the three locomotives whistled "every place wherever they go"; that they whistled both when they passed out of the mill and when they passed into the mill; that they whistled as they passed back and forth within the mill, when not intending to pass out; and that the locomotives "always whistle, they are always going, never stop." Under the circumstances disclosed and especially in view of the proximity of the runway crossing to the doorway, it is evident that the custom of signaling by whistle was not calculated adequately to protect an inexperienced operative, such as the plaintiff was, having occasion to use the runway crossing; and this is all the more apparent in view of the fact that at most only two or three seconds could elapse between the time when a person on the runway crossing within one foot of the nearer rail could, under the most favorable circumstances, first see a car or locomotive coming round the sharp curve on its way out of the mill, and its reaching the spot where he stood. On the runway crossing lurked sudden death or mutilation for those who used it without exercising the utmost vigilance. An operative, wheeling a heavily laden barrow six feet long and stumbling or making a misstep while a locomotive or car was moving on its way out of the mill, would incur grave peril of loss of life or limb. The runway crossing was, by reason of the mode in which the defendant carried on its operations, a peculiarly hazardous place. There was some evidence relating to the nature of the caution generally given to new men about the danger resulting from the movements of locomotives. This evidence, however, is vague, indefinite and unsatisfactory. Barnes, the foreman of the bessemer department, testified: "As a rule I generally cautioned the men about the tracks to be crossed and the locomotive coming out on the tracks." Wooley testified: "Q. Isn't it your habit to warn those men in regard to locomotives when they are employed? A. The foremen generally warn them. Q. As a matter of fact, they are all supposed to be warned, are they not? A. No; I can't say that. Q. It is the custom to warn them all, is it not? A. Not particularly about the locomotives, no, no more than anything else about the works. Q. You warned them in regard to all the dangers of their employment? A. Of their employment. * * * Q. You also said in answer to Mr. Demming that it was your custom generally to warn men. What kind of warning do you give them? A. If the foreman hires a man, he turns them over to the gang in which he is to work, and the man understands it, without being told every time, to tell him what the work is, and he can certainly see without being told, although he is very often told, and I think as a rule told, where the dangers are, if there are any particular ones, and to avoid them." In point of fact the evidence does not disclose that the plaintiff was cautioned at or after the time of his employment by the defendant. On the contrary, the testimony shows that he was not. Such a caution or warning as is above indicated, had it been given,

was manifestly inadequate and of little importance in so far as the runway crossing is concerned. Certainly every person of full age and sound mind, who has seen locomotives or cars moving along tracks, is supposed to know that if he steps on the railway directly in front of an approaching locomotive or car and remains there until struck, he will be liable to loss of life or limb. And so every reasonable man must regard a railway, which is operated, as in itself a warning of danger, putting him on his guard. But the giving of information only as to these points is of small avail. Any sane adult possesses such knowledge without instruction from his employer. It appears from the evidence that the only rule established by the defendant for the protection of operatives using the runway crossing against locomotives or cars emerging from the doorway, was that a whistle should be given by the locomotive as a signal of its approach. But this signal, in view of the physical environments of the runway crossing and the noisy din and confusion of whistles within the mill, was, in my judgment, clearly an inadequate caution or warning to new and inexperienced operatives using that crossing and unable properly to locate and distinguish the sounds within the mill. The evidence does not show the existence of any rule requiring operatives about to use the runway crossing to stop before going upon it. And, had any such rule existed, it would be proper for the jury to pass on its sufficiency with respect to inexperienced employes. For a man, burdened with a heavily laden wheelbarrow, undertaking, even after stopping to go across the tracks, was liable to be struck and killed within one second from the time a car or locomotive should project beyond the doorway, and within two or three seconds from the time when, under the most favorable circumstances, he could have seen from the crossing the approach of a locomotive or car. It could hardly be expected, and evidently was not intended by the defendant, that operatives before crossing the tracks should leave their wheelbarrows and go through the doorway to ascertain whether a car or locomotive was approaching. There was no rule that this should be done; the defendant relying only on the whistle as a signal. Owing to the large number of crossings made each night, it was probably impracticable that it should be done. And if it had been done, the operatives would, on returning to their wheelbarrows, have been subject practically to the same peril as if it had not been done. New and inexperienced operatives were entitled to a reasonably proper and sufficient warning of the peril, and such a warning does not mean a general warning to look out for cars and locomotives given at the inception of the employment, but, in a case like this, a reasonable and sufficient warning given to the operatives at the time a locomotive or car was about to cross the runway. The warning should have been timely, and the approach of a locomotive or car marked the right time. An obviously proper rule for the giving of such warning would have required an operative, when a locomotive or car was about to emerge from the mill, to be stationed at the doorway or to precede the locomotive or car. In such case, it would not have been necessary that a locomotive or car, about to pass from the mill across the runway, should stop.

While the defendant was not an insurer of the safety of the plaintiff at the time he received his injuries, and while the plaintiff, when he entered the service of the defendant, assumed the ordinary and usual risks of his employment, including the risk of injury from the negligence of his fellow servants, in the absence of negligence on the part of the defendant in their selection or retention, he did not assume any risk resulting from the defendant's negligence, nor had the defendant any right to expose him to unusual and unnecessary peril against which the defendant by the exercise of reasonable care could guard him. The plaintiff had the right to assume that he would not be exposed to such peril. The evidence does not show any necessity for the maintenance of the runway and runway crossing in such close proximity to the mill. Had the plaintiff's service in the employ of the defendant been of long continuance, and had he become thoroughly familiar with the noises in the mill and the mode in which the defendant operated its cars and locomotives when passing through the doorway, a case materially different from the one in hand might be presented. But the plaintiff, as a new and inexperienced operative, had a right to rely upon greater care, consideration and protection, than he received from the defendant. It was his right that the defendant should use reasonable care and precaution for his protection at the runway crossing.

In *Improvement Co. v. Stead*, 95 U. S. 161, Mr. Justice Bradley, delivering the unanimous opinion of the court, in speaking of a railway grade crossing on a common road, said:

"The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing."

So, here, the defendant, in view of the surroundings of the runway crossing, should have adopted and promulgated a rule for the protection of new and inexperienced operatives requiring someone to stand at the doorway or precede locomotives or cars emerging from the mill. Had the defendant adopted and promulgated such a rule and used reasonable circumspection to secure its enforcement at all times, the negligent omission of the operative or operatives detailed or designated for that purpose in any given instance to carry out the rule, might be considered negligence with respect to an executive detail of the operation of the defendant's plant, and, as such, not to involve the defendant in any liability for an injury received through such negligent omission. But it is unnecessary to further pursue this particular branch. In my judgment, the defendant was culpably negligent, with respect to the plaintiff, in

not establishing such a rule. The above points relating to the negligence of the defendant, if not, indeed, sufficient to establish such negligence as a matter of law, should certainly have been freely and fully left for consideration by the jury. Were they so left? If not, in view of their important bearing upon the case, there was reversible error. In *Starr v. U. S.*, 153 U. S. 614, 14 Sup. Ct. 923, Chief Justice Fuller, delivering the opinion of the court, in speaking of the proper functions of a judge in charging juries, said:

"But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. *McLanahan v. Insurance Co.*, 1 Pet. 170, 182. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to."

The seventh assignment of error is as follows:

"(7) The learned judge erred in instructing the jury as follows: 'I feel it to be my duty to say to you that I do not think the evidence justifies a conclusion that the defendants failed in their duty in this particular. I do not take the question from you; I submit it to you; the responsibility will be upon you of deciding it justly. But you ought not to reach a conclusion on the subject without the exercise of great care, and the best judgment you possess. You cannot undertake to say how an establishment like this shall be constructed, how the railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary to enable you to form a reliable judgment. The real question here in this respect is, whether or not proper warning was given to this man at that crossing, or whether he was misled respecting it, for want of proper information. These are the questions, and the only questions that the court sees as respects this branch of the case, and I repeat what I have said, that in the judgment of the court, the evidence on one side and the other, properly considered, does not justify a conclusion that the defendant omitted, or failed in, any part of its duty in this matter. I repeat, however, so that you will not misunderstand me, that the question is one of fact, which is submitted to you. If you find that the defendants were not negligent, your verdict will be in their favor.'"

The learned judge below, in this portion of the charge was dealing principally with the sufficiency of a locomotive whistle as a warning of danger and with the knowledge of the plaintiff of the situation generally. On these points, while expressing his opinion adversely to the plaintiff, the learned judge nevertheless left them for the decision of the jury. But language was used which virtually took away from the jury the right to determine whether the defendant was not culpably negligent toward the plaintiff, in failing to adopt a rule requiring warning to be given of the approach of a locomotive or car by an operative stationed at the doorway, or preceding the locomotive or car. The learned judge said:

"You cannot undertake to say how an establishment like this shall be constructed, how the railroad shall be located, what will answer its purposes, and what will not. You have not the information necessary to enable you to form a reliable judgment."

The jury was thus told in effect that they had not the information or the power to decide whether the defendant was not at fault

for omitting to adopt such a rule as is above indicated. The jury, however, in my judgment, had that right. Neither the rule of *damnum absque injuria* nor any other principle of the law deprived the jury of that right. I am, therefore, of the opinion that fatal error was committed which requires the reversal of the judgment of the court below and the granting of a new trial.

With respect to alleged error in the charge touching contributory negligence I fully concur with the presiding judge in his views on that subject.

BROWN et ux. v. UNITED STATES CASUALTY CO.

(Circuit Court, W. D. Tennessee, E. D. May 5, 1898.)

No. 140.

1. INSURANCE—SUBSTITUTED POLICY—NEW CONDITIONS.

An insurance company, which offers to issue, free of charge, to the policy holders of an insolvent company, its own policies for the period for which premiums have been paid in the old company, is bound, on acceptance of its offer, only by the stipulations in its own substituted policy, and not by those in the original policy of the insolvent company.

2. SAME—ACCIDENT POLICY—MURDER.

Where an accident insurance policy provides that the insurance shall not cover "death * * * resulting from * * * intentional injuries inflicted by any person," no recovery can be had against the company in case of the murder of the insured.

Trial by the court without a jury.

During the argument of the demurrer filed in the record the parties stipulated in writing that the case should be tried by the court without a jury, and thereupon filed an agreed statement of facts upon which the cause was heard. The stipulation to try without a jury and the agreed statement of facts are filed in the record.

Special Finding of Facts.

The court therefore finds the following facts:

(1) The testator, H. B. Miller, was the holder of a policy in the United States Mutual Accident Association, of the city of New York, No. 671, which insured him "against personal bodily injuries effected through external, violent, and accidental means." It contains in none of its stipulations any expressed limitation or exception upon the liability declared by the above-quoted covenant of insurance, so far as applicable to the facts of this case.

(2) The United States Mutual Accident Association becoming insolvent, and being wound up as such, the defendant, the United States Casualty Company, issued its circular letter inviting the policy holders of the defunct company to accept a policy in that company, free of cost, for the period for which the premiums had been paid in the defunct company; this being a business scheme to possess itself, as successor, of the business of the insolvent company.

(3) This offer Miller accepted by returning to the defendant company a postal card whereon was printed the form of acceptance which had been sent to him by the defendant company for that purpose. It reads as follows:

"United States Casualty Company: I hereby reaffirm the statements and warranties contained in my application to the United States Mutual Accident Association for membership therein, and authorize the United States Casualty Company to issue to me an accident policy based thereon, conditioned that my insurance shall be carried without further charge to the date to which it now stands paid on the books of the United States Mutual Accident Asso-

clation; and I agree that upon the issue of such new policy my present policies in the United States Mutual Accident Association shall thereafter be void and of no effect, reserving my right to share in the distribution of any assets of the United States Mutual Accident Association after payment of all liabilities.

H. P. Miller, Milan, Tennessee."

(4) Thereupon the defendant company issued to him the policy sued on in this case, insuring him "against bodily injuries sustained through external, violent, and accidental means," but also containing among its other stipulations the following condition:

"First. The insurance under this contract shall not cover disappearances, or injuries, whether fatal or disabling, of which there is no visible mark on the body (the body in case of death not to be deemed such mark), nor cover injuries, dismemberment, disability, or death sustained while the insured is bereft of reason, sight, or hearing, or while mining, blasting, wrecking, or employed in the manufacture, sale, transportation, or handling of any explosive compound, or while, or in consequence of, violating the law, or while under the influence of intoxicating drinks or narcotics, or in consequence thereof, or while in any wild or uncivilized countries, or while riding or traveling in any vehicle or conveyance not provided for transportation of passengers, or resulting from or caused, directly or indirectly, wholly or in part, or while so affected, by vertigo, somnambulism, bodily infirmities, deformities, or disease of any kind, gas or poison in any form or manner, contact with poisonous substances, surgical or medical treatment, dueling, fighting, wrestling, war, riot, lifting, overexertion, suicide (sane or insane), sunstroke, freezing, riding or driving races, voluntary exposure to unnecessary danger, or intentional injuries inflicted by any person."

(5) Subsequently, on the 31st day of December, 1896, Miller was killed and murdered in his hotel by negroes striking him upon the head with a railway coupling pin, from which injuries he died almost immediately. He was killed while secluded in a water-closet, for the purpose of robbing his person of the money which he then carried, and which the murderers took from him. It is agreed, therefore, by the parties, that he was guilty of no negligence in being at the place where he was murdered, and that he had no knowledge whatever of the intention on the part of the parties who murdered him. It is also agreed that the two murderers have been convicted of the crime.

Conclusions of Law Found by the Court.

First. The defendant company is bound only by the stipulations of its own substituted policy, and not at all by the broader stipulations of the original policy of its predecessor.

Secondly. The injuries through which the death was effected fall within the stipulated exceptions contained in the conditions of the policy. It was a death resulting from, and wholly caused directly by, intentional injuries inflicted by other persons, his murderers; wherefore the defendant company is not liable in this action, and the judgment should be for the defendant, which is ordered accordingly.

S. P. L. Hill, J. P. Rhodes, and J. J. Hays, for plaintiffs.
Watkins & Latimore, for defendant.

HAMMOND, J. (after stating the facts as above). The notion that Miller had contracted for an insurance as broad as the original policy, and was not, under the circumstances, bound by the more restricted limitations of the substituted policy, is wholly untenable. There is nothing whatever in the circular letter found in the evidence offering to bind the substituted company to the old policy of the defunct company. The first company was a mutual company, the second was a stock company; and this, of itself, would suggest the necessity of some change of the form of contract, and the necessity for a new policy. There was not a guaranty or an assumption of an old contract, nor

any offer of such an arrangement, but only one to issue "free insurance" for the period for which the premium had been paid in the old company, with the evident expectation of continuing the business upon the receipt of the newly-accrued premiums, and thereby taking the policy holder into the new company as one of its policy holders. This was the natural and orderly method growing out of the business scheme. But, no matter how that might be, Miller's own acceptance on the postal card in its very words authorized the United States Casualty Company to issue to him an accident insurance policy based upon his application to the old company, and not upon the terms and stipulations of the old policy; and then he says, "I agree that upon the issue of such new policy my present policies in the United States Accident Association shall thereafter be void and of no effect." This shows conclusively that he contemplated the issuance of a new policy, and the well-known principle of law is that when he accepted the policy he accepted all its stipulations as they were contained therein, including the conditions which were made a part of it.

Much stress has been laid upon what I will call the "fine print" argument, so often resorted to in cases like this. There are occasions, undoubtedly, when there is force in this argument, and the courts have sometimes sustained it when the circumstances were such that special notice of the particular condition would be required to charge the policy holder with a knowledge of the fact of its existence. A pertinent illustration is found in the case cited by counsel of Bassell v. Insurance Co., 2 Hughes, 531, Fed. Cas. No. 1,094. There, in the negotiations with the agent of the insurance company, the policy holder had told him that he used kerosene oil for the lighting of his store, but did not keep it in stock. Afterwards a policy was sent to him, in which there was a condition printed that kerosene oil should not be used for lighting the premises, except by special permission; and it was held that under the circumstances the policy holder was not bound by the condition without having his attention specially called to it, for the obvious reason that he had negotiated for a contract which permitted him to use the kerosene oil, as he might reasonably suppose; and the appearance of the condition in fine print on the back of the policy with innumerable other conditions was held not to charge him with notice, or bind him to a change of the contract which he had made. Other cases might be cited to the same effect, but they do not at all proceed upon the theory of eliminating the conditions that are printed in fine print, but depend upon the particular circumstances of the making of the contract which show that the policy holder had never agreed to it. It is unnecessary to consider these cases more particularly, for the reason that the present case is destitute of a single circumstance to invoke that principle. It is well enough to remark, in the first place, that there is no fine print on this policy. The condition involved is conspicuously printed in type as large as that on the face of the policy, and in such manner as to attract the attention of any one who should give the subject the least attention. The argument by the plaintiff assumes that Miller, being aware of the fact that he had a broad policy covering his life if he should be murdered, naturally supposed that the new policy was as

broad as the old, and that he was misled into accepting the limitations of the new policy for want of his attention being called to the distinctions between the two; but there is not the least circumstance in this case to justify the assumption that Miller ever knew or recognized any such difference. Even now and here, on the authority of the cases cited pro and con, counsel differ as to whether or not the old policy, properly construed, would cover a life lost by murder. It may be conceded that the better opinion is that it does, yet it is not at all probable that Miller's attention was called to the conflict about the construction of his original policy, and there is no proof that between him and any agent of the company there was ever any reference made to that subject. Doubtless he took the policy as it was given to him, without any consideration of that particular point. When the new policy came into existence, the circumstances were such that naturally he would be likely to accept anything that was offered to him. His old company had collapsed, and his old insurance was worthless. The new was offered to him gratuitously. He was paying nothing for it, and it is well denominated "free insurance"; and it is altogether probable that he was following the homely adage not to look a gift horse in the mouth. So there is no circumstance proved here like that in the case just cited from the federal court of Virginia to invoke in behalf of the policy holder the idea that he was misled, and not advised of the conditions of his policy; nothing whatever to overcome the firmly established doctrine that ordinarily and without special circumstance the policy holder, by accepting the policy, takes it as it is written or printed, with all its terms and conditions alike binding upon him; and this is particularly so when he agrees, as he did in this case, on the face of the policy itself, that the insurance should be "subject to all conditions indorsed hereon." He must be conclusively presumed to have read his policy unless the circumstances take the case out of that rule. *Insurance Co. v. Fletcher*, 117 U. S. 519, 529, 6 Sup. Ct. 837.

The great and substantial struggle between the parties in this case depends upon the proper construction of the language of the condition containing the exception relied upon to eliminate any liability in a case where the policy holder was murdered. Deeming it possible that the rights of the parties might depend upon the construction of the phraseology of the old policy insuring in its broad terms against "bodily injuries effected through external, violent, and accidental means," without any limitation applicable to the case of one murdered, or that it was possible that the exception in the new policy might be disregarded upon the "fine print" theory, there was a very learned and able argument between counsel upon the authorities on the question whether or not the words of the old policy within themselves would cover a case of murder; whether death by murder, in the sense of the law, is a death by "accidental means," which are the words of both policies; but we are relieved from a consideration of this argument, or of the cases on either side, by the holding that the rights of the parties do not depend upon the old policy, and that the disputed condition of the new policy was accepted by Miller, and binding on him. It then becomes a question of the proper construction

of the language of the given condition or exception, as quoted in the special finding of facts.

Again, an ingenious argument has been made to the effect that, notwithstanding the condition, the case of murder is not taken from the broad language of the insurance clause of the policy, and, conceding that death by murder is an accidental means by which the life was destroyed, that there is then no exception in the condition against it. The argument for the plaintiff proceeds upon the theory that the disputed words, "or intentional injuries inflicted by any person," can properly be held to apply only to "injuries that do not include death," to use the language of learned counsel for the plaintiff. Injury, commonly so called, counsel contends, includes any and all hurt and harm short of death, and this policy so confines the meaning of the word that only bodily injuries short of death, sustained through external, violent, or accidental means, are comprehended within the disputed phrase above quoted. It divides, or rather subdivides, injuries short of death into three classes or divisions, for each of which different indemnities are to be paid: (a) Losses of time, not including loss of one or both hands, feet, or eyes, for each of which a different indemnity is paid; (b) severance or dismemberment,—the loss of one or both hands, feet, or eyes, for each of which a different indemnity is paid; this class of injuries being called "severance or dismemberment"; (c) total disability for two years arising from some injury other than the loss of one or both hands, feet, or eyes, for which a different indemnity is paid. This classification of the argument is taken from the terms of the policy, and is substantially correct; and now the argument proceeds to urge that the language or phraseology of the conditions containing the exceptions must be construed in reference to that classification. Then we come to (d) death resulting from external, violent, and accidental means; this being an entirely independent class of "losses," not at all related to the others, for which also a different indemnity is paid, namely, a life insurance of ten thousand dollars,—the final contention of the argument being that this death loss is not included in the exception of "intentional injuries inflicted by any person," the phrase used in the exception. In other words, the argument is that the exception of "intentional injuries inflicted by any person" must be, by proper construction of the sentence, confined to those injuries which would otherwise be covered by the policy falling short of death.

The argument here is very ingenious and quite persuasive, but I think it is illusory and unsound, and is broken down by the plain, everyday, grammatical arrangement of the sentence. It does not depend upon adjudicated precedents, for no case has been cited on either side deciding the point. The full authority of the cases cited on either side may be conceded, and yet they do not throw even a useful sidelight upon this question, and I shall therefore confine consideration of the subject to the construction of the sentence itself, conceding to the fullest extent the claim that all doubt must be resolved against the company. Undoubtedly, this question would never have been made if the architect of the sentence had anticipated the point we have under consideration, and had proceeded to recon-

struct the sentence to make its meaning more clear in respect of that point. Like most of the sentences in policies of insurance establishing the conditions and exceptions, this sentence is overloaded with an immense cargo of details. With a commendable desire for condensation, the sentence is made to bear schedules of enumeration which very much obscure its meaning, undeniably, and which give occasion for the breeding of lawsuits by just such contentions as we have here. But a little close thought and careful analysis brings out the meaning with sufficient distinctness to satisfy the judicial judgment as to the meaning of the parties in making the contract. It should not be overlooked in construing a contract like this, and a condition like this, and a sentence like this, that the exception was adopted to provide against the very conflict of authority which has been developed by the investigations of counsel in this case. It being doubtful, under the authorities or adjudications of the courts, whether a death by murder was a death by accidental means, if the parties should set to work to agree upon the question whether it should be so considered, they might use much more specific language to express their intention than we find in this policy, and, possibly, under such a writing of the policy, this question would not have arisen; but when the insurance company, being also aware of the wider scope of the question, were desirous of constructing a policy which should provide against any liability for any injuries, whether resulting in death or not, that might come from the intentional assaults of third parties upon the person of the policy holder, they might reasonably be expected to construct a sentence very much like that we have here, although it might even then have been more clearly expressed than in the sentence we have under consideration, which unites with this subject, in the same complex sentence, many others rather widely separated in their analogies. The argument for the plaintiff uses in the simple process of grammatical analysis a very rigid and relentless sort of foot rule, or measuring tape, which has nothing on it except the classifications or subdivisions of injuries made for another purpose in the body of the policy, entirely ignoring the methodical classifications or subdivisions of injuries and liabilities which are contained in the sentence itself, for the different purpose of enumerating exceptions. The body of the policy schedules or enumerates injuries for which the liability exists. Naturally these would be strictly specific in their description, and the word "injury" might be confined as the plaintiff suggests. The body of the condition or exception schedules or enumerates the injuries for which no liability is to exist, and, while the essential connection between the two cannot be denied, they are not essentially wholly interdependent upon each other in the manner insisted upon by plaintiff's counsel. Naturally these schedules would be broadly generic in their description, and the word "injury" might have an enlarged meaning in this place.

Let us analyze the sentence in a simple way, as follows: (1) The insurance under this contract shall not cover (a) disappearances, or (b) injuries, whether fatal or disabling, of which there is no visible mark, etc. (2) Nor cover (a) injuries, (b) dismemberment, (c) dis-

ability, or (d) death sustained (a) while the insured is bereft of reason, sight, etc., (b) or while mining, blasting, wrecking, (c) or employed in the manufacture, sale, transportation, or handling of any explosive compound, (d) or while, or in consequence of, violating the law, (e) or while under the influence of intoxicating drinks or narcotics, or in consequence thereof, (f) or while in any wild or uncivilized countries, (g) or while riding or traveling in any vehicle or conveyance not provided for transportation of passengers; or resulting from or caused, directly or indirectly, wholly or in part, or while so affected, by (a) vertigo, (b) somnambulism, (c) bodily infirmities, (d) deformities, or (e) disease of any kind, (f) gas or (g) poison in any form or manner, (h) contact with poisonous substances, (i) surgical or medical treatment, (j) dueling, (k) fighting, (l) wrestling, (m) war, (n) riot, (o) lifting, (p) overexertion, (q) suicide (sane or insane), (r) sunstroke, (s) freezing, (t) riding or driving races, (u) voluntary exposure to unnecessary danger, or (v) intentional injuries inflicted by any person. Now, by the mere cancellation of the outlying terms of the sentence, we have the exception stated thus: "The insurance under this contract shall not cover * * * death * * * resulting from * * * intentional injuries inflicted by any person." And then we have almost precisely the case of *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, where it was held that under such an exception the policy did not cover a case of murder. It is true that in that policy the exception in its application to a case of death was somewhat more clearly manifested by a structural plan of the sentence, bringing the word "death" more closely in association with the words "intentional injuries inflicted by the insured or any other person." But I think the intention of the parties to exclude a case of death so inflicted is just as clear under this policy as it was under that. Judgment for the defendant. So ordered.

WOOD v. LOUISVILLE & N. R. CO.

(Circuit Court, W. D. Tennessee, E. D. June 2, 1898.)

No. 3,130.

1. NEGLIGENCE—CATTLE CHUTES.

A railroad company is negligent in constructing a cattle chute so close to the track that a brakeman, on the ladder of a passing car, may be struck by it.

2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

A brakeman who is struck by a cattle chute, while climbing the ladder of a passing car, is not negligent, although he did not see the chute until he was struck.

3. PERSONAL INJURY—EXCESSIVE DAMAGES.

A verdict for \$8,000 damages for the loss by a railroad brakeman of one foot and four toes on the other is excessive.

This was an action by Horace J. Wood against the Louisville & Nashville Railroad Company to recover damages for personal injuries. There was a verdict for plaintiff for \$8,000, and defendant moves for a new trial.

The plaintiff was a switchman on the Louisville & Nashville Railroad, and had been so engaged for about three months on a gravel train. Being transferred to the position of middle brakeman on a freight train, which was switching cars on the railroad side tracks, and while in the discharge of his duty, climbing one of the ladders to the top of the car, he was raked off by a cattle chute, which was so near to the track that there was not room for his body to pass without being struck in the manner in which it was. The injury crushed the toes of his left foot in such a way that he lost all the toes by amputation, except the great toe, of that foot, and his right foot was crushed entirely off, just above the ankle, so that he is permanently crippled in both legs. There is a dispute in the testimony as to whether the close proximity of the cattle chute to the rails of the track was the result of the original construction, or whether it had become from long disuse so dilapidated that it had got out of plumb, and for that reason was too close to the track. There was also some dispute in the testimony as to the exact distance between the mouth of the chute and the track, and, as the structure has since the accident been torn down, it is impossible to determine with accuracy just the number of feet and inches, the testimony of the witnesses ranging from an estimate of eighteen inches to four feet. Defendant's witnesses swore that this chute was constructed like all other cattle chutes on the line. Whatever the accurate distance from the track was, the fact is that the plaintiff, while climbing the ladder, was knocked off. The structure had been there for a number of years, and had been for some time out of use, but was left standing as described by the witnesses. The plaintiff swears that he did not know the chute was there, had not observed it while at work, and that he did not on the occasion of his injury observe it at all. The jury found a verdict in favor of the plaintiff for \$8,000.

J. W. E. Moore, for plaintiff.

A. D. Bright, for defendant.

HAMMOND, J. (after stating the facts as above). The verdict of the jury is conclusive as to the negligence of the defendant company in the construction of this cattle chute. It is not a question of a few inches more or less of proximity to the track, nor is it a question of the different sizes of the men called upon to operate in or near it, as to whether they could comfortably pass between the mouth of the chute and side of the car while the car was being loaded or unloaded from the cattle pens, as described by the witnesses. Neither is it a question of avoidance, in climbing the ladder, of the too great protrusion of the body by the skillful or unskillful use of the ladder. It seems to me quite unreasonable to demand that a brakeman, intently engaged in moving over a running freight train, and climbing the ladders put there for that purpose, shall make a nice calculation of inches as to the protrusion of his body, so as not to strike an obstruction to which his attention is not specifically called, and which is of such a nature that he would not be required to be on the lookout for it unless particularly informed about the danger. The case of a bridge across the road or an overhanging roof presents a different question. Either is a structure the danger of which is always apparent, and against which the brakeman must be constantly on his guard; but these cattle chutes along the road may be located at any place, and the primary duty of every railroad company in their construction is to see that they are not so close to the track as by any possibility to result in such an injury as this. It is only a matter of the length of the bridge that must connect the cattle chute with

the floor of the car which is being loaded or unloaded. Of course, the cattle can be more readily controlled in passing in or out of the car to or from the chute the shorter this distance is, but by giving a few inches of extra space the structure can be so far removed from the track as to provide against raking a brakeman off who is on the ladders, and against the possible inequalities arising out of any narrower or wider cars that may be moving on the track.

Therefore I think there is no doubt, from the proof in this case, that the jury was right in concluding that this structure was too close to the railroad track, and the cases cited by counsel of passing bridges, station houses, railroad frogs, and structures like that are not applicable to the facts of this case, for the reason that there is nothing in the nature and character of the structure itself to make it dangerous, if it is kept far enough back from the track. The truth is that such a structure might be used for years and years in too close proximity to the track without attracting attention, because the unhappy combination of a brakeman on a ladder at the precise moment of passing the cattle chute would occur very rarely, if ever. Unhappily, it did occur in this case. In overhanging bridges or roofs, the danger is obvious, and threatens every time the trains move under them. Of course, if the cattle chute be allowed to fall into dilapidation, or be out of repair, and become loose in its joints, there would be danger of the few number of inches that might have been allowed in the original construction becoming closed by the falling away of the timber from the close-fitting framework, and that is possibly what occurred in this case.

As to the contributory negligence of the defendant, I think, also, that the verdict of the jury was right. It cannot be required of a brakeman that he shall go about upon the line of a railroad upon which he is operating, and lay a foot rule to all the structures of this kind, and see whether or not they be so close as to make it necessary that he should be watchful when he is climbing the ladders, or to avoid taking the ladder until the chute shall have been passed. The fact that no accident of this kind had happened before upon the railroad, and that trains were constantly passing this chute without the development of this danger, brings it directly within the class of what we may call "concealed dangers." This danger was lurking for years without its being known. The constituent element of it was a matter of mere inches, and that, in the very nature of things, could not be detected by ordinary observation. It is an idle struggle to escape the liability for this negligence to impute contributory negligence to the plaintiff under the circumstances of this case. Even if he had been aware of the fact that the cattle chute was there, it does not follow that he was aware of the fact that it was a few inches more or less too close to the track; and he had a right to rely upon and believe that the railroad company would not put it too close to the track, or would not permit the customers whom they allowed to build it to put it too close to the track, to injure their employes. It is a danger that does not probably show itself until an accident like this brings it into prominence, either to the railroad owner who operates the road or to the man who originally construct-

ed it. They were thinking of establishing a clearance for the cars, and not for a man climbing the ladders at the moment of passing the chute. That danger was probably not thought of by anybody; not by the constructors any more than by the plaintiff. It is a danger that might arise, and possibly did arise, in this case, because the car on which he was mounted was wider than ordinary cars; or perhaps the ladder might have been constructed so as to have been further away from the side of the car than in the ordinary construction of ladders. Many differences of this kind might appear to make a danger in this particular conjunction of a brakeman on a ladder and a cattle chute too near the track that would not be observable to any ordinary intelligence or observation.

The case was fairly left to the jury, and they have decided these questions of negligence and contributory negligence against the defendant, and I think properly so. I can see no error in the action of either the court or the jury entitling the party to a new trial upon that ground.

But the difficulty that I have had with this verdict has been that I have thought all along that it was excessive. In the opinions that I have heretofore written upon this subject, which it is not necessary to cite here, it will be found that I have always had the greatest reluctance, in exercising the right or power of the court over a verdict, to set it aside because the amount was too large, and I have never exercised the power where the sum was at all reasonable. It is the province of the jury to determine the amount that will compensate for the injury, and it is a denial of the right of trial by jury to interfere with the exercise of this duty by them. Yet it is also one of the rights of trial by jury that the trial judge shall see that the jury does no injustice by being carried away through passion, prejudice, or undue sympathy, and I think in this case they have been misled by their sympathies for this plaintiff into giving a larger verdict than the facts demand. Sentimentally considered, the loss of life or the loss of a limb is irremedial by any sum of money, but this is not the rule of compensation in such cases. It is not the fair rule of judgment.

I know it is not evidence to go before a jury to prove sums that are ordinarily allowed by accident and life insurance companies for loss of life or limb, and there was no such proof as that before this jury, and no proof before the trial judge upon the subject; but, in reflecting upon the question of what is fair compensation for the loss of one's limbs or life, it occurs to me that the common experience of men undertaking to provide for indemnity against accidents resulting in the loss of life or limb may be fairly considered. If the plaintiff had lost his life, I think it is apparent, from his earning capacity and the amount required by him to live, that, in the common experience of switchmen, he would not have been able to earn sufficient money, after paying his living expenses, to provide for himself a policy of insurance for \$8,000, upon which he would be able to pay the premiums. He would, from necessity, have had to take a less indemnity and a policy for a smaller amount. He would not be able, fairly and reasonably, to insure his life from his earnings

for the sum of \$8,000, nor would he be able to provide the necessary money to insure himself against loss of limb for that amount of money; and perhaps no accident insurance company would have been willing, for any sum of money he would be able reasonably to pay, to have agreed to pay him \$8,000 for the loss of his limb and toes, as that loss appears in this evidence. I mention this only as an argument which has force in my mind, at least, in determining the question, how much money would fairly compensate him for the loss he has sustained?

Taking the young man just as we find him in the proof, I think the verdict is more than he could have otherwise provided as an indemnity against this loss, and I think it is very largely more. Reluctant as I am to interfere with the verdict of a jury upon such a matter, I have concluded to grant this motion for a new trial upon the ground of an excessive verdict, unless the plaintiff shall, within 30 days from this date, enter a remittitur of one-half the amount of the verdict. If this is done, there may be a judgment for that amount and the interest since the rendition of the verdict. Ordered accordingly.

BADGER SILVER MIN. CO. v. DRAKE.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 633.

1. VENDOR AND PURCHASER—CONSTRUCTION OF LAND CONTRACT.

A contract under seal, by which one party agrees to sell and another agrees to buy certain lands and other property, which provides for delivery of the property and payment therefor, and the deposit of deeds in escrow for delivery upon completion of the payments, is a contract of sale, and not a contract for sale.

2. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL.

Plaintiff's assignor, by contract under seal, sold land to an agent, who contracted in his own name without disclosing his principal. *Held* that, on default of payments, the plaintiff had no right of action against the principal afterwards discovered.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This action was brought by the plaintiff in error against A. M. Drake and Levy Mayer in the circuit court of Suwannee county, Fla., and removed to the federal court, no service being had upon Mayer.

The action was brought upon the following contract:

This agreement, made at Milwaukee, in the state of Wisconsin, this 13th day of January, 1891, by and between the Badger Silver Mining Company, of Gillies, Ontario, a corporation, organized under the laws of Wisconsin, party of the first part, and Herbert N. Nichols, of Denver, Col., party of the second part, witnesseth:

First. Said first party hereby agrees to sell, transfer, assign, convey, and deliver unto said second party all the property, of every kind, character, and description, of said first party, real, personal, and mixed, wheresoever situate, whether enumerated herein or not. Said property embraces, among other things, the following: That part of mining location known as 200 T, commencing at the northeast corner of said 200 T; thence, running south, along the east line of said 200 T, 12 chains 98 links, more or less, to a point; thence west 80 chains 8 links, more or less, to the west boundary of said

200 T; thence north twelve chains 98 links, more or less, to the northwest corner of said 200 T; thence east, along the north line of said 200 T, 80 chains 13 links, more or less, to the point of beginning,—containing one hundred and four acres, more or less; comprising all the land in said 200 T deeded to the said first party by John M. Stowell. Also the mining location known as 201 T and 96 T, the said 201 T and 96 T, together with the said land in said 200 T, embracing 360 acres, more or less, all of said location being in the township of Gillies, district of Thunder Bay, province of Ontario, Canada. Also all mills, buildings, improvements, fixtures, machinery, tools, implements, and supplies in, upon, or about said mining locations, or used in connection with the working and operation of the same. Also all ores of every description, wherever the same may be. Also all books, maps, plans, papers, and documents, now in use or heretofore used in connection with the working of said mining location or the business connected therewith or otherwise. Said first party hereby covenants and agrees that it has a good, clear, free, absolute, and uninterrupted right to sell, transfer, assign, convey, and deliver all of the foregoing property, and every part thereof; that it has an absolute and indefeasible title in fee simple to all of said real estate, and that it is the absolute owner of all said personal property; that all of said property, real, personal, and mixed, and wheresoever situate, is free and clear from all mortgages, charges, incumbrances, liens, claims, taxes, and assessments whatsoever, except as hereinafter stated; and that it will forever warrant and defend the title to said property, and every part thereof, against any and all person or persons, corporation and corporations, whatsoever. Absolute and uninterrupted possession of all the said property in manner and form as aforesaid shall be delivered to said second party on or before February 10th, 1891, and none of said property of any kind shall be removed or disposed of in any way by said first party, its agents or employes, on and after the date hereof. It is the intent of this agreement that though absolute possession may not be delivered until on or before February 10th, 1891, the same shall take effect on, and relate back to, the date hereof. It is understood that the said first party, for purposes of convenience, has held and holds the title to said mining location 96 T, otherwise known as the "Porcupine Mine," in the name of John M. Stowell, as trustee, the president of said first party, and that the mining location last aforesaid is subject to an incumbrance of about \$13,000.00. It is covenanted and agreed by said first party that, contemporaneously with the making of the payment of the sum of \$24,000.00 hereinafter referred to, the said amount or so much thereof as is necessary shall be immediately applied towards the complete release and payment of said incumbrance, and that contemporaneously therewith the said Stowell shall execute and deliver to the escrow hereinafter mentioned a good and sufficient warranty deed running to the said second party or his assigns, and containing covenants of warranty on the part of said Stowell against any and all acts and omissions on his part, and containing also full covenants of warranty on the part of the said first party. The deed last aforesaid shall at once be joined in by the wife of the said Stowell, releasing all her dower and homestead rights, if any, therein. The said deed, immediately upon its execution, shall be delivered in escrow to the American Trust & Savings Bank, of Chicago, Ill., by said bank to be held until all of the payments hereinafter referred to have been made in manner as hereinafter set forth, on the making of which the said deed shall be delivered by said bank to said second party or his assigns. Contemporaneously with the execution and delivery of this contract, the said first party shall execute and deliver to said escrow full and complete and absolute instruments of transfer and conveyance, containing full covenants of warranty, and conveying to said second party or his assigns all of the property hereinbefore specified. Said instruments of transfer and conveyance shall be held by said escrow until all the payments hereinafter referred to have been made in manner as hereinafter set forth, and, immediately upon the making of the same, shall be delivered to said second party or his assigns.

Second. Said second party hereby agrees to and does purchase all of the foregoing property, and agrees to and shall pay therefor the sum of two hundred and fifty thousand dollars (\$250,000) in manner following: \$1,000 in cash upon

the date of the execution of this agreement, the receipt of which by said first party is hereby acknowledged; \$24,000.00 in cash on or before February 10th, 1891; \$25,000 in cash on or before May 1st, 1891, with interest thereon from the date hereof at the rate of 6 per cent. per annum; \$25,000 shall be paid into said bank as escrow on or before Sept. 1st, 1891, with interest thereon from the date hereof at the rate of 6 per cent. per annum; \$50,000 shall be paid into said bank as escrow on or before December 1st, 1891, with interest thereon from the date hereof at the rate of 6 per cent. per annum; \$50,000 shall be paid into said bank as escrow on or before March 1st, 1892, with interest thereon from the date hereof at the rate of 6 per cent. per annum; \$75,000 shall be paid into said bank as escrow on or before July 1st, 1892, with interest thereon from the date hereof at the rate of 6 per cent. per annum. If the titles to the said property or any part thereof shall upon examination by the solicitors of said party of the second part be found to be other than as hereinbefore covenanted, then, upon notice of said fact to said escrow, the said moneys so to be deposited with the said escrow as aforesaid shall not be paid over to said first party until the defects in said title, if any, shall have been satisfactorily cured, or the value of said defects adjusted and paid or abated to said second party or his assigns; and thereafter, or in the event of the titles to said property being as herein covenanted, the said payments shall, after they have been made to said bank as escrow as aforesaid, and provided said first party shall not be in default in any way in the premises, be paid to the said first party by said bank, and contemporaneously therewith the said deeds so as aforesaid to be held in escrow by said bank shall be delivered to said second party or his assigns. If the said titles shall be found satisfactory by said solicitors, as herein provided, before the time for the making of said last payment to said escrow, then and in that event the said escrow shall turn over such payments theretofore made or thereafter to be made to it under this contract to said first party, provided said first party shall not be then in any way in default in the premises. It is further covenanted and agreed that if it becomes necessary to take any proceedings to cure any defects, if any, in any of the titles to the property aforesaid, that such proceedings shall be taken at the sole expense of said first party, and said second party, his heirs, legal representatives, and assigns, shall, if necessary, join in or allow such proceedings, and do whatever is necessary to effect the same, provided said second party is satisfactorily secured and indemnified in the premises.

Third. It is covenanted and agreed that, until the full payment is made of all said deferred payments, sixty per cent. of the net receipts for ores hereafter mined and sold before the making of said final payments as aforesaid shall be applied towards the said deferred payments. The said ores, prior to the making of said final payment as aforesaid, shall be shipped to Balbach & Sons, Newark, New Jersey, or any other responsible and reliable smelter to be selected by said first party, provided said Balbach & Sons or said other smelter shall do the smelting as cheap as any other equally responsible or reliable smelter. Said first party is hereby given the right, at its own sole cost and expense, to place a man at said mining locations until all of said deferred payments have been made as hereinbefore specified; and such man shall have the right to ascertain the amount of all said net receipts as aforesaid, but he shall have no right of any kind in any way to interfere with the working of said mining locations, or the conduct, control, or management of the business therewith connected.

Fourth. If said second party shall make default in any of the payments specified in paragraph second of this contract, and shall continue in default for thirty days, then and in that event said first party, if said first party shall not then be in default in the premises, shall have the right to forfeit all payments heretofore made in the premises, and to become reinvested with the title to all of said property, with the same effect as though this instrument had not been made; but the second party shall not be entitled to withhold payment of the first \$50,000 of said purchase price on account of any defect of title to said mining locations known as 200 T and 201 T.

Fifth. Said first party further covenants and agrees that it will properly execute and deliver, and cause to be properly executed and delivered, prompt-

ly, upon demand, any and all instruments of transfer and conveyance which may from time to time be required by said second party in the premises, for the purpose of fully and completely carrying out both the spirit and letter of this instrument; said instrument of transfer and conveyance to contain full and complete covenants of warranty.

It is the intention of this agreement that the payments made to the bank in escrow shall be withheld by the bank until the title to said premises is in such condition that the deeds herein specified will confer upon the party of the second part such title as is herein covenanted, and that after said title is perfected as aforesaid, and so found by the solicitors of the party of the second part, that then the payments made to the bank shall be paid over forthwith to the party of the first part, but that the deed shall remain in escrow until the completion of all the payments. This instrument in all its parts shall be binding upon the said first party and all of its stockholders, its successors and assigns, and shall run to and in favor of the said second party, his heirs, legal representatives, and assigns, forever.

In witness whereof, the said first party has caused these presents to be signed by its president, and attested by its secretary under its corporate seal, and the said second party has attached hereto his hand and seal, all done the day, date, and place first above written.

The Badger Silver Mining Company of Gillies, Ontario,
[Corporate Seal.] By John M. Stowell, President.

Attest: Walter Read, Secretary.

Herbert N. Nichols. [Seal.]

Signed, sealed, and delivered in presence of:

Elias H. Bottom.

State of Wisconsin, Milwaukee County—ss.: Be it remembered that on this 7th day of Feby., 1891, personally appeared before me John M. Stowell, president, and Walter Read, secretary, of the Badger Silver Mining Company of Gillies, Ontario, to me personally well known to be such officers, and to me well known to be the persons described in and who executed the foregoing contract, and severally and duly acknowledged the execution of the foregoing contract as president and secretary, respectively, as their free act and deed of said corporation; and the said John M. Stowell and Walter Read severally affirmed before me that they executed the foregoing contract for and on behalf of the said corporation by virtue of and pursuant to the unanimous vote of the directors of said corporation lawfully taken.

Witness my hand and official seal.

Chas. L. Goss,

[Notarial Seal.]

Notary Public Milwaukee County, Wisconsin.

Milwaukee, Wisconsin, Jan. 30, '91.

For good and valuable considerations to us and each of us, who are stockholders of the Badger Silver Mining Co., the party of the first part in the foregoing contract, this day in hand paid, the receipt of which is hereby acknowledged, we, the undersigned, do hereby fully consent to ratify, approve, and confirm the action of the Badger Silver Mining Co. as evidenced by the foregoing instrument and all of its parts, and hereby covenant to and with Herbert N. Nichols, the party of the second part to said contract, his heirs, legal representatives, and assigns, forever, that we and each of us hereby do and will and shall guaranty the full, complete, and prompt performance by the said Badger Silver Mining Co. of all and every part of the said contract by the said Badger Silver Mining Co. to be performed. The individual liability of each of us under this contract is however expressly limited to such proportion of the purchase price specified in the foregoing instrument as our respective holdings of the stock of said Badger Silver Mining Co. bear to the total capital stock thereof.

Name of Stockholders.	No. of Shares.
Jno. M. Stowell.....	6,362½
Geo. W. Robinson.....	11,923
C. A. Reed.....	7,591
Walter Read.....	8,148½
Chas. E. Sammons.....	5,312½
Ch. Preusser.....	1,250

The declaration alleges that Nichols was, at the time of the negotiation and making of the contract, a duly-authorized agent of the defendants, A. M. Drake and Levy Mayer, and of C. E. Dickerman and A. H. Wilder, for the purpose of making the contract, and that said Nichols entered into and executed the contract as the agent for and on behalf of the said Drake, Mayer, Dickerman, and Wilder; that Dickerman and Wilder have died since the execution and delivery of the contract, and were never residents of the state of Florida, and that the plaintiff company has not been able to ascertain who had been appointed as administrator of the estate of either of said decedents; that, in pursuance of the said contract, defendants and their associates paid to the said first party \$25,000, the first two payments under the contract, on or about the 10th of February, 1891; and that on or about the last-named date the defendants and the said Dickerman and Wilder received, and the said first party delivered, possession of all the property mentioned in said contract as purchased by the said Nichols, and have ever since retained the same. The declaration also alleges the delivery by the first party to the bank named in the contract of sufficient deeds of the lands described in the contract, and the making of a good title to Nichols to said lands, and that all things precedent to be done by the plaintiff had been done, but that the defendants had not carried out the contract or paid any further portion of the purchase money beyond \$25,000. The transfer from the first party to the contract to the plaintiff herein of the contract and all its rights thereunder is alleged, and the declaration seeks to recover from Drake and Mayer the purchase price of the property sold and delivered. In the second count it alleges the damages sustained by the plaintiff to have been the loss of profits arising from the defendants' failure to carry out the contract. The third count alleges that the defendants and their associates have been in possession of the property ever since the time of delivery, and have derived therefrom large sums of money, which the plaintiff seeks to recover.

The declaration was demurred to, on the ground that the declaration and contract showed that Nichols was not the agent of the defendant Drake, and that no testimony was admissible to establish such agency. The demurrer was sustained by the order following:

"This cause having come on to be heard, by brief, on defendant's demurrer to plaintiff's declaration, and having been duly considered, the court considers that the decisions cited in 135 U. S. 313, 10 Sup. Ct. 831 [Willard v. Wood], 64 N. Y. 358 [Briggs v. Partridge], and 2 N. E. 785 [Haley v. Belting Co. (Mass.)], apply to the facts in this case; that the contract sued upon was not a contract for sale, but a contract of sale, so far as questions of covenanting by both parties are concerned; that third parties not mentioned in the contract cannot be sued upon covenants to which they are not directly parties in the contract. Nichols covenants for himself, and discloses no one else. It is therefore ordered that the demurrer herein be sustained."

The plaintiff then filed an amended declaration based, in one count, on the theory of an implied contract on the part of the defendants to pay for the value of the property, as evidenced by the purchase price, specified in the written contract, on the alleged grounds that the defendants and their associates received and retained the property,

In another count the theory is that the defendants are liable to pay for the value of the silver ore taken from the mines while in the possession of the defendants and their associates, which ore is alleged to have been converted by the defendants to their use. This amended declaration was also demurred to, and demurrer sustained.

W. A. Blount and A. C. Blount, Jr., for plaintiff in error.

H. Bisbee, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. For the reasons given by the trial judge, and considering *Willard v. Wood*, 135 U. S. 309, 313, 10 Sup. Ct. 831, *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, *Briggs v. Partridge*, 64 N. Y. 358, and *Haley v. Belting Co.*, 140 Mass. 73, 2 N. E. 785, the judgment of the circuit court is affirmed.

STAPYLTON v. CIE DES PHOSPHATES DE FRANCE.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 623.

BANKS AND BANKING—RECEIVERS.

Defendant deposited in bank a draft drawn on its New York correspondent, having theretofore slightly overdrawn its account. The draft was passed to defendant's credit, and checked against. On suspension of the bank, defendant stopped payment of the draft by telegram, whereupon plaintiff sued as receiver to recover on the draft. *Held*, that he was entitled to recover only the amount due the bank after charging back the draft.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This was a suit brought by G. C. Stapylton, as receiver of the First National Bank of Ocala, against the Cie des Phosphates de France, a corporation under the laws of France, upon a draft for \$3,000, directed to Lazard Freres. The draft was duly presented for acceptance, and dishonored, of which the defendant had due notice. The defendant pleaded that the bank did not own the draft, and pleaded a set-off of \$2,665.18, a balance on deposit account of the First National Bank of Ocala at the time of the suspension of the bank, and also a claim of set-off of \$500 by reason of a certain draft drawn by the Ocala Bank in favor of the Live Oak Bank upon the National Bank of Jacksonville,—a draft which was the property of the defendant, and represented money which defendant had placed with the Ocala Bank to purchase said draft. The cause was submitted to the judge without a jury, and the plaintiff proved the draft was made and executed by the defendant, and placed to the credit of defendant in the Ocala Bank as cash, and drawn upon as cash; that the draft was sent to New York for collection; that the draft was returned from New York, having been presented for payment, and payment refused; that payment was refused by Lazard Freres because payment was stopped by a telegram by the defendant through its manager, P. Levy; that by the course of dealing between the defendant and the bank, the bank had been in the habit of receiving such drafts as cash, and crediting the same to the defendant as cash, and that this draft was entered both on the bank's books and on the book of the defendant, or by a receipt given it, as so much cash deposited. The defendant sought to show that of this \$3,000 there was a credit balance of \$2,665.18 on the books of the bank at the time of the failure. The plaintiff objected to the intro-

duction of this evidence on the ground that defendant was not entitled to set off the said alleged credit balance, and allowing the said set-off being equivalent to permitting the defendant to make itself a preferred creditor by its own action in refusing to pay the \$3,000 draft; that such proceeding was contrary to the acts of congress controlling national banks.

The statement and findings of the court below are as follows:

"That the defendant, by its general manager, P. Levy, deposited in the First National Bank of Ocala, of which the plaintiff herein is the regularly appointed and qualified receiver, on the 16th day of April, 1895, its check on Lazard Freres, New York, for \$3,000, payable to the order of said bank. That the same was credited to the defendant's general deposit account on the books of the said bank. That defendant had been accustomed to so deposit checks to be drawn against after the officers of the defendant company had exhibited to the officers of the bank advices by cable from their Paris office authorizing such checks. There was no contract or agreement between the parties with regard to the treatment of such checks, but they were usually placed to the general account of the defendant, and drawn against as funds were required. There had been certain checks drawn by the general manager of the defendant company upon the bank, which were outstanding at the time of this deposit, to the extent of \$777.80, which was paid, and charged to the account of the company. That the said check of \$3,000 was not paid upon presentation to the drawee in New York, and the protest fees amounted to \$1.31, which were paid by the plaintiff. That allowing the defendant the \$3,000 credit given it for the unpaid check, there was to the credit of the defendant company by said bank, at the time of insolvency, \$2,665.18; but charging back the \$3,000 credited for said check there was an overdraft of \$334.82 due said bank; and the court fails to find sufficient evidence of the indebtedness of the plaintiff to the defendant of the \$500 pleaded as set-off by said defendant to find such set-off. And the court finds as a mixed matter of law and fact that the defendant company is indebted to the plaintiff in the amount of \$334.82, and interest to the amount of \$50.70, making a total amount of \$385.52, for which judgment should follow, together with the costs to be herein taxed and allowed."

J. C. Cooper, for plaintiff in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. As a jury was waived in the court below, the findings of fact by the judge are controlling in this court; and, considering those findings, applying the principles declared in *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, and *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, the judgment of the circuit court does substantial justice between the parties, and is therefore affirmed.

UNITED STATES v. STRATTON.

(Circuit Court of Appeals, Fifth Circuit. May 24, 1898.)

No. 685.

1. SUITS AGAINST UNITED STATES—SUFFICIENCY OF FINDINGS.

Under the act of March 3, 1887, providing for the bringing of suits against the United States, which requires the court to file an opinion setting forth the specific findings of fact, etc., such findings must exhibit exactly the services for which compensation is asked; and, in a suit by a United States commissioner to recover for fees, a finding that he has rendered services as follows: "Charges for per diems for taking bail under capias, etc., \$160.00,"—is insufficient, because it cannot be inferred therefrom what the charges are for.

2. SAME—PLEADING.

A petition filed under the act of March 3, 1887, must, as required by section 5, contain a succinct statement of the facts on which the claim is based. And, in a petition by a United States commissioner to recover for fees, general statements of items—such as "Per diems for taking bail," "Charges for per diems in certain cases," "Charges of all fees in case v. Holloway," etc.—are insufficient.

In Error to the District Court of the United States for the Middle District of Alabama.

This suit was commenced by the filing of a petition in the district court, as follows:

"Your petitioner, Asa E. Stratton, who is a resident citizen of Pike county, in the state of Alabama, and district aforesaid, respectfully shows to your honor:

"First. That petitioner was duly appointed and legally qualified as a commissioner of the circuit court of the United States for the Middle district of Alabama, on the 9th day of June, A. D. 1894, and that, continuously since the day of his appointment and qualification as such commissioner, has rendered and performed services to the government of the United States, hereinafter referred to, and specifically set out in a bill of particulars herewith filed, marked 'Exhibit A,' and made a part of this petition. Petitioner further alleges that said services were rendered and performed at the instance and request of the United States, and that such service consisted in taking complaints and the issuance of warrants, and the examination under complaint and warrant of such persons as were brought before him as such commissioner by the marshal of said Middle district of Alabama charged with the violation of the internal revenue laws and other criminal statutes of the United States, and in the holding of persons to bail who had been arrested under *capias*, or other legal process of the courts of the United States.

"Second. Petitioner avers that he is entitled to have and receive from and to be paid by the United States the aggregate sum of six hundred and five dollars and seventy cents (\$605.70). The said amount is made up of the following items, shown by the summary to the account hereinbefore referred to, as Exhibit A, and made a part of this petition, to wit:

Per diems for taking bail only.....	\$160 00
Charge for subpoenas, entering, returning, and filing.....	7 50
Charge for more than one warrant when there was more than one defendant in a case.....	38 00
Charges for filing mittimus sent to clerk.....	10
Charge for writ of attachment for defaulting witness.....	3 75
Charge for per diem on a warrant issued in Florida.....	5 00
Charge for duplicate order to marshal to pay witness.....	1 20
Charge for certified transcript of proceedings.....	35 10
Charge for excess of one folio in recognizances.....	172 90
Charge for complaint in addition to testimony of informing witness	55 25
Charge for testimony of informing witnesses in addition to complaint	17 60
Entering return and filing warrant in cases tried by some other commissioner	10 00
Charges for filing complaint issued by some other commissioner..	1 80
Charges for per diems in certain cases.....	60 00
Charges for per diems in case United States v. Eddins.....	5 00
Charges of all fees in case v. Holloway.....	13 60
Charges for excess of one folio on each day in case for docket entry	8 55
Charges for per diems in case v. Wadsworth.....	5 00
Charges for justifying sureties on bonds.....	50
Charges for docket entries.....	95
Total	\$605 70

"Third. Petitioner avers that he made out, rendered in due form, and at the proper time, accounts for the several quarters on the respective fiscal years since his appointment and qualification, as aforesaid; that said accounts embraced each and all of the items herein sued for; and that the same were duly allowed by your honor's court, and thereafter forwarded in due course to the proper auditing and accounting officers of the government of the United States, as will more fully appear from the record of said court.

"Fourth. Petitioner further avers that each [and] all of the several items and charges in said Exhibit A and summary thereto, and which are here sued on, were the items and charges in petitioner's said accounts for services rendered as such commissioner, and are the items and charges which the said auditing and accounting officers, in the adjustment of petitioner's said accounts, erroneously and unlawfully suspended and disallowed.

"Fifth. Petitioner further avers that the said account, amounting in the aggregate to six hundred and five dollars and seventy cents (\$605.70), as shown in said Exhibit A, and each and all of the items and charges therein, are due and owing to your petitioner; that no part of the same has been allowed or paid to him by the defendant, the United States of America, nor has any part thereof been passed upon or rejected by any court authorized to pass upon the same; and that petitioner now has the legal right to claim, sue for, and receive payment therefor,"—concluding with prayer for judgment.

The Exhibit A referred to in the petition as a bill of particulars appears to be the copy of the commissioner's account for several quarters prior to the institution of the suit, upon which memoranda have been made by accounting officers of the government and by petitioner. The following is a sample:

2. 2.		Account from July the 1st to September 30, 1894.	
		Judiciary No. 506.	
3.	2.	Charge for taking bail only (per diem) after completion of case, disallowed. This is not a hearing or deciding on criminal charge, within the meaning of the statute. This is simply a clerical, and not a judicial, act.	\$20 00
4.	3.	Charge for more than one warrant where there are more than one defendant in a case, disallowed. All defendants in a case should be included in one warrant.	17 50
5.	4.	Charge for more than one copy of complaint as unnecessary, as in item 3 (attached to warrant).	5 25
6.	5.	Charge for more than one subpoena at any time, disallowed. All witnesses should be included in one subpoena, you being allowed for copy for service.	6 25
		(There was no charge except for copy for each witness, and all witnesses were included in the original.)	
7.	7.	Charge for filing mittimus sent up to the clerk, disallowed, who files it.	10
8.	8.	Case v. Henry Ansley and R. L. McAliley. Charge for writ of attachment for defaulting witness suspended to know if this was issued under rule of court, or state practice. If so, send certified copy of the rule.	1 25
9.	9.	Case v. Bullell Phillips et als., the same as item 8.	2 50
10.	11.	Charge for duplicated copies of subpoenas and order for marshal in duplicate, disallowed. To pay witness. The witnesses should not have been discharged until the case was completed.	1 20
		(There was no duplicate orders to the marshal to pay witnesses. Part of the witnesses came in on one day, were examined, and discharged. The others came on another, were examined, paid, and discharged.)	

Service was duly made upon the attorney general, but the United States made no appearance to the suit, and thereupon, after proper delays, the following entry was made by the court:

"Finding of Fact and Law.

"Thursday, June 24, 1897.

"In the District Court of the United States for the Middle District of Alabama.

"Asa E. Stratton vs. The United States.

"The above-entitled cause, coming on regularly to be heard at the present term of the court, on the 18th day of June, A. D. 1897, was submitted for decision on pleadings and evidence, and the court makes and files the following findings of facts: First. That petitioner is now, and has been since the ninth day of June, 1894, a commissioner of the circuit court of the United States for the Middle district of Alabama. That said petitioner, as such commissioner, has, at the instance and request of the United States, performed certain services, which are as follows, to wit:

Charges for per diems for taking bail under capias, &c.....	\$160 00
Charges for subpoenas, entering, returning, and filing.....	7 50
Charges for more than one warrant when there was more than one defendant in a case.....	38 00
Charge for filing mittimus sent to clerk.....	10
Charge for writ of attachment for defaulting witnesses.....	3 75
Charge for per diem on warrant issued in case of defendant from Florida, and for removal proceedings.....	5 00
Charge for duplicate order to marshal to pay witnesses.....	1 20
Charge for certified transcript of proceedings.....	35 10
Charge for excess of one folio in recognizances. These recognizances contained about seven folios, but the petitioner only charged for four folios, making his claim for this item.....	172 90
Charges for complaint in addition to testimony of informing witnesses	55 25
Charges for testimony of informing witnesses in addition to complaint	10 00
Charges for filing complaint issued by some other commissioner..	1 80
Charges for per diems to trying cases.....	45 00
Charges for fees in case U. S. v. Holloway.....	13 00
Charges for excess of one folio on each day in case for docket entry	8 55
Charges for per diem in case U. S. v. Wadsworth.....	5 00
Charges for justifying sureties on bonds.....	50
Total	\$580 85

"All of these items have been presented in said commissioner's quarterly account, heretofore rendered and disallowed by the accounting officers of the treasury.

"The court finds as a fact that said services were actually rendered by said petitioner, and therefore the court files the following as its findings of law: First. The court declares and holds, that under the provisions and statutes of the United States regulating the fees to be paid to commissioners of the circuit court of the United States, the charges hereinbefore set forth are proper charges against the United States.

"John Bruce, Judge.

"Judgment: It is therefore ordered and adjudged by the court that the petitioner, Asa E. Stratton, do have and recover of and from the defendants, the United States of America, the sum of five hundred and eighty dollars (\$580.85) and eighty-five cents, together with the costs in this behalf expended.

"Filed June 24, 1897."

The United States have brought the case to this court for relief, assigning errors as follows: "(1) The district court erred in its findings of facts. (2) The district court erred in its findings of law. (3) The district court erred in allowing certain charges to be included in said findings of facts, which were not proper and legal charges. (4) The district court erred in allowing certain charges to be included in said findings of facts, when in truth and

In fact such services warranting such charges were never performed by said court. (5) The district court erred in holding that plaintiff was entitled to recover the whole amount sued for by him, without deducting therefrom certain charges that were not lawful, and certain other charges for which the services were not performed, and therefore improper. (6) The district court erred in rendering judgment against the defendants, as shown by the record."

Thereafter, on leave of the court, the assignment of errors was amended, and additional errors assigned, as follows: "The district court erred in its findings of facts as shown in charge 14 in findings of facts, viz.: 'Charges for per diems to trying cases, \$45.00.' See Transcript, p. 13. (8) That the district court erred in its findings of law. (a) In charge No. 1 of findings of facts and law, 'Charges for per diems for taking bail, under capias, etc., \$160.00.' See Transcript, p. 12. (b) In charge No. 4, in finding of facts and law, 'Charge for filing mittimus sent to clerk, 10 cents.' See Transcript, p. 12. (c) In charge No. 9, findings of facts and law, 'Excess of one folio in recognizances. These recognizances contained about seven folios, but the petitioner only charges for four folios, making his claim for this item, \$172.90.' See Transcript, p. 13. (d) Charge No. 14 in finding of law and facts, 'Charge for per diems to trying cases, \$45.00.' See Transcript, p. 13."

W. S. Reese, Jr., for the United States.

Geo. F. Moore, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. This suit against the United States was brought under an act of congress entitled "An act to provide for the bringing of suits against the government of the United States," approved March 3, 1887. Supp. Rev. St. p. 559. The seventh section of that act provides that:

"It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings of the court of the facts therein and the conclusion of the court upon all questions of law involved in the case and to render judgment thereon."

From the statement given above of the proceedings in the court a quo, it will be seen that, while an attempt was made to comply with the provisions of section 7 above quoted, yet there is no such specific finding of facts as to exhibit exactly the services for which the claimant asks compensation. One class of service for which judgment for \$160 is given against the United States is described as, "Charges for per diems for taking bail under capias," etc. If these charges are for hearing and deciding criminal charges, for which the statute allows commissioners \$5 per day for the time necessarily employed, they are within the statute; but from the finding of facts we cannot infer what they were for, nor how many days were occupied by the commissioner in thus taking bail under capias.

Another large item of the account going into the judgment is described as follows: "Charge for excess of one folio in recognizances. These recognizances contained about seven folios, but the petitioner only charged for four folios, making his claim for this item." Does this finding mean that this charge is for four folios in recognizances which contained seven folios, or for the three folios in excess of the four folios theretofore charged for? In short, the finding of facts is incomplete and obscure, and not in substantial com-

pliance with the law. To do justice to the United States and to the appellee, and in the interest of both parties, the case should be reversed, and the cause remanded, to permit a specific finding of facts to be made.

It is proper to notice that the petition in this case, even as aided by the alleged bill of particulars, does not contain a succinct statement of the facts upon which the claim is based, as required by section 5 of the above-mentioned act of congress. The statements made in the petition are largely of a general nature, such as, "Per diems for taking bail only," "Charges for per diems in certain cases," "Charges of all fees in case v. Holloway"; and the bill of particulars attached is no more specific, and, being interspersed with auditor's memoranda, is of doubtful value, beyond showing that many items were rejected or suspended by the auditor for insufficient statement.

The original assignment of errors was of too general a nature to be in accordance with our rules. As amended, the errors complained of questioned the correctness of findings of fact, or mixed law and fact. The judgment of the district court is reversed, and the case is remanded, with instructions to grant a new trial.

MARION COUNTY v. COLER et al.

(Circuit Court of Appeals, Fifth Circuit. May 10, 1898.)

No. 690.

1. RES JUDICATA—ACTION ON COUNTY BONDS.

Where a judgment has been recovered against a county on its refunding bonds, and subsequently mandamus has been issued to compel the levy of a tax to pay such bonds, the question of their validity is concluded as between the same parties, and cannot be again raised in a subsequent suit.

2. COUNTY JUDGE—VACANCY—APPOINTMENT BY COMMISSIONERS.

In Texas, three out of four county commissioners have power to appoint a county judge to fill a vacancy, who will be a judge de facto, if not de jure.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

F. H. Prendergast and W. T. Armistead, for plaintiff in error.

W. S. Herndon and Ben B. Cain, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. The defendants in error, W. N. Coler & Co., first sued Marion county on June 6, 1892, in the United States circuit court for the Eastern district of Texas, at Jefferson, on certain court-house and jail bonds, and certain refunding bonds, and on certain "funding or Urquhart bonds." To that suit the county filed various defenses to the validity of the funding bonds. Said funding bonds were signed by J. M. Urquhart as county judge. The defense then

set up was as follows: That the funding bonds were issued without any authority, and that the same were issued in redemption of false, fictitious, and void obligations against the county, and the plaintiffs were present when the same were issued and signed by this county judge of Marion county, and urged him, the said county judge, to sign the same, when they well knew that there was no consideration passing therefor, and that the said judge who signed said bonds was wholly incapacitated to do or perform any rational act at the time of the signing of said bonds, and the plaintiffs and their agents well knew this fact; that said bonds were issued in fraud of the defendant county, and are not valid claims against it. This defense was overruled, and judgment was rendered against the county in October, 1893, for the amount due on the funding bonds involved in that suit. The county appealed to the United States circuit court of appeals, and the judgment was affirmed. 14 C. C. A. 301, 67 Fed. 60. On August 3, 1895, W. N. Coler & Co. filed suit in the United States circuit court at Jefferson for a mandamus against Marion county to compel the county to levy a tax to pay the judgment recovered. In the mandamus suit the county pleaded as a defense that J. M. Urquhart, whose name appeared on said coupons sued on, being coupons from the funding bonds, was never at any date county judge of said county, and was never either elected or appointed, and was a volunteer only, entirely without power to bind the county. This defense was overruled, and the mandamus was awarded as prayed for. The county appealed said cause, and the judgment was affirmed in the United States circuit court of appeals. 21 C. C. A. 392, 75 Fed. 352. On May 13, 1895, the present suit was filed against Marion county by W. N. Coler & Co., in which they seek to recover against Marion county for about \$10,000 due on the "funding or Urquhart bonds." The defendant answered in the present suit substantially as follows: That the funding bonds set out by plaintiffs are null and void, and are not binding bonds against the defendant, because said funding bonds of 1880 were never executed or signed by any officer authorized to sign the same and to bind the defendant county thereby; for that one Charles Haughn was the duly-elected county judge at that time, and had ceased by his own motion to act as such judge, and had begun to act as county attorney, after either vacating or attempting to vacate his office as county judge, in December, 1879, and on said day and date, by the action of only three out of four of the county commissioners, and in the absence of the judge, the said three commissioners undertook to appoint, and did appoint, one J. M. Urquhart as county judge, he being only a private citizen. In the absence of one of the commissioners, the three other commissioners appointed said Urquhart as judge; and the county alleged that three of the commissioners, in the absence of a county judge, had no power to fill the vacancy of the office of county judge, and its act in so doing was a nullity, and the subsequent act of the judge did not and could not bind the county; and that plaintiffs claim that by the signature of the said J. M. Urquhart the funding bonds are made valid and bind the county.

To this answer W. N. Coler & Co. filed the plea of *res adjudicata*, in effect, that the county was estopped from making this defense by reason of the judgment for the debt in the first suit on these bonds, and by reason of the judgment awarding the *mandamus* compelling the county to levy a tax to pay the first judgment. The court sustained the plea on the former adjudication as to the validity of the funding bonds, and directed the jury to return a verdict for the plaintiffs for the amount of the Urquhart bonds in suit.

We find no error in the ruling of the court. The validity of the Urquhart or funding bonds has been twice an issue between the same parties in the same court, and twice the decision has been against the plaintiff in error. On the facts admitted in the pleadings, J. M. Urquhart, at the time he signed the bonds and coupons in question, was county judge of Marion county *de facto*, if not *de jure*. The judgment of the circuit court is affirmed.

SAXLEHNER v. EISNER & MENDELSON CO. SAME v. SIEGEL-COOPER CO. SAME v. GIES. SAME v. MARQUET.

(Circuit Court, S. D. New York. June 28, 1898.)

1. PRINCIPAL AND AGENT—CONTRACT RELATION.

A contract whereby the owner of a well of mineral water in Europe "abandoned" to a certain corporation the exclusive sale thereof in this country—the corporation to pay him specified prices for the water, and take a specified number of bottles yearly, agreeing to sell no other similar waters—creates the relation of buyer and seller, and not of principal and agent.

2. TRADE-MARKS—ABANDONMENT.

The owner of wells of bitter water in Hungary, which water was sold in Europe under the name "Hunyadi Janos," by contract gave to a corporation the exclusive right to sell the same in this country. For several years the company sold large quantities here, until the name had in fact become an established trade-mark. The owner of the wells failed, however, to suppress in Europe the use of "Hunyadi" as a prefix to the names of other competing waters, and, partly in consequence thereof, certain suits instituted in this country for infringement were voluntarily dismissed, and the use of the name became common by competitors; and thereafter the corporation selling the water here published notices stating that "Hunyadi" had become a general name for bitter Hungarian waters, and that it would henceforth distinguish its "Janos" water by a red diamond on the label, which was done for several years, and until the termination of the contract. *Held*, that this was an actual abandonment of the term "Hunyadi" to competitors, who invested money in reliance upon such assertions, so that, although the owner of the wells finally established an exclusive right to the word in Hungary, he could not, after the termination of the contract, assert such a right here.

3. SAME—ABANDONMENT OF LABELS.

Where a corporation, having an exclusive right to sell certain European mineral waters in this country, neglected for four or five years to take any action against persons using infringing labels on competing waters, to the use of which labels the European owner had an undoubted exclusive right, *held*, that this was not an abandonment of the label, as against the owners of the well, after the termination of their contract with such corporation.

4. SAME—INFRINGEMENT—INJUNCTION.

One who, after using an infringing label for some time, discontinues it merely for financial reasons, still claiming a right to use it, should be enjoined.

5. SAME—INFRINGEMENT BY RETAILERS.

A retailer, whose clerks, on receiving requests for a particular brand of goods, wrap up and deliver competing goods, will be enjoined.

These were four suits in equity brought by Emilie Saxlehner against the Eisner & Mendelson Company, the Siegel-Cooper Company, Rudolph Gies, and Louis Marquet, to enjoin an improper use of trade-marks and labels in connection with certain Hungarian mineral waters.

Antonio Knauth, for complainant.

Edmund Wetmore and Charles G. Coe, for defendants.

SHIPMAN, Circuit Judge. These four bills in equity were brought to restrain the improper use of the complainant's trade-marks and labels; and, in the three cases against retailers, to restrain the fraudulent sale of the water from wells not of the complainant as the product of the wells which she owns. The jurisdiction of the court is founded upon the citizenship of the parties. The complainant resides at Budapest, in the kingdom of Hungary, and is a subject of the king of Hungary. The Eisner & Mendelson Company is a corporation of the state of West Virginia, and transacts its entire business in New York City. The other three defendants are residents of the city of New York, and citizens of the state of New York.

The following facts, which were alleged in the bills of complaint, or which are incidental thereto, were clearly proved:

Andreas Saxlehner in about the year 1863 commenced to bottle the waters of a well of bitter water owned by him, situated within the city limits of Budapest, Hungary, and, for the purpose of distinguishing the bitter waters of this spring from other waters then known and on sale, adopted in 1865 the arbitrary name or trade-mark of "Hunyadi Janos" for the water of his spring. Hunyadi Janos, or John of Hunyad, was a Hungarian hero who lived in the fifteenth century. The business soon increased; additional wells were sunk by him in the same territory, which gave forth similar water; and in the course of time the water was exported beyond the limits of Hungary,—to other countries of Europe, and also to the United States. When Saxlehner commenced this business he adopted a characteristic and novel style of bottles; the same being of a straight shape, with a short neck, to the top of which was attached a metal capsule bearing the inscription, "Hunyadi Janos, Budai Keseruviz" (meaning Hunyadi Janos, Bitter Water of Buda), together with a portrait, supposed to be the portrait of the hero, stamped therein, and a novel and peculiar label, covering almost the whole body of the bottle, the characteristic features of which were a division of the same into three longitudinal fields; the middle field bearing the said portrait in a medallion, with the name "Hunyadi Janos" written in large letters on the top part of the label,—the color of the middle field being red. As this water was exported to and sold in the various countries of the world, a different custom concerning its appellation sprung up in different countries; the Latin races using the word "Janos" as the common appellation of the water, it being known as "Eau de Janos," or "Aqua di Janos," while in England

and the United States of America the name "Hunyadi" became its common appellation, it being known as "Hunyadi Water."

In the month of March, 1876, Andreas Saxlehner made a contract with the Apollinaris Company, Limited, of London, by which he gave it the exclusive opportunity of selling his Hunyadi Janos water in Great Britain, the United States of America, and other transmarine countries, for a term of years, which terminated finally on March 25, 1896. About this time a label was designed, to be used on the bottles which were to be sold by the Apollinaris Company, Limited, of substantially the same contents and characteristic features, but of a different color; the body of the label being a blue color, retaining, however, the red color of the central field. A narrow strip on top of the label was added, containing the imprint of the Apollinaris Company as importers; and ever since the making of this contract large quantities of Hunyadi Janos water, bearing this blue and red label, were exported to the United States, and sold here,—the water being ordered and sold under the short name "Hunyadi," or the full name "Hunyadi Janos." In the year 1889 Andreas Saxlehner died, whereupon his widow, the complainant, succeeded him in the business of bottling and exporting the Hunyadi Janos water; and since the termination of the contract with the Apollinaris Company, Limited, she has continued to export to the United States, and sell here, the Hunyadi Janos water in the same bottles, and with substantially the same labels, the name of her firm being substituted in place of that of the Apollinaris Company on the labels. In the year 1887 Andreas Saxlehner caused the name "Hunyadi" to be registered as his trade-mark for natural aperient waters in the United States patent office. By reason of the great care exercised by complainant and her predecessors in business in bottling it, the water has become widely and favorably known, and is commonly designated by consumers in the United States as "Hunyadi Water." Until the year 1890 complainant did not enjoy adequate protection in Hungary in the use of her trade-marks and labels, on account of a lack of statutes regulating such matters, by reason of which fact other persons in Hungary and in Europe used the name "Hunyadi" in connection with other names, imitating her labels, capsules, and bottles; and she was unable to stop these practices. Since 1890 the law of Hungary has been changed, and she has succeeded in causing all these marks and labels to be suppressed in Hungary, including also the use of the names "Hunyadi Laszlo" and "Hunyadi Matyas." The bill of complaint complained of two different kinds of labels used by defendants in the sale of Hungarian bitter waters; one being marked with the name "Hunyadi Matyas," while the other is marked with the name "Hunyadi Laszlo"; both labels being otherwise closely similar to complainant's label in their color, size, shape, and general arrangement; stress being laid upon the tripartite division already described, the medallion portrait on the center label, the blue and red color, the name "Hunyadi," and also the similarity of the capsules used on both bottles, the bottles being of the same size and shape. It is alleged that these were adopted by the defendants with full knowledge of the complainant's rights, and for the purpose of imposing upon the public, and depriving the complainant of the ben-

efits of her business. The bill of complaint, thus, is of a twofold character; being brought for infringement of trade-mark rights of the complainant, and also to enjoin an unfair competition by means of simulated labels and insignia of trade. A decree for permanent injunction, damages, profits, and costs, was prayed for.

The wells of Andreas Saxlehner, which finally became 112 in number, are situated in the valley of Orsod, near the inhabited part of the city of Budapest, and cover an extent of 100 acres, and produce an aperient water. In 1873 one Ignatius Markus, the proprietor of a spring of bitter water in Budapest, applied to the city authorities for permission to call the spring and its water by the name "Hunyadi Matyas," and to register this name as a designation of the water. This application was successfully opposed by Saxlehner before the local authorities, but the decision was reversed upon appeal to the minister of agriculture, who held that the two names were sufficiently distinct, and that it sufficiently appeared that the waters of the springs were of the same quality, and granted Markus' petition. Afterwards this spring was registered in Budapest by the name of "Hunyadi Matyas." Thereupon the proprietors of other wells commenced to sell their waters in Europe under the name of "Hunyadi," with some added name, with the use of a close imitation of the red and white labels. Saxlehner made in 1887 another unsuccessful attempt to stop the employment of the name "Hunyadi" when applied to the water called "Hunyadi Joseph"; his Hunyadi Janos water had been sold by him in the United States, under the red and white label, to a limited extent, before March, 1876, when he made his contract with the Apollinaris Company of London. By the contract he "abandoned" to that company the exclusive sale of his Janos water in this country. It was to pay specified prices. It agreed to take yearly 100,000 half or entire bottles, and to sell no other bitter water. The goods were to travel at its risk. Saxlehner was to furnish careful package and faultless bottling. Upon the red part of the label there was a warning, signed by Saxlehner, that "imitation of this water, or of the label, or of the capsule, will be the subject of legal proceedings at the instance of the Apollinaris Company," but the company did not agree to institute such proceedings. The contract was for 10 years, and was afterwards extended for 25 years, beginning January 1, 1876, but the company could withdraw upon 12 months' notice. Saxlehner had no such right of cancellation. The company went on in the business of selling Janos water in the United States without a competitor of importance until 1886, and succeeded in developing a very large business, and the water had secured for itself a high popular and medical reputation under the short name "Hunyadi." In 1886 Mattoni & Wille, of Budapest, consigned to one Andres, in New York, 121 cases of their Hunyadi Matyas bitter water. This firm had bought four springs in Budapest, one of their purchases being the original Markus spring; and in 1877 they registered in Hungary four trade-marks for four several wells, viz. Szcihenyi, Deak, Sz-Istvan, and Hunyadi Matyas. Ignatz Ungar & Son became in 1880 the owner of a Budapest spring, which they called "Hunyadi Arpad," and registered the name in Hungary, and in 1886 began to sell the water from

it in New York City through Joseph Ungar, as their agent. This water was put up in an imitation of Saxlehner's red and blue labels. The Matyas, bearing the words "Hunyadi Mathias Quille" in small print, was put up in red and white labels. Suits were promptly, and before Andres had an opportunity to sell his lot, commenced in 1886 in the United States circuit court for this district by the Apollinaris Company against these agents, to enjoin against the use of the trade-name "Hunyadi," and of the labels, but were withdrawn on the ground of want of jurisdiction; and two suits (one against Andres, and the other against Ungar) were brought by the Apollinaris Company, in the supreme court in the city of New York. Ex parte injunctions were issued in each case in February, 1887, and remained in force until July, 1888, when, on application of the defendant in the Ungar Case, the injunction in that suit was dissolved, no one appearing in opposition; and soon after the injunction in the Andres suit was dissolved without objection, and the suit was voluntarily discontinued. An attempt was made by the Eisner & Mendelson Company to show that the Apollinaris Company notified Saxlehner of the pendency of the motion to dissolve the injunction in the Ungar Case, and his refusal to assist in the opposition; but the offered testimony was merely hearsay, and was inadmissible. After the dissolution of these injunctions, the Hunyadi Arpad and the Hunyadi Laszlo waters were sold in this country by the agent of Ungar until 1892, who also sold the Hunyadi Bela water to a limited extent,—all under the general name of "Hunyadi," and with the imitation red and blue label. The Arpad water was extensively advertised. The sale of the Matyas water was not renewed, but the quantity on hand was disposed of under changed labels. The Apollinaris Company published in April 6, 1889, and thereafter in 1889 and 1890, the following advertisement:

"The Apollinaris Company, Limited, London, beg to announce that, as numerous aperient waters are offered to the public under names of which the word 'Hunyadi' forms a part, they have now adopted an additional label, comprising their registered trade-mark of selection, which consists of a red diamond. This label will henceforth also serve to distinguish the Hungarian aperient water sold by the company from all other aperient waters."

After April, 1889, and until the cancellation of the contract in 1896, this company placed upon each bottle of Janos water which it sold in this country a red diamond, containing these words:

"The red diamond is the trade-mark of the Apollinaris Company, Limited, and is meant only to indicate that the mineral waters so marked are sold by the Apollinaris Company, Limited."

In 1886 or 1887 the Apollinaris Company purchased a spring of bitter water, under the name of "Apenta," in Budapest, and, immediately upon the dissolution of the contract, began to push the sale of this water in this country and in England, under the name of "Apenta from the Uj (New) Hunyadi Springs at Budapest," with the red diamond label. Its use of the word "Hunyadi" was stopped by injunction in England in June, 1897, and was abandoned in this country.

The Eisner & Mendelson Company of Pennsylvania, the predecessor of the present defendant, which was organized in April, 1892, and

succeeded to all the business and contracts of its predecessor, made a contract, dated July 30, 1889, with Heinrich Mattoni, the owner of the springs, the water of which had been sold by Mattoni & Wille, by which it obtained the sole agency for the United States and Canada for the sale of the bitter waters which he owned, for the term of 20 years from September 1, 1889. Eisner, who acted for the Eisner & Mendelson Company, saw half a dozen different Mattoni labels, but devised a new one for the American market, and imported some 20,000 bottles in 1889 and 1890 under the name "Royal Hungarian Bitter Water," upon a red and white label. In July, 1890, the Eisner & Mendelson Company took a lease for 5 years, with an option for a renewal for 20 years thereafter, from Mattoni, of the so-called "Hunyadi Matyas Spring, No. 2," and became entitled to have all the bitter water for its American use bottled from this spring. This lease superseded the previous contract. The reason which induced Eisner to make this lease was his desire to control the American label, so that neither Mattoni & Wille nor European purchasers could interfere with the American trade. A new label was therefore forthwith devised by Eisner, which was a reddish brown and blue label, and is described in the complaint, containing the name "Hunyadi Matyas," "Buda Keserwurz," and a medallion portrait of King Stephen in the center of the red division. He intentionally simulated the Saxlehner United States label, for the purpose of obtaining, by means of the simulation, a part of the good will which the Janos water had gained. This "Matyas Spring, No. 2," was not the original Matyas spring, in regard to which Markus had his litigation in 1873, but was another spring, called the "Franz Deak Spring," which Mattoni & Wille bought in 1876 from Michael Ivanyi and wife, and was the spring registered in 1877 under the name "Deak." In May, 1890, the Eisner & Mendelson Company commenced vigorous measures to advertise this water, and introduce it, through circulars and newspapers and sample bottles, to druggists and to physicians. It was extensively advertised as a Hunyadi water, and, being sold below the market price of the Janos water, has been largely bought, especially by druggists who receive the custom of the class which desires economy. On May 2, 1892, the present Eisner & Mendelson Company entered into a contract with Ignatz Ungar & Sons for the sole agency in the United States of their waters from four Hungarian springs,—the Hunyadi Arpad, Hunyadi Bela, Victoria, and Racoczy Georgy,—and acquired by purchase from Perrine & Co., the Ungar agents in New York, their rights under the contract which they had held. In April, 1892, it acquired from a Paris corporation the exclusive right to the sale in this country of a Hungarian bitter spring water called "Hunyadi Laszlo." These various waters, with the exception of the Victoria and the Georgy, were sold under the name "Hunyadi," and with the red and blue label. In April, 1893, the Apollinaris Company, for the purpose of counteracting the idea that the Eisner & Mendelson Company had become lessees of all the Hunyadi springs, issued an advertisement and postal cards, of which the following is the important part:

"Before any Hunyadi water was practically known in the United States, the Apollinaris Company, Limited, of London, widely and successfully introduced

the Hunyadi Janos water; the proprietor in Buda Pest of the springs having intrusted to them, for a term of years still unexpired, the sole sale of this water in England, and in all transmarine places. Hunyadi Janos water having become very popular, quite a number of other waters are now offered for sale under names of which the word 'Hunyadi' forms part, and in bottles and with labels closely resembling in appearance and color those long used for Hunyadi Janos water. The word 'Hunyadi' having become a general name for Hungarian bitter waters,—good, bad, or indifferent,—the Apollinaris Company affixed to the bottles of Hunyadi Janos, the Hungarian bitter water of which they have still the sole sale, a small, yellow label, with their red diamond; the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris Company, Limited."

On July 6, 1893, the complainant bought from Ignatz Ungar & Sons the Ungar springs, the Ungar contract with the Eisner & Mendelson Company was terminated, and the importation of those waters ceased. In 1895 or 1896 the defendant ceased to import the Laszlo waters. In 1893 the Eisner & Mendelson Company began to use, and has used ever since, upon their standard bottles of Matyas water, an additional label, consisting of a red seal upon a white ground, and containing the words:

"Ask for the seal brand. This label has been adopted to protect the public from imitation, and as a guaranty of the genuineness of the Hunyadi Matyas water, imported solely by Eisner & Mendelson Co., New York."

The attention of druggists had been called to this seal brand by advertisements in the trade papers. The Mattoni lease was renewed for 20 years from March 1, 1895. The Apollinaris Company, during the continuance of its Saxlehner contract, did not object to the Eisner & Mendelson Company's operations or trade-marks or representations, except in one particular, which was changed at the former's request.

The following table, compiled by the agent of the Apollinaris Company from the Journal of Commerce and Bonfort's Journal, which are considered to be authorities upon the subject of importations, states the number of cases of so-called "Hunyadi Water," other than Janos, reported in those journals to have been imported into the United States from 1886 to 1896, inclusive:

Importation into the United States of the Following Waters:

NAME	1886	1887	1888	1889	1890	1891	1892	1893	1894	1895	1896	Total
Hunyadi Arpad.....	201	.....	1000	7649	7979	3752	4438	2382	Jan. 1	to	Apr. 30	27,901
" Corvin.....	20	.....	.....	.....	.....	.....	.....	20
" Matyas.....	2500	4662	4531	1954	6210	5185	520	25,652
" Laszlo.....	200	.....	397	264	936	268	.....	2,065
" Bela.....	397	268	284	.....	.....	.....	949
" Jozsef.....	123	.....	.....	144	.....	.....	276
" Lajos.....	667	2265	2772	5148	523	.....	11,380
" Miklos.....	132	.....	.....	132
" Vilmos.....	268	.....	268

The figures given represent cases, each containing fifty (50) bottles.

In 1894, and in October, 1896, the Hungarian minister of commerce canceled all the Hunyadi Matyas trade-marks, and also five illustrated labels for Hunyadi Matyas bottles, and also canceled the Hunyadi trade-marks of all the claimants or users thereof, except the one belonging to the complainant. This action was taken upon her petition, and under authority of progressive Hungarian litigation on the subject in 1890 and in 1895; so that it is established in Hungary that the complainant is alone entitled to the use of the word "Hunyadi." This litigation was vigorously conducted by the complainant. The questions in regard to the right of the Eisner & Mendelson Company to the use of the name "Hunyadi," and of the Saxlehner label, depend upon circumstances which differ in important particulars. The Hunyadi question is by far the most important to the parties. In 1886, when substantial competition in the sale of Hunyadi bitter waters made its appearance in this country, the name "Hunyadi" was in fact the established trade-mark of the Janos water. In was prevented from taking that position in Hungary or in continental Europe by the decision of 1873, which declared that "Hunyadi Janos" and "Hunyadi Matyas" were different names. Whether, upon an attack, Saxlehner could have then maintained his right to have an exclusive use of the name in this country, is not now clear. The Apollinaris Company, having obtained *ex parte* injunctions, abandoned them in 1888, influenced in part, probably, by the failure of Saxlehner in the Hunyadi Joseph litigation of 1887, published their advertisement of 1889, which announced that their red diamond would serve to distinguish the Janos water, and again, in 1893, published a notice that the word "Hunyadi" had become a general name for Hungarian bitter waters of all varieties of excellence. Much reliance has been placed by the defendant upon these statements, upon the theory that they were made by the agents of Saxlehner. The Apollinaris Company was never an agent of the owner of the well. Their relations were those of seller and buyer. The company simply agreed to buy a specified number of bottles yearly, and to introduce no other bitter water. It did not agree to use any other efforts to protect the good will or the trade-marks of Saxlehner, or to use any efforts to promote his business or his pecuniary interests, and it could cancel the contract upon notice. Inasmuch as it was the sole person who had the right to sell the Janos water in this country, and to use its trade-mark, and to enjoy the good will of the business, it was in a position in which it could in fact destroy the name and the good will, if its own interest dictated such a course. In considering the reasons, legal and commercial, which induced the Apollinaris Company to publish its advertisements, and to rely upon its red diamond label, it is right to say that the history of the Hungarian litigation, and of the continental use of "Hunyadi," presented a legal reason, which was at least very plausible, for the conclusion that kindred waters could use the name anywhere, and served to embarrass a litigant in the attempt to enforce an exclusive right to it in the United States. Whatever may have induced the action of the Apollinaris Company, it did, notwithstanding the name had become localized here, abandon, in terms and pos-

itively, a claim to a right to its exclusive use, and affirmed that it had become, in practice, a general name. As the name had become in fact a trade-name in 1886, so, also, it could by affirmative and positive action cease to be such; and, when it had publicly become open to use by competitors, the persons who invested their money in the honest belief that the name was public property should have a fair standing in a court of equity. I am obliged to say that by the positive action of the corporation, which alone had the right to the enjoyment of the name in this country, and which had the right to bring suits for its protection, it became after 1888 one which dealers in Hungarian bitter waters could use as a prefix to the other specific name of the respective waters. They could not call their water "Hunyadi," but they could use the word as a prefix. Two causes contributed to this result: First, the action of the Hungarian authorities; and, secondly, the careless contract by which the Apollinaris Company entered into no contractual obligations to protect Saxlehner's interest or property.

The question in regard to the label is a different one. The red and blue label was Saxlehner's label in England and in this country. He devised it, and his sole right to its use was never entangled by any claim of a public right to use it wherever Hungarian bitter waters are sold; and before the injunctions were dissolved, in 1888, his exclusive right in this country was undeniable. After the dissolution it was used upon the Arpad water until July, 1893, when its further use was effectively stopped by the action of the complainant. It was not used upon the Matyas water until 1890, when the defendant abandoned the use of the Mattoni label, which it had devised, and assumed the insignia of the Janos water, with a simulated change of color from red to reddish brown. It is said, however, that the Apollinaris Company also abandoned to the public any claim to an exclusive right to a red and blue label. Its action in regard to the name was positive, but it neither asserted nor admitted anything in regard to the label. It simply did not act against its use upon the Arpad water, which, as the table of importations shows, was the only competitor of importance until 1890; nor against the Matyas, which did not come into the field with this label until July, 1890. The other waters whose names were frequently repeated in the record were of no importance as competitors, certainly until 1895, when the Apollinaris Company gave notice of its intent to cancel the contract. Its conduct in regard to labels was that of indifference and of laches, and can give no rights, as against the complainant, to the Eisner & Mendelson Company, who started in 1890 to use her label, and feigned to have avoided it. The charge of laches against the complainant or her predecessor is not adequately sustained. Neither of them could practically accomplish anything through litigation in this country until the cancellation of the Apollinaris contract. In November, 1895, the son of the complainant came to this country to take charge of his mother's business; and he has been active in litigation since the contract closed, and in October, 1896, notified the defendant of his proposed suit against it. The defendant has, however, since 1893, for the purpose of having a mark of its own,

and thus avoid the injurious effect of new competition, used a distinctive "seal brand," which is a red seal upon a white ground, large enough and peculiar enough to be easily recognized, and which informs the public, in substance, that the water is Matyas water, and is sold only by the defendant. Inasmuch as the name "Hunyadi" can be used in this country by rivals of the Janos water, I think that this label is a sufficient attempt on the part of the defendant to assert that it is the seller of Matyas water, and that since 1893 it frees the defendant from the charge which before that time was true,—that it was cajoling or deceiving the ordinary retail purchaser into the belief that he was buying the Janos water. This freedom applies only to the water sold under the seal brand. In the spring of 1896 the Eisner & Mendelson Company imported a few hundred cases of another kind of Matyas water, which was called "No. 3," and which they sold without the seal brand, and with "3" marked upon the red and blue label. It would not be an infringement, except for the use of the three well-known longitudinal red and blue fields of the Saxlehner label,—the field covering the whole bottle,—and the red field in the middle, with a medallion portrait. The company ceased to import this water, and it also ceased in 1895 or 1896 to import the Laszlo water, which was sold under its red and blue label; but it claims the right to sell these, or any other Hunyadi waters, under the simulated label of Saxlehner. It ceased to make these importations for financial reasons only. Let there be an interlocutory decree against further infringement of this label, and for an accounting for the damages occasioned by past infringements since April 13, 1892, the date of the organization of the defendant. The question of costs will be reserved until final decree.

The cases against retailers, which were based upon instances of a fraudulent sale of Matyas water, representing it to be Janos, were defended by the Eisner & Mendelson Company, and all the cases were presented in one record. There is no substantial evidence of fraudulent conduct on the part of Siegel-Cooper Company, and the bill is dismissed, without costs. The testimony in regard to sales at the retail drug stores of Rudolph Gies and Louis Marquet satisfies me that the clerk in charge at each of those stores, in response to special requests for Janos water, wrapped up and delivered bottles of the Matyas water of the Eisner & Mendelson Company. In each case the witnesses were evidently mistaken in regard to the figure and complexion of the clerk, but I have little doubt that the man in charge made the deliveries as testified. Their sales were probably not large enough to justify the expense of taking an account, but there should be in each case an injunction against a sale of Matyas water as and for the Janos water of the complainant, without costs.

SAXLEHNER v. NIELSON.

(Circuit Court, E. D. New York. June 30, 1898.)

TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT OF LABELS.

One using a name or mark, which is free to the public, in connection with a label purposely imitating the label of another, which he has the exclusive right to use, for the purpose of utilizing, by the use of the simulated label, the reputation of such other, will be enjoined from a further use of such label, and held to account for previous damages.

This was a suit in equity by Emilie Saxlehner against Alexander Nielson to enjoin an unfair use of labels and trade-marks, and for an accounting for past infringements.

Briesen & Knauth, for complainant.

Louis C. Raeger, for defendant.

SHIPMAN, Circuit Judge. This is a bill in equity by a resident of Budapest, in Hungary, and a subject of the king of Hungary, against a citizen of Brooklyn and the state of New York, to enjoin him from the sale of Hungarian bitter water under the name of "Hunyadi Lajos," and in bottles bearing labels which imitate those used by the complainant in her business of selling in this country a Hungarian bitter water called "Hunyadi Janos." A similar action by the complainant against the Eisner & Mendelson Company, to restrain that company from the use of the name "Hunyadi Matyas," has recently been tried before me in the United States circuit court for the Southern district of New York, upon a full record; and the facts in regard to the history of the name "Hunyadi" in connection with the sale of Hungarian bitter waters, and to the history of such sales in this country, and to the exclusive right of the complainant to the name, and the conclusions of the court, are stated at length in the opinion, which has just been filed, and need not be formally repeated. 88 Fed. 61. The record in this case is much shorter, and gives the Hunyadi history in a somewhat disjointed way; but the conclusion that the complainant had no exclusive right in this country, after the year 1888, to the name "Hunyadi," is unaltered.

The history of the complainant's red and blue label, which has been used in this country upon the bottles of her Hunyadi Janos water, was also stated in the Eisner & Mendelson Case. The firm of Bell, Pollitz & Co., of which Nielson was a member, began to import Hungarian bitter water into this country in 1892, under the name of "Hunyadi Lajos," and to sell it in bottles with labels closely resembling the red and blue labels of the complainant. The water was called by that name in Hungary, and the importers used the label because it was associated in the minds of the public with the character and reputation of the Janos water, and because its use greatly facilitated the sale of any Hunyadi water, and created for the Lajos water a market without trouble or expense. The use of this simulated label was intentional, and was fraudulent in its object and in its results. It does not appear in the record when the partnership of Bell, Pollitz & Co. was dissolved, and when Nielson took the business upon himself;

but he continued the use of the label upon the bottles which he sold until after the commencement of this suit, when he changed the label. He was notified of the alleged infringement in October, 1896. The complainant is not chargeable with laches in not taking earlier measures to suppress the defendant's use of the label. There can be no decree against the use of the name "Hunyadi." Let there be an interlocutory decree for an injunction against the infringement of the complainant's red and blue label, and an accounting of the damages to the complainant arising from the infringements since the defendant's sole ownership of the business. The question of costs will be reserved until final decree.

LAMONT v. LEEDY et al.

(Circuit Court, D. Washington, N. D. June 20, 1898.)

1. TRADE-MARKS—WHAT MAY BE APPROPRIATED—DESCRIPTIVE TERMS.

"Crystallized egg," being words in common use, cannot be appropriated as an exclusive trade-mark for egg meat preserved by secret process, and put up in cans and bottles, though they may not indicate with clearness or accuracy the character of the goods.

2. SAME—UNFAIR COMPETITION.

A bill for infringement of a trade-mark cannot be sustained as a bill to restrain unfair competition, when it does not allege that defendants have attempted or intend to practice any deceit for the purpose of selling defendants' goods as the goods of complainant.

This was a suit in equity by Charles Fred Lamont against John D. Leedy and others for alleged infringement of a trade-mark. The cause was heard on demurrer to the bill.

Humphries, Humphrey & Bostwick, for plaintiff.
White, Munday & Fulton, for defendants.

HANFORD, District Judge. This is a suit in equity to restrain infringement of an alleged trade-mark, and for an accounting, and to recover damages. The bill of complaint avers that the complainant, his predecessors and assignors, are and have been engaged in the business of preparing and selling an article of food consisting of egg meat, preserved by a secret process, and put up in cans and bottles, hermetically sealed, and have built up an extensive and profitable trade throughout the world, due in part to the merit and value of the product as an article of food, and in part to extensive advertising; that the product has been sold and advertised under the name of "crystallized egg," that being an arbitrary term, designed and used as a trade-mark by which the article manufactured by the complainant, his predecessors and assignors, would be known and recognized by consumers and the public; that said trade-mark is printed, embossed, and stamped upon all labels and brands placed upon the cans, bottles, boxes, and other receptacles of the article manufactured and sold by the complainant, and said words "crystallized egg" have also been duly registered as a trade-mark by the complainant in the United States patent office, pursuant to the act of congress providing for registering trade-marks, and in the office of the secretary of state of the state of Washington,

pursuant to a statute of the state of Washington, and in the dominion of Canada, pursuant to the laws of Canada. The gist of the complaint against the defendants is that they are engaged in the manufacture and sale of a food preparation consisting of preserved egg meat, in cans and boxes labeled "Leedy's Perfected Crystallized Egg," intending thereby to make the public believe that they have improved and perfected the goods sold by the complainant, in order to gain an advantage and reap profits from the advertising and business reputation of the complainant, and to attract the attention of consumers and the public from the complainant's business to their own business. The bill contains no averment that the defendants are using or will use labels, brands, or stamps in imitation of the labels, brands, or stamps placed upon complainant's goods, or that they are endeavoring to palm off upon the public their own goods as the goods manufactured by the complainant. The wrong complained of consists entirely in the use of the words "crystallized egg" as descriptive of the goods manufactured and offered for sale by the defendants. The defendants have demurred to the bill, and in the argument upon the demurrer they dispute the right of the complainant to appropriate to his exclusive use the words "crystallized egg" as a trade-mark. The words "crystallized egg" may not be well chosen to indicate with clearness or accuracy the character of the goods sold under that name, but they are suggestive of its general nature and character, and they do not, even in the remotest way, serve to identify the proprietorship or origin of the product. Being words of common and general use, they cannot be fairly appropriated to the exclusive use of the complainant as a trade-mark. The rules which must govern in deciding the question raised by the demurrer are given in the decisions of the supreme court of the United States in the cases of *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598-604, 9 Sup. Ct. 166, and *Mill Co. v. Alcorn*, 150 U. S. 460-467, 14 Sup. Ct. 151. In the latter case the opinion by Mr. Justice Jackson states the following as propositions established and settled by the prior decisions of the supreme court, viz.:

"(1) That to acquire the right to the exclusive use of a name, device, or symbol as a trade-mark it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. (3) That the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production. (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country."

The bill in this case cannot be sustained on the ground that a lawful trade-mark has been infringed. The right to use a trade-mark will not protect a monopoly of the trade in evaporated eggs.

The bill is also insufficient to entitle the complainant to relief on the ground that the defendants have injured or intend to injure them by deceitfully misrepresenting and marketing their product as the product sold by the complainant under the name of "crystallized egg," for the reason that it is not shown that the defendants have attempted to or intend to practice such deceit; on the contrary, the bill plainly charges that the defendants are trying to divert public attention from the complainant's goods to their own production. In the case of Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., in the opinion of the court by Mr. Justice Field it was said that:

"The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff. *McLean v. Fleming*, 96 U. S. 245; *Sawyer v. Horn*, 4 Hughes, 239, 1 Fed. 24; *Perry v. Truefitt*, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84. There is no proof of any attempt of the defendant to represent the goods manufactured and sold by him as those manufactured and sold by the plaintiff; but, on the contrary, the record shows a persistent effort on its part to call the attention of the public to its own manufactured goods, and the places where they are to be had, and that it has no connection with the plaintiff."

Demurrer sustained.

BRODER et al. v. ZENO MAUVAIS MUSIC CO.

(Circuit Court, N. D. California. June 1, 1898.)

No. 12,183.

1. COPYRIGHT—PRIORITY—EVIDENCE.

On conflicting evidence, *held*, that Bert A. Williams was the original composer of the copyrighted song "Dora Dean," and that Charles Sidney O'Brien, in pretending to compose the melody of the song "Ma Angeline," which was copyrighted by him, pirated the melody of the song "Dora Dean."

2. SAME—COPYRIGHTABLE WORDS—IMMORAL CHARACTER.

Musical compositions of immoral character cannot be protected by copyright; but where a copyright is held invalid because of the use of a word of immoral significance the owners thereof may republish the song, omitting the objectionable matter, and obtain a valid copyright therefor.

3. SAME—RESTRAINING ORDER—DAMAGES.

A defendant, who is shown to have pirated a song from complainant, is not entitled to damages occasioned to him by a restraining order, though the court dissolves such order because of the invalidity of complainant's copyright.

H. C. Dibble, for complainants.

H. R. Wiley, for defendant.

MORROW, Circuit Judge. This is a suit for infringement of the copyright to a song entitled "Dora Dean," alleged to have been composed by Bert A. Williams, who sold all his right, title, and interest in and to the same to the complainants. It is claimed that the song "Ma Angeline," alleged to have been composed by Charles Sidney O'Brien, and by him sold to the defendant company, was pirated from the song "Dora Dean." On the other hand, the defendant, in

and by its answer and cross bill, claims that the song "Dora Dean" was pirated from the song "Ma Angeline." Both of the songs are colored melodies, and both of the alleged composers of "Dora Dean" and "Ma Angeline," respectively, are colored gentlemen. It is conceded that the melody of the two songs is substantially the same. Charles Sidney O'Brien, the alleged composer of "Ma Angeline," secured a copyright for his song on February 6, 1896, while Bert A. Williams, the alleged composer of "Dora Dean," secured a copyright for his song on February 10, 1896, or only four days after O'Brien got his copyright. Each of these alleged composers charges the other with having pirated the melody, merely changing the title and words. The important question to be determined, therefore, is, which of these two alleged composers first composed his song. A second question also arises in this case, and that is whether the use of the word "hottest" in the song "Dora Dean" as first published has the effect of rendering the song obscene and vulgar, and thereby of excluding it from the class of compositions that may be copyrighted. The evidence is of a voluminous and conflicting character. The case must be determined largely upon the credibility of the witnesses adduced for each side, and upon the inherent probabilities and improbabilities of their stories. The case as made out by the complainants is this: Bert A. Williams first conceived the idea of the song "Dora Dean" on or about the latter part of July, 1895, in San Francisco. In August following, Williams, being a vaudeville artist, was employed by the proprietors of a vaudeville resort in San Francisco, called the "Midway Plaisance," to do a performance on the stage, and play in a café afterwards. It appears that he played the piano and his partner did the singing. During the course of his employment there, he worked out and composed the song "Dora Dean." It further appears that Charles Sidney O'Brien, the alleged composer of the song "Ma Angeline," frequented the resort at which Williams was then employed, where he occasionally rendered services to the management by assisting in songs and such like work. He played the banjo and sang. He and Williams became acquainted with each other. According to Williams, O'Brien first heard the melody of "Dora Dean" while the former was working out and practicing the song, and singing the same in the presence of the attaches and frequenters of the resort. Williams testified that O'Brien came to him, and asked him to teach him the song, representing that he was going out with a minstrel troupe, and that he wanted something that nobody else had, and that he (Williams) complied with his request, and taught him the song. The testimony of Williams is corroborated in several respects by a number of witnesses who testified that they first heard Williams compose and rehearse the song "Dora Dean," and that Williams frequently sang it to them to obtain their opinion. Furthermore, Williams was corroborated as to the fact that O'Brien had frequented the resort where Williams had been employed, and where he had composed and practiced the song. The testimony and evidence on behalf of the complainant also shows, without entering into detail, that on August 30, 1895; George W. Hetzel, a musician and arranger of music, took down the melody of "Dora Dean" from

Williams, who had completed the song some time previous. On September 30, 1895, Hetzel received the words of the song from Williams. The draft of the song, in the handwriting of Williams, was introduced in evidence. On November 24, 1895, Hetzel had completed the piano arrangement for publication, and on November 30th ensuing a copy was delivered to the printer. On December 10, 1895, the proof was read and revised, and a copy given to the complainants. On December 13, 1895, the stereotyped plates of the song were delivered to the complainants, and, on December 14, 1895, the plates were given to the H. S. Crocker Company to do the presswork. A delay then occurred in securing the copyright, owing to the fact that Williams desired to have the song introduced to the public by two noted vaudeville artists, and desired to print their pictures on the title page. The time consumed in communicating with them and in obtaining their permission caused the delay in getting the song out. On January 21, 1896, the complainants gave their order to the H. S. Crocker Company to print the song, and it was finally brought out on February 4, 1896. On that day, the title page of the song was sent from San Francisco to the librarian of congress to be copyrighted, and was deposited in the latter's office on February 10, 1896. A copyright was thereafter duly issued to the complainants. It is to be noted that the song "Ma Angeline," alleged to have been composed by O'Brien, and owned by the defendant company, was issued for public sale on the same day in San Francisco that the song of complainants was, viz. February 4, 1896.

The case presented by the defendant company in support of its defense that O'Brien did not pirate from Williams' song, "Dora Dean," but that, on the contrary, Williams pirated from O'Brien's song, "Ma Angeline," is briefly as follows: O'Brien testified that he was a singer and comedian; that he first conceived the idea of the melody of "Ma Angeline" in 1887, while in Liverpool; that he sang the melody, with some of the words, at various places and times in San Francisco prior to the time of the song's publication, and previous to the composition of the song "Dora Dean" by Williams; that the song, as originally written by him, contained the name "Ma Angeline"; that in singing said song he would change the name from "Ma Angeline" to "Dora Dean," "Josephine," or "Seraphine," as his fancy dictated; that during the entire time of the Midwinter Fair held in San Francisco the first half of 1894, he was employed and sang at various concessions at the Fair called "The Palace of Black Art," "Cooney Island Lunch Counter," and "The 49 Mining Camp"; that, during the greater part of the time he was so employed he was assisted in singing by one Frederick H. Worth and one Isaac Long; that the song "Ma Angeline" was sung by them frequently during the said Fair; that he knows Bert A. Williams, and that Williams often came to his (O'Brien's) place of business, and heard him sing the song "Ma Angeline"; that he sold the song to the Zeno Mauvais Music Company, the defendant, on January 30, 1896, for five dollars. It further appears from the evidence introduced on behalf of the defendant that the melody of the song "Ma Angeline" was taken down by one Donigan, otherwise known as Lee Johnson, a musician and solo

cornetist. Donigan negotiated the sale from O'Brien to the defendant, and receives a royalty upon the sale of the song. He secured, on January 31, 1896, the services of Charles H. Reed, a musician, to arrange the music for the piano, and to make a proper arrangement of the song. This work appears to have been despatched without delay, for the song was placed in the hands of the printer the same or the next day, and on February 4, 1896, as stated, the song "Ma Angeline" came out simultaneously with that of "Dora Dean." The title page of "Ma Angeline" had, however, been sent to Washington on February 1, 1896, some four days before that of "Dora Dean" was forwarded. Many witnesses were called for the defendant, who testified that they had heard O'Brien sing "Ma Angeline" at the various places and times testified to by him before the song "Dora Dean" was produced; notably at the Midwinter Fair held in San Francisco the first part of 1894. In rebuttal, the complainants introduced witnesses who testified with equal positiveness that they had never heard the song "Ma Angeline" sung at the Midwinter Fair, and that, if such a song or melody had been sung, they were in a position to know that fact, and would have noticed it.

It is obvious, from this brief statement of the case as presented pro and con, that the issue of piracy must be determined upon the veracity and credibility of the witnesses. It would serve no useful purpose to analyze the testimony, and make comparisons, which would necessarily involve much detail; but upon the whole of the case I am compelled to accept the testimony and evidence adduced by the complainants as the more reliable and trustworthy. I am satisfied that Williams first conceived the melody, which is common to both of the songs "Dora Dean" and "Ma Angeline," and that O'Brien pirated the same, merely changing the title and words. The evidence shows very clearly, to my mind, that Williams, by reason of his musical proficiency and education, was far more competent and more likely to produce a song than O'Brien. Williams appears to be regarded as a very clever vaudeville artist, whereas the evidence does not warrant the belief that O'Brien is anything more than a street or saloon negro minstrel. It appeared affirmatively from O'Brien's own admissions that he played the banjo and sang negro songs in saloons and such like resorts, passing around the hat for his livelihood. Furthermore, it is extremely singular that a song whose melody proved to be as popular as "Ma Angeline" has shown itself to be, should have been sung by O'Brien from 1887, when he testifies he first conceived the melody, to 1896, when it was first publicly produced and sold in San Francisco, without it having been noticed more generally than is testified to by the score or so of witnesses who appeared in behalf of the defendant. It is strange that, if it be true that O'Brien and two others sang the song at the Midwinter Fair, which lasted for several months, and at other resorts in San Francisco, it did not attain any appreciable degree of popularity until its production, simultaneously with the song "Dora Dean," in the early part of 1896, at San Francisco. Nor does the evidence on behalf of the defendant satisfactorily explain why it was, if the melody of the song "Ma Angeline" was so catchy and well received by those who heard it, that O'Brien

never secured a copyright for the same until the early part of the year 1896, when he had heard Williams sing the melody of "Dora Dean," and it appears, by the evidence presented on behalf of the complainants, after he had actually sung not only the melody, but the words, of the song "Dora Dean" at the Alcazar Theater in San Francisco. This evidence tends to show very strongly that O'Brien had heard, and was very familiar with, the song "Dora Dean." Finally, when it was determined by O'Brien, one Donigan, also known as Lee Johnson, and the defendant company, which bought the song through the mediation of Donigan, to write, publish, and copyright the song, matters were so rushed that a copyright for the song was obtained just four days before that for the song "Dora Dean" was secured, and both songs appeared for sale in San Francisco on the same day, as already stated. Such anomalous and peculiar state of facts certainly invites suspicion, and tends to cast discredit on the contention, so earnestly pressed by counsel for defendant, that O'Brien was the original composer of the melody common to both "Dora Dean" and "Ma Angeline." But it is needless to enter into the several inconsistencies and incongruities which a careful analysis of the case presented on behalf of the defendant would show. It is my belief that the complainants have established their case by a reasonable preponderance of evidence; that Williams was the original composer of the melody of the song "Dora Dean"; and that O'Brien, in pretending to compose the melody of the song "Ma Angeline," pirated the melody of the song "Dora Dean." So far as the melody of the songs is concerned, therefore, the complainants have established a better right to the copyright than the defendant.

Another question arises, however, and that is as to whether the complainants are entitled to a copyright in view of the fact that the word "hottest" in the verse, "She's the hottest thing you ever seen," is used by Williams in his song "Dora Dean." In other words, the question arises whether the use of the word "hottest" in the connection referred to renders the song morally objectionable, musical compositions of an immoral character not being protected by copyright. *Lawrence v. Smith*, Jac. 471; *Walcot v. Walker*, 7 Ves. 1; *Martinetti v. Maguire*, 1 Abb. (U. S.) 356, Fed. Cas. No. 9,173; *Shook v. Daly*, 49 How. Prac. 366, 368; *Drone*, Copyr. 181; 7 Am. & Eng. Enc. Law (2d. Ed.) 538. The original restraining order was discharged, and a motion for a preliminary injunction denied by my predecessor, now Mr. Justice McKenna, on the ground that the word "hottest," as used in song "Dora Dean," was an indecent and obscene expression. Since that ruling additional testimony has been presented on both sides. That introduced on behalf of the complainants is to the effect that the word "hottest," as used in the song "Dora Dean," and as understood by colored people, has no obscene or vulgar meaning, but simply means "great," "grand," "brilliant," or, as one of the witnesses stated, it means, with colored people, the same as the expression, "She's out of sight," does with some white people. On the other hand, the witnesses for the defendant testify that the word "hottest," as used in the song "Dora Dean,"

is obscene and vulgar. While it cannot be said that the word "hottest," as used in its ordinary sense, is vulgar per se, yet in its colloquial or vernacular meaning, as applied to a woman, it is obviously different. The word "hot," as defined in Webster's Unabridged Dictionary, means, among other things, "lustful, lewd, lecherous." As used in the song "Dora Dean," it is used in its superlative sense, and is applied to a female. It is difficult to escape the conclusion that the word "hottest," as used in the song "Dora Dean," has an immoral signification. Several songs were introduced in evidence by the complainants which appear to have been copyrighted, and which contain such words and expressions as "hot stuff," "hot," "warmest," "red hot coon," and other similar words and phrases, and it is argued that the use of the word "hottest" in the song "Dora Dean" is no more objectionable than the words above referred to in the songs introduced in evidence. It is to be observed that some of these expressions also referred to women. But the fact that such words and expressions may be found in other songs which have been copyrighted does not justify the court in upholding the use of the word "hottest" in the context in which it is used in the song involved in the case at bar. Nor can the contention that the word "hottest" is immaterial be upheld. The word is given a prominent part in the chorus, and is printed on the title page in the refrain, "The Hottest Thing You Ever Seen." It therefore can hardly be regarded as an immaterial word when it appears to give character to the whole composition. I am of the opinion that the word "hottest," as used in the chorus of song "Dora Dean," has an indelicate and vulgar meaning, and that for that reason the song cannot be protected by copyright. This decision will, however, not prevent the complainants from republishing their song, and, by omitting the objectionable word, thus to secure a valid copyright therefor. In fact, it appeared in evidence that the complainants had since been publishing the song "Dora Dean" in this form. It results from what has been said that, while the complainants are undoubtedly entitled to a copyright for the melody of the song "Dora Dean," yet they are not entitled to a copyright of the song with the objectionable word in the composition. The bill will therefore have to be dismissed. The cross bill will also be dismissed.

The defendant claims that it is entitled to be reimbursed for such damages as it suffered by reason of the restraining order which prevented it, for a time, from selling the song "Ma Angeline." This order was discharged, as previously stated, on the ground that the song "Dora Dean" was not entitled to the protection of a copyright because of the objectionable word referred to. The defendant therefore contends that it had a right to sell its song "Ma Angeline." But, whatever claim for damages by reason of the restraining order the defendant may have had, it is certainly defeated by the fact, established by a fair preponderance of evidence, that O'Brien pirated the melody of the song "Dora Dean" in pretending to compose the song "Ma Angeline."

An order will be entered dismissing both the bill and cross bill, and that each party pay its own costs.

A. B. DICK CO. v. HENRY.

(Circuit Court, S. D. New York. July 5, 1898.)

INJUNCTIONS IN PATENT CASES—VIOLATION—PUNISHMENT.

A defendant knowingly violating an injunction is not to be excused from punishment on the ground that the few dollars to be earned by selling the infringing article constituted too strong a temptation to be resisted; his circumstances being such that he finds it difficult to make a living.

This was a suit in equity by the A. B. Dick Company against Sidney Henry for infringement of a patent. The cause was heard on motion to punish the defendant for contempt in disobeying a decree for perpetual injunction.

Richard N. Dyer, for complainant.
Sidney Henry, per se.

LACOMBE, Circuit Judge. This is a peculiarly disagreeable motion to deal with, as, indeed, are all such where defendants do not appear by counsel, and appeal to the mercy of the court with some pitiable story of necessity. It seems necessary, however, to vindicate the process of the court, since violation of its injunction seems to be growing more frequent. The defendant once before violated this same injunction, and, upon being brought up upon proceedings to punish for contempt, appeared without counsel, and represented that he supposed some decision in another cause concerning the same patent left him free to infringe. His ignorance of the law was taken as an excuse. He was cautioned, and sentence suspended. Now it appears that he has again, and this time knowingly, infringed. His only excuse is that the few dollars to be earned by selling the infringing article were too strong a temptation to be resisted; his circumstances being such that he finds it difficult to make a living. Of course, this is no excuse; and, unless the obligation of its decrees is enforced, the court itself will soon be in contempt. Complainants are as much entitled to consideration as are defendants, even though the complainant be—as defendant here urges in excuse for his conduct—a corporation. Consideration, however, will be given to the defendant's distressful condition in this particular case,—a measure of consideration which is not to be taken as a precedent. Indeed, where a copy of this opinion is served with the writ of injunction in future cases, complainant, in the event of subsequent violation, will be in a position to urge that individuals thus disobeying be fined and imprisoned to the full extent allowed. Let a warrant issue committing defendant for two days.

THOMPSON et al. v. N. T. BUSHNELL CO.

(Circuit Court, D. Connecticut. June 23, 1898.)

PATENTS—PRELIMINARY INJUNCTION—SAWS.

The Fowler patent, No. 328,019, for a saw to cut metal, with a tough pliable steel blade, highly tempered as to its teeth only, *held* valid and infringed.

This was a suit in equity by Henry G. Thompson and others against the N. T. Bushnell Company for alleged infringement of letters patent No. 328,019, issued October 13, 1885, to complainants as assignees of the inventor, Thaddeus Fowler.

John K. Beach, for complainant.

Phillipp, Phelps & Sawyer, for defendant.

TOWNSEND, District Judge. The parties herein are practically the same as in Thompson v. Jennings, 21 C. C. A. 486, 75 Fed. 572. In said action the decision of the circuit court which dismissed the bill was affirmed by the circuit court of appeals. The circuit court in its opinion held that the patent was valid, but that the defendant did not infringe. The circuit court of appeals held that, "unless the patent in suit can be limited so as to cover only a band saw or a hack saw, there appears to be no escape from the conclusions expressed in the opinion of Judge Lacombe in the court below. It cannot be thus limited, in view of its unequivocal language." In accordance with this suggestion, complainant filed a disclaimer so as "to include only hack saws and band saws." The issues herein relate to certain hack saws sold by defendant. I am satisfied, from the expert testimony and from demonstrations at the hearing and upon practical tests with said exhibits, that many of these saws unquestionably infringe the patent as construed by Judge Lacombe. "They are either hardened to the base line of the teeth, or so near it that the variance from the distinctive fractional tempering of the patent was trivial." It is immaterial that defendant claims said infringement is accidental. If, as it now contends, the saw of the patent in suit is impracticable, and the flexibility which results from the invention of the patent in suit is a disadvantage, the defendant will not suffer from the effect of an injunction which will operate to prevent its making such defective saws in the future, accidentally or otherwise. It is unnecessary now to discuss the elaborate and ingenious arguments of counsel as to the effect of the former judgment or of said disclaimer. The new evidence of alleged prior use is not only discredited by the failure to produce exhibits and by its antiquity and indefiniteness, but because it fails to show that by these uses the new results of the new invention of the patent in suit were produced. Let a decree be entered for an injunction and an accounting.

88 F.—6

UNION RY. CO. et al. v. SPRAGUE ELECTRIC RAILWAY & MOTOR CO.

(Circuit Court of Appeals, Second Circuit. May 17, 1898.)

No. 108.

1. PATENTS—INFRINGEMENT—ELECTRIC RAILWAY MOTORS.

In a patent for an electric railway motor, a claim describing the field magnet of the motor as "sleeved upon an axle" of the vehicle at one end is infringed by a construction in which flexible extensions from the field magnet are journaled upon the axle.

2. SAME—CONSTRUCTION OF CLAIMS.

In a claim for the combination with a wheeled vehicle of an electro-dynamic motor flexibly supported from such vehicle, "and centered upon the driving axle thereof," the use of the word "centered" does not require a perfectly rigid union of axle and motor, but only that the center of movement of the motor shall always be the car axle.

3. SAME.

The Sprague patent, No. 324,892, for an improved electric railway motor, covers, not a pioneer or broad invention, but a clearly-defined one, the gist of which consists in the utilization of the frame of the motor itself with the necessary extension, and the centering of the motor on the driven axle by extension pieces from the field magnet at one end, and in its flexible suspension, at the other end, to the car track, the armature, being carried rigidly by the field magnet. Claims 2 and 6 of this patent are infringed by a motor made in accordance with the Short patent, No. 546,560, and claim 9 is not infringed.

This appeal is from a decree of the circuit court for the Southern district of New York, which adjudged that the defendants had infringed claims 2, 6, and 9 of letters patent No. 324,892, dated August 25, 1885, and issued to Frank J. Sprague, for an improved electric railway motor. 84 Fed. 641. The defendants' motor is made in accordance with letters patent No. 546,560, dated September 17, 1895, and issued to Sidney H. Short.

The three claims which the circuit court found to have been infringed are as follows:

"(2) The combination of a wheeled vehicle and an electro-dynamic motor mounted upon and propelling the same, the field magnet of said motor being sleeved upon an axle of the vehicle at one end, and supported by flexible connections from the body of the vehicle at the other end, substantially as set forth."

"(6) The combination, with a wheeled vehicle, supported upon its axles by springs, of an electro-dynamic motor flexibly supported from such vehicle, and centered upon the driving axle thereof, substantially as set forth."

"(9) The combination, with a wheeled vehicle, of an electro-dynamic motor centered upon the driving axle thereof at one end, a spring support for that end of the motor from the truck or body of vehicle, and relieving axle wholly or partly of dead weight, and a spring support for the other end of motor from the truck or body of vehicle, substantially as set forth."

Chas. E. Mitchell and Wm. H. Kenyon, for appellants.

Fredk. H. Betts, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. As soon as the use of an electric motor for the propulsion of cars upon a street railway was thought to be attainable, divers methods were invented which were intended to enable the motor to act efficiently, economically, and certainly upon

the car axle. At first, the motor was supported by or on the car body, and afterwards it was upheld upon a separate platform. The state of the art upon the subject is so fully stated by Judge Sanborn in *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 40 U. S. App. 482, 23 C. C. A. 223, and 77 Fed. 432, that it need not be restated here. Sprague hung the motor under the car body directly upon the axle of one of the pairs of wheels by an extension or solid bearing attached directly to the motor. He used a magnet having a yoke and pole pieces, and, by sleeving one end upon the axle, he caused the armature which was carried between the poles of the magnet to be held with firmness, and the armature shaft to be held in alignment with the car axle. The opposite end of the motor was upheld by springs extending to a crossbar on the truck frame. He also relieved the weight upon the axle by a spring support from the truck of the vehicle. The motor was thus hung below the car, one end being centered upon the axle, and the other end being flexibly attached by springs to the truck frame. The effect of the mode of construction is explained in the specification as follows:

"The armature being carried rigidly by the field magnet, these two parts must always maintain precisely the same relative position under every vertical or lateral movement of the wheels or of the car body; and, as the field magnet which carries the armature is itself centered by the axle of the wheels to which the armature shaft is geared, the engaging gears, also, must always maintain precisely the same relative position. At the same time the connection of the entire motor with the truck is through springs, so that its position is not affected by the movements of the truck on its springs."

The simplicity and comparative lightness of the general plan upon which this motor was constructed, and the adaptability of the means to the required result, made the motor successful, and other pre-existing methods of construction disappeared to a great extent.

The question of anticipation by a pre-existing electric railway motor may be laid out of the case, for it is not asserted that any patent prior to the date of the patent in suit described an electric motor geared to and propelling a vehicle, and supported at one end by sleeving extension pieces from the field magnet upon the driven axle, and at the other end by a flexible connection with the truck or body of the vehicle. Upon the question of nonpatentability, the defendants urge that substantially the same features of construction were shown in other than electric motors, and the patent to Charles W. Hermance, No. 111,644, dated February 7, 1871, for a steam road wagon, is relied upon as affording the closest analogy to the Sprague device. Upon the Hermance axle the rear end of a frame was hinged, the front end of which rested upon springs which were attached to beams which were also attached to the axle. The boiler, engine, and machinery were all attached to this frame, which was above the car frame, and which suspended the entire parts and permitted vertical motion. The Sprague device discarded frames, and hung the motor by extension pieces from the magnet directly to the car axle. Hermance and the electric motor patentees who followed the same line of construction hung the motor upon a frame which was hung upon the axle. An inspection of the Hermance wagon would not suggest an abandonment of independent frames and a construction which compelled the motor to be its own frame, and we see nothing in his wagon, or in

the other steam wagons in the record, which diminishes the patentable character of the Sprague method of construction.

The defendants' field magnet is cylindrical, and surrounds the armature. "The yoke or neutral part of the field magnet forms the exterior portion thereof, and is extended around and over the ends, so as to complete the casing within which the armature and the other portions of the field magnet are contained." The motor, therefore, appears like a small barrel or cylinder of iron, the surface of which is magnetically neutral." In their structure the extension from the field magnet towards the car axle is not rigid with the field magnet, but is jointed thereto, being for this purpose of a U shape, the base of the U being journaled on the car axle, and the two arms of the U being jointed to the opposite lateral sides of the motor, which is embraced between them. A form of the defendants' method of suspension is described in one of the advertisements of the Walker Company as follows:

"B is a U-shaped frame, the rounded end of the U being journaled on the car axle in the ordinary way. Swinging freely between the arms of this U is the motor, A, trunnioned by its bearing cases. The motor is then supported at the rear by spiral springs, C, between the lugs on the frame—which have a factor of safety in strength of twenty—and the arms of the U. This feature is also shown in figure 3. At the front end it is supported by a swinging arm from the ordinary spring truck bar, D."

The three points which the defendants' experts regard as patentably distinguishing their motor from the Sprague invention, as described in claims 2 and 6, are that their field magnet is not sleeved upon the axle, as required in claim 2, and that their motor is not centered upon the driving axle, as required in claim 6; and, as a part of the same proposition, that their field magnet is not so centered, and that their motor, being in the form of a drum, is not equipped with ends, as required in claim 2. The third point may be dismissed as trivial.

The Sprague invention was not a pioneer, and was not of a broad character, but it was a distinct and clearly-defined invention, in the method of hanging electric motors for vehicles, and its gist consisted in the utilization of the frame of the motor itself with the necessary extension, and the centering of the motor on the driven axle by extension pieces from the field magnet at one end, and in its flexible suspension at the other end to the car truck, the armature being carried rigidly by the field magnet.

The question of the infringement of claim 2 is of the most importance; for, if the defendants' jointed attachment of their motor to the axle of the vehicle is not the sleeving of claim 2, it would almost necessarily follow that the defendants' centering of the motor is accomplished in a substantially different way from that of the patent. Sprague bolted the extension piece from his motor to the axle, and hung his motor upon the axle by a connection which might be called rigid. Short hung his barrel-shaped motor to the axle by journaling the rounded end of the U-shaped extension to the car axle, and jointing the two arms of the U to the opposite lateral sides of the motor, and thus his extensions from the field magnet to the axle are flexible, and the motor can rock or tip towards and

from the axle, which is esteemed to be a noteworthy improvement. The defendants insist that, inasmuch as the motor is hung by extensions to trunnions upon its opposite sides, it is not sleeved to the axle, because sleeving, as described in the patent, is by a rigid attachment; and that if the magnet is sleeved upon the axle it has no capacity of up and down movement relatively to the axle, except at the unsleeved end. This construction presupposes that Sprague's invention consisted in the details by which he attached his motor or his magnet to the axle. If it did so consist, the defendants are right, but the invention was more than a matter of form or detail. The part of the invention now under consideration consisted, as has been said, in utilizing the frame of the motor, and hanging it by its necessary extensions from the field magnet at one end to the axle; and, while it is true that the patentee showed a rigid extension, his claim did not tie up that part of the invention to rigidity. A jointed and a flexible extension is not only within the invention, but within the claim.

The defendants also say, in this part of the case, that the field magnet is required by claim 2 to be sleeved upon the axle, and that their magnet is not so sleeved because the trunnions from which the side arms extend are not parts of the field magnet, and the side arms which extend from the trunnions to the axle are not extensions from the field magnet. In the Sprague motor, the field magnet, by means of extensions from the pole pieces, is sleeved upon the axle, whereas in the defendants' motor extensions from the exterior shell, which is mechanically integral with the yoke of the magnet, are journaled or sleeved upon the axle. This supposed difference, which mainly results from the use of a different shape of magnet and of motor, is of an unsubstantial character with regard to infringement.

The next point is in regard to the use of the word "centered" in claim 6. The defendants say that "centering" means fixing upon a central point, and that the motion of the patented extension must be limited to the motion of the axle, whereas the arms of their U are yielding, and their motor swings between them. By the use of the word "center," a perfectly rigid union of axle and motor was not demanded, but it was intended that the center of the movement of the motor was always to be the car axle, and the defendants' motor is thus centered. Its yielding movement is in an arc of which the driving axle is the center, and therefore its driving gears retain the same relative position, which is the effect of the centering of the Sprague magnet, as stated in the extract from the specification which has already been quoted. The specification of the Short patent describes the movement of its motor as follows:

"Any yielding movement of the motor in either direction, either upwardly or downwardly, being in the arc of a circle of which the driving axle is the center and the supporting frame the radius, it follows that the driving gears will always retain the same relative positions, and be kept in perfect mesh throughout all adjustments and positions of the motor."

The various discussions by the defendants in regard to infringement, except the one in regard to sleeving by a rigid extension, are discussions in regard to words, and not in regard to things. The

difference between a rigid attachment and a jointed and flexible attachment to the axle has a reality with relation to this invention which is lacking in the other alleged differences, but the difficulty with that part of the defendants' case is that the Short device is an improvement upon the Sprague invention, which was of a broader character than the defendants interpret it to have been.

Claim 9 requires a spring support for the axle end of the motor from the truck or body of the vehicle. The specification says that the springs, known as "springs M," extend to crossbars on the truck frame, or to the car body, in case no truck is used. The spring supports on the axle end of the defendants' motor are from the car axle. It is true that the car axle is held in the truck, but the claim made it imperative that the support for that end must be from the truck or body of the vehicle, and the specification describes the same method of construction. We think that claim 9 was not infringed.

The decree should be modified, with costs of this court to the appellants, by limiting the injunction and the accounting to claims 2 and 6; and the case is remanded to the circuit court, with directions to enter a modified decree in accordance with the foregoing opinion, with costs of that court.

UNION GAS-ENGINE CO. et al. v. DOAK.

(Circuit Court, N. D. California. May 10, 1898.)

No. 11,947.

1. PATENTS—SUBJECTS OF PATENT.

It is not the result attained which is patentable, but the device or mechanical means by which that result is secured.

2. SAME—ANALOGOUS USE.

There is no invention in adapting the prior devices for igniting gaslights by an electric spark, by what is known as the wiping or reciprocating movement, to the ignition of gas in the explosion chambers of gas engines. The changes required involve mere mechanical adaptations, obvious to the skilled workman.

3. SAME—GAS ENGINES.

The Barrett & Daly patent, No. 430,505, for an improvement in gas engines, consisting in mechanism for igniting the gas by means of an electric spark, is void, because of anticipation and want of novelty.

This was a suit in equity by the Union Gas-Engine Company, Mora M. Barrett, and John F. Daly against John E. Doak for alleged infringement of a patent for an improvement in gas engines.

John H. Miller, for complainants.

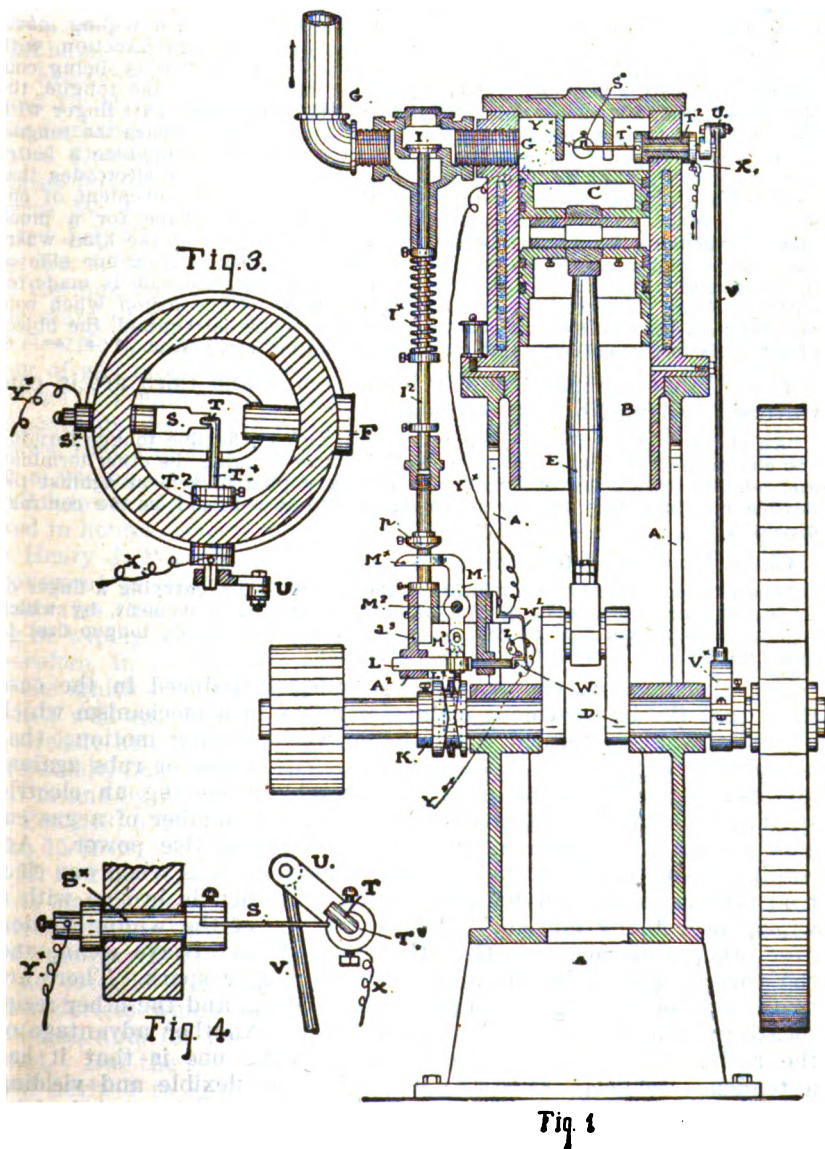
John L. Boone, for defendant.

MORROW, Circuit Judge. This is a suit for the infringement of letters patent No. 430,505, issued on June 17, 1890, to Mora M. Barrett and John F. Daly. The Union Gas-Engine Company, one of the complainants, appears to be the successor in interest of all the rights, title, and interest of the Pacific Gas-Engine Company, to whom the patentees, Barrett and Daly, had assigned their patent. The patent was issued for a new and useful improvement in gas engines. The improvement consists in a device or mechanism for

igniting the gas used in gas engines, by means of an electric spark. In their specification, the patentees thus describe the invention:

"The present improvements are applied to gas engines of the upright kind, and they relate to novel valve mechanism for operating the exhaust valve, to a novel electric ignitor on an open circuit for exploding the charges of gas in the cylinder, and, in connection therewith, a current interrupter adapted to break the circuit at every alternate revolution of the crank shaft."

Then follows a description of the improvements with reference to the drawings accompanying the specification.



That part which relates to the claims alleged to have been infringed is as follows:

"S and T are the two electrodes or contact points of the ignitor. The part S is a flexible yielding tongue of metal fixed at one end in an insulated plug, S*, and setting through the side of the cylinder into the space above the piston; and the part T is a finger or projection on a short rock shaft, T*, that sets through and has movement in an insulated bearing, T², in the side of the cylinder. Rocking movement is given to this shaft by an arm, U, on the outer end of an eccentric rod, V, and an eccentric, V*, fast on the crank shaft. The finger, T, sets in line with and in close relation to the free end of the yielding tongue. By the rocking movement of the shaft it is pressed against and drawn over the end of the tongue with a wiping movement, first in a downward direction, and then in an upward direction, with equal pressure in both movements. One wire from the battery being connected at X to the rock shaft, and the other one, at Y*, to the tongue, the circuit is closed, and then broken, by the contact of the rock-shaft finger with the tongue, and the subsequent separation when the finger clears the tongue. As thus constructed for operation, this ignitor is found to produce a better quality of spark than is usually made by contact points or electrodes that work with a simple contact without a rubbing or wiping movement of one upon the other. The yielding tongue also retains its shape for a much longer time than the tongues or springs in other ignitors of the kind where the contact and pressure of one part against the other is from one side or in one direction only. In connection with these parts, provision is made for cutting off the current at every alternate upstroke of the piston when contact between the two electrodes is made; but no spark is required, the object of which is to prevent waste and economize the battery power. * * *

Four claims are made, of which the second and third are in controversy. Claim No. 2 is as follows:

"An electric ignitor for gas engines, consisting of a flexible tongue forming one electrode or terminal, and an oscillating finger forming the other terminal, and adapted by its movements to act with a wiping movement against the flexible terminal, first in one direction, or downward, and in the contrary direction."

Claim No. 3 is as follows:

"The combination of the yielding tongue, S, shaft, T*, carrying a finger or projection, and mechanism giving said shaft rocking movement, by which the finger is drawn against and off the end of the yielding tongue first in one direction, and then in the contrary direction."

The specification, claims, and testimony introduced in the case show that the improvement claimed consists in a mechanism which produces what is termed a wiping or reciprocating motion; that is, one electrode, which is fixed to the shaft, wipes or rubs against the flexible and yielding electrode, thereby producing an electric spark, which ignites the gas in the explosion chamber of a gas engine, causes an explosion, and furnishes the motive power. According to one of the witnesses, "the wiping spark is when one electrode comes in contact with the other, and then is broken with a wiping or rubbing motion." The advantage of the wiping motion over other movements is that the electrode is always clean, and the current passes better, and creates a bigger spark. There are two wiping or rubbing movements, one rotating, and the other reciprocating; that is, moving back and forth. Another advantage of the reciprocating movement over the rotating one is that it has a tendency to keep the spring to which the flexible and yielding electrode is attached straight, thereby prolonging the period of its serviceability, whereas the tendency of the rotating movement is

that the flexible and yielding electrode is habitually bent in one direction, thereby softening it; and it becomes more and more bent until the contact electrodes fail to touch, from which it must result that no spark can be produced. In short, the value of the improvement consists in the device which produces the wiping movement, instead of the rotating movement, with the results above set forth.

The defendant, in his answer, sets up anticipation and want of invention. He relies upon the following prior patents to support the first defense, viz.: (1) Reissued United States letters patent No. 9,846, dated August 23, 1881, issued to J. P. Tirrell and George T. Pinkham, entitled "Apparatus for Lighting and Extinguishing Gas by Electricity"; (2) United States letters patent No. 272,004, issued to H. J. Warren, dated February 6, 1883, entitled "Electric Gas-Lighting Burners"; (3) United States letters patent No. 333,336, dated December 29, 1885, issued to Daniel S. Regan; (4) United States letters patent No. 368,445, dated August 16, 1887, issued to Cyrus W. Baldwin; (5) United States letters patent No. 387,167, dated July 31, 1888, issued to Julig & Ewald; (6) British letters patent No. 4,736, of 1884; (7) British letters patent No. 11,448, of 1888; (8) German patent No. 43,446. These patents all throw light upon the state of the art with respect to the ignition of gas by means of electric sparking, and the application of this principle to the ignition of gas in gas engines. The patent issued to J. P. Tirrell and George T. Pinkham, No. 9,846, on August 23, 1881, and denominated "Apparatus for Lighting and Extinguishing Gas by Electricity," shows that the idea of igniting gas by electric sparking produced by a wiping or reciprocating motion between two electrodes was well known and understood, and, as applied to the lighting of gas used in houses, streets, etc., worked successfully. The patent issued to Henry J. Warren, No. 272,004, on February 6, 1883, for an improvement in electric gas-lighting burners, further exemplifies and illustrates this idea of electrical sparking produced by a reciprocating or wiping movement, as above stated. There was nothing new, therefore, in the application of the principle of electric sparking to the ignition of gas used as a motive power in gas engines. But it is a well-established doctrine of the law of patents that it is not the result attained by a patentable device or mechanism which is patentable, but that the subject of a patent is the device or mechanical means by which the desired result is secured. *Carver v. Hyde*, 16 Pet. 513, 519; *Le Roy v. Tatham*, 14 How. 156; *Corning v. Burden*, 15 How. 252; *Burr v. Duryee*, 1 Wall. 531; *Fuller v. Yentzer*, 94 U. S. 288; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81.

As stated above, the improvement claimed for the complainant's patent consists in the wiping movement, back and forth; also called the "reciprocating motion." The superiority of this improvement in an electric sparking igniting mechanism for gas engines over other devices which have rotating movements is supported by the evidence, and, for the purposes of the case, may be taken as established. But the fact remains that the wiping or reciprocating movement devised to ignite gas issuing from a gas jet is substantially the same as that which complainants claim for the ignition of gas

in the explosion chamber of gas engines. There is no material difference between the two. The only difference is that one is adapted to operate on a gas jet, and the other in the explosion chamber of a gas engine. In both instances, the movement, the process of operation, and the result are the same. It may well be that the simple mechanism attached to a gas jet is sufficiently effective for the purpose of igniting gas issuing from a gas jet, and that the same mechanism placed in the explosion chamber of a gas engine would be practically ineffective and useless for want of proper mechanical adaptation. But such change in the mechanism as is necessary to make the device attached to a gas jet adaptable to the explosion chamber of a gas engine, and thereby conserve the wiping or reciprocating motion, is purely a mechanical adaptation, and does not, in my opinion, require any inventive faculty. It appears to be a matter which any skilled and trained mechanic could easily accomplish, and the testimony introduced tends to support that view of the case. It is well settled that, where the public has acquired the right to use a machine or device for a particular purpose, it has the right to use it for all like purposes to which it can be applied, unless a new and different result is obtained by a new application of it. *Blake v. City and County of San Francisco*, 113 U. S. 679, 5 Sup. Ct. 692. If what the device claimed as an improvement in this case performs is essentially the same as that performed by the gas-jet devices referred to, and the structure, operation, idea, and result of the latter are such as would suggest to the mind of an ordinarily skillful mechanic their adaptation to a gas engine for the same purpose and by substantially the same means, this adaptation is not a new invention, nor such an improvement as would entitle it to be regarded as an invention, and is not patentable. *Tucker v. Spalding*, 13 Wall. 453; *Blake v. City and County of San Francisco*, 113 U. S. 679, 5 Sup. Ct. 692. In *Pennsylvania R. R. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 494, 4 Sup. Ct. 220, 222, Mr. Justice Gray, speaking for the court, said:

"It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated,"—citing *Hotchkiss v. Greenwood*, 11 How. 248; *Phillips v. Page*, 24 How. 164, 167; *Jones v. Morehead*, 1 Wall. 155, overruling *s. c.*, *nom. Livingston v. Jones*, 1 Fish. Pat. Cas. 521, Fed. Cas. No. 8,413; *Hicks v. Kelsey*, 18 Wall. 670; *Smith v. Nichols*, 21 Wall. 112; *Brown v. Piper*, 91 U. S. 37; *Roberts v. Ryer*, 91 U. S. 150; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 276; *Machine Co. v. Keith*, 101 U. S. 479, 491; *Pearce v. Mulford*, 102 U. S. 112; *Held v. Rice*, 104 U. S. 737, 754-756; *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225.

The other prior patents introduced in the case not only confirm this view of the case, but show that the idea contained in the Barrett and Daly patent, viz. the wiping movement, had been anticipated, and, further, convince me that the mere change in the igniting device from a rotating motion to a reciprocating movement is purely a question of mechanical skill. It appeared affirmatively in evidence that the number of sparks would be the same, only one spark being deemed expedient in the movement. Furthermore, as tending to show the

mechanical nature of this wiping movement in place of the rotating motion, it appears from the testimony in the case that at least four gentlemen, all more or less familiar with and experienced in electrical sparking devices, have devised mechanism or devices which contain the same wiping or reciprocating motion. This fact strongly confirms the opinion I hold that the mere change of motion, claimed as an improvement by the Barrett and Daly patent, from the rotating to the reciprocating movement, involved only mechanical skill, and did not require any peculiar inventive genius. As was said by Acheson, Circuit Judge, in *Haslem v. Plate-Glass Co.*, 68 Fed. 479, the fact that "three skillful mechanics, * * * acting independently of each other, suggested the duplication of the orbicular beam, * * * is a circumstance that furnishes persuasive evidence that the change was obvious to the skilled mechanic." See, also, in this connection, *Atlantic Works v. Brady*, 107 U. S. 192; 2 Sup. Ct. 225. Upon the whole of the case, I conclude that the Barrett and Daly patent, No. 430,505, issued June 17, 1890, has been in effect anticipated, and is void for want of novelty. The bill will be dismissed, at complainants' costs.

WHITMIRE v. COBB.

(Circuit Court of Appeals, Fifth Circuit. May 24, 1898.)

No. 659.

1. SALVAGE—WHEN ALLOWED.

Timber found drifting with the tide, on deep water, in a harbor, and out of control of the owners, is the subject of salvage.

2. SAME—AMOUNT OF RECOVERY.

Upon proof that the public custodian of lost timber, who himself was entitled to demand 75 cents per stick for timber recovered, paid regularly to salvors 50 cents per stick for timber turned over to him, the court allowed a salvor 50 cents per stick as against the owner of the timber. *Held* no abuse of discretion.

Appeal from the District Court of the United States for the Northern District of Florida.

On July 7, 1896, a storm swept over the western part of Florida, taking in its course the mouths of Escambia River and Escambia Bay, an arm of Pensacola Bay. At Ferry Pass, on one of these mouths of the river, there were several thousand sticks of timber gathered together which were cast adrift by the storm, and carried by the wind and tide out into the waters of Escambia Bay. Two hundred and forty-one of these sticks, scattered along the eastern shore of Escambia Bay near Garcon Point, for a distance of one and one-half miles, were collected together by the appellee, N. H. Cobb, assisted by his three children and one man. According to his statement, Cobb worked three days in gathering two hundred pieces, and collected the balance during a period of two weeks' time. The man employed by Cobb to assist him worked one-half day. The timber was afterwards taken by Whitmire, the appellant. Thereupon the appellee filed a libel against the timber in the United States district court for the Northern district of Florida. Whitmire interposed a claim and filed his answer. Upon the hearing upon the merits the district judge awarded Cobb, the appellee, the sum of \$120.50, or 50 cents per stick, as salvage, and the costs. From this decree Whitmire appeals to this court, assigning error as follows: "The district judge erred (1) in rendering a decree for the libellant; (2) in rendering a decree for so much as the

sum of one hundred and twenty dollars in favor of the libellant and against the claimant; (3) in rendering a decree of any sum whatever in favor of the libellant against the claimant; (4) in not dismissing the libel."

W. A. Blount and A. C. Blount, for appellant.

B. C. Tunison, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PAR-LANGE, District Judge.

PER CURIAM. The assignments of error raise two questions: Is the case made by the libel one of salvage? and whether the amount allowed by the district court is erroneous, because excessive.

Timber found drifting with the tide on deep water, in the harbor and out of the control of the owners, is the subject of salvage. *By-water v. A Raft of Piles*, 42 Fed. 917. See, also, *Muntz v. A Raft of Timber*, 15 Fed. 555; *A Raft of Spars*, 1 Abb. Adm. 485, Fed. Cas. No. 11,529; *Fifty Thousand Feet of Timber*, 2 Lowell, 64, Fed. Cas. No. 4,783. Following these decisions, we hold that the case made by the libel is one of salvage.

As to the amount allowed: While we are of opinion that the salvage services in question were of a low order, and would have been adequately compensated on the basis of work and labor, yet we cannot hold that the amount allowed was so manifestly excessive as to justify its revision on appeal. The district judge acted upon proof that the public custodian of lost timber and lumber, who himself was entitled to demand and receive for each stick of timber recovered and delivered 75 cents, paid regularly to salvors of timber 50 cents per stick turned over to him. While the price paid by the public custodian was arbitrary, and not based upon services actually rendered, yet we are not prepared to say the district judge, in adopting it, proceeded upon a wrong principle or abused the discretion vested in him. The decree appealed from is affirmed.

THE WEBER BROS. AND THIRTEEN OTHER CANAL BOATS.

(District Court, E. D. New York. June 20, 1898.)

SALVAGE—TOWAGE COMPENSATION.

A tug which rendered some aid in drawing a fleet of canal boats into a safe harbor, after they had been rescued from all serious danger by other tugs, held not entitled to a salvage award, but merely to a compensation of \$100 for towage.

This was a libel in rem by Mary T. Millen against the canal boats Weber Bros., Peter A. Weber, R. T. Hedden, Lottie A. Collins, D. Johnson, Mrs. Mary Monks, John Monks, Willie J. Clark, Augustus Swan, John T. Dunbar, Albert Atwood, David Taylor, Ard McCormack, and their cargoes, to recover compensation for alleged salvage services.

Peter S. Carter, for libellant.

Carpenter & Mosher, for all boats except the Peter A. Weber and the Weber Bros.

James J. Macklin, for the Peter A. Weber and the Weber Bros.

THOMAS, District Judge. The libelant brings the present action for salvage services alleged to have been rendered the boats of the claimants in the Hudson river, on the 28th day of August, 1893. During the night of the 27th of August a storm of great, and, on that river, unprecedented, violence arose, which continued unabated until the afternoon of the 28th. The tug Hudson, owned by the libelant, was lying at Rockland Lake landing, when the canal boats libeled herein, and other canal boats, were towed down the river past such point by certain tugs, to wit, the tugs Pocohontas, Komuk, and Victoria. The tow proceeded safely until opposite Irvington, when the sinking of one of the boats caused the tow to break up. Thereupon, after considerable difficulty, a portion of the tow proceeded down the river in charge of the Pocohontas. The tugs Komuk and Victoria undertook to secure control of the remaining fragment of the tow, consisting of the boats libeled herein, laden with grain, and partially succeeded in doing so. The tow was conducted with great difficulty, and amidst great peril to the boats and those in charge thereof, to a point some two miles south of the Rockland Lake landing. At about that point a signal of distress was sent out by one of the tugs, and although the tug Hudson was lying at Rockland Lake landing, and in sight of the distressed boats, she preferred the security of her place of refuge, and did not respond to the signal. However, the tug Terror did so respond, and rendered aid to the tow. The Terror fastened to the stern of the tow, somewhat on the starboard side, and the tug Komuk did the same on the port side, and in these positions pulled the tow up the stream; while the Victoria, running a line from her stern to the bow of the tow, drew in a direction contrary to that of the Komuk and the Terror, so as to keep the boats apart, and prevent them from pounding against and injuring each other. There were four tiers of boats. In the front tier were the boats owned by or in charge of Weber. In the second tier were three boats, and in each of the fourth and fifth tiers were four boats. At this time the tow was in the center of the channel or somewhat eastward thereof. The tide was flood and the wind blowing with considerable velocity. The libelant's witnesses place the wind slightly west of south, while the claimant's witnesses give it a slightly southeasterly course. It was blowing substantially from the south, which would carry the tug directly up the river. The tow, in charge of the tugs as above stated, was drawn northwesterly in the direction of Rockland Lake landing, and, according to the evidence of the claimant's witnesses, passed the dock at a distance in the river of from 500 to 800 feet, to a point where the bow of the tow was somewhat above or northerly from the dock; whereupon the Komuk and Terror left their positions at the stern of the tow, and secured lines to the bow thereof, the Victoria having disconnected her lines, as her rudder was somewhat impaired, and it is claimed that her services were no longer necessary. The claimants contend that the intention was to draw the tow into the harbor at Rockland Lake landing. At about this juncture, but before the tugs changed their position, the Hudson, as the claimants contend, came

out from the dock, went in front of the Victoria, around to the port side and stern of the tow, and offered her aid to the Terror; that the captain of the Victoria, temporarily on the Komuk, and in charge of the entire tow, called out to the captain of the Terror not to take the line; that the captain of the Terror directed his deck hand not to take the line, and that it was accordingly refused. The captain of the Hudson admits that the Terror declined the line, but states that the reason given him was that it might cause the Terror's hawser to part, and that a suggestion was made by some one that the Hudson should connect directly with the tow. In any case, it is agreed that the Hudson did offer her aid to the Weber boats, in the front tier of the tow, and that this offer was declined by some person in immediate charge of the two canal boats in such tier. The captain of the Hudson states that it was declined for the same reason and with the same suggestion made by some one on the Terror. Again, the Hudson, her line having been refused by the second tier of boats, dropped back and threw her line to the Collins, in the third tier. No one testifying for the claimant knows, as they testify, how the Hudson made her attachment to the Collins. However, some of them state that the first line thrown to the Hudson was not taken by persons on the Collins, and was allowed to fall back into the water. The captain of the Hudson states that his line was taken and made fast by those on the Collins, and he is corroborated in this by the captain of the Collins. The fact seems to be uncontradicted that thereupon the Hudson assisted to haul the boats to the Rockland Lake landing, and to secure them in the refuge there provided. Several persons in charge of the canal boats, and the captains of the towing tugs, all unite in a substantially similar statement as to the position of the tugs and tow when the Hudson came up. They assert that the water was at that point not violent, as was the case further out in the stream; that the boats were in no danger whatever; that the tugs in charge could have landed them without difficulty; that the perils had been passed, and the harbor of refuge all but made, when the Hudson came out; and that the entire service of the Hudson did not continue for more than half an hour.

The captain of the Hudson, confirmed somewhat by other witnesses, gives quite another and different account. He says that when he went out the tow was a mile or a mile and a quarter to the east of the dock; that her tugs were fastened to the bow, but were so impotent to hold the tow that it was drifting sternways towards Teller's Point, on the east side of the river. Teller's Point is not directly east from Rockland Lake landing, but northeasterly thereof, and about northerly of the center of the river opposite Rockland Lake landing, and about a mile and a half from that point. The river opposite Rockland Lake landing is some $2\frac{1}{2}$ miles in width. The libellant's evidence also tends to show that the river was very much disturbed; that the water was dashing over the boats; that they were unmanageable, and in danger of parting their lines, separating, and being carried to and wrecked on the rocky shore; and that the Hudson's aid, continuing something like $1\frac{1}{2}$ hours, prevented such catastrophe.

The question is whether the boats were in any danger when the Hudson appeared, whether her proffered aid was declined, and whether it was necessary.

In any case, before reaching Rockland Lake landing, going sternways, the boats had been in extreme danger for many hours; also boats in the same locality had been separated from their tow, and several of them dashed to pieces, and sunk or washed upon the shore. The boats in question had narrowly escaped destruction, and when making for Rockland Lake landing, if they were not in, yet they were in close conjunction to, a danger that had for many hours beset them; and those on board of the canal boats, suffering from exposure, had barely escaped, even if they had then escaped, from a continuing menace to their lives. The alleged indifference of those on the tugs and boats, amounting almost to serenity, as stated by them severally on the witness stand, when the Hudson appeared, comports illy with the very great and just sense of peril that seems theretofore to have pursued these men, in what was on both sides admitted to be the most destructive storm that had ever come over the river; and yet the abundance of the evidence offered by the claimants, the apparent candor and intelligence of several of their witnesses, render improbable the evidence of the libellant's witnesses as to the dire peril of the crew at the very time when the Hudson went to render aid. The tow had been taken for some miles up the river, and had been kept off the shore. It is true that full control of the tow would have been necessary to have taken it around Teller's Point, had it drifted so far northerly; but it is incredible that so many persons, of apparently respectable character, should have disclaimed so strongly and deliberately against the continuance of the full dangers that attended them, if in fact they had been in peril of being swept by the tempest and tide upon the rock.

The burden of proof upon the libellant has not been sufficiently maintained to impress the court with the truth of his contention that he delivered these boats from great peril. They had probably escaped the physical dangers, but those in charge were probably in such condition that they were not unwilling to receive the assistance extended to them by the Hudson. This the evidence fairly shows. It is suggested by some of the parties interested that the act of the Hudson was regarded as a mere courtesy, such as is frequently extended by tugs to tows, and that it was not expected that a salvage service was intended. The captain in general charge of the tow stated that he understood that the Hudson was offering a service for which a charge would be made. However that may be, the service was rendered, and, if not received with eagerness, it was not repelled as absolutely unwelcome. The libellant has the legal right to be paid in money rather than by a reciprocity of courtesies. The question is, what should that payment be? It cannot be said that the Hudson saved the boats, but it gave a helping hand to those who had then reached, and only barely reached, in weariness and distress, a place of safety. While compensation for salvage service, as such, cannot be allowed, yet something in the nature of compensation for towage should be paid, in justice to the libellant. The sum of \$100

is the full, if not beyond the full, limit of just compensation for the services. For such sum and costs let a decree be entered in favor of the libellant. If any question shall arise as to the share of the decree that the vessels should respectively bear, the matter may be presented to the court for settlement.

THE MARION.

(District Court, N. D. California. May 21, 1898.)

No. 11,800.

SEAMEN'S WAGES—LIBEL AGAINST CARGO—CATCH OF FISH.

Claimants advanced money and supplies to the owners, to enable the vessel to make a fishing voyage. On her return she delivered the catch of fish to them in payment of such advances. *Held* that, on these facts, the owners of the vessel were owners of the fish when caught, and when landed after her return, and that such cargo was therefore subject to a lien for seamen's wages in an amount equal to what would be a reasonable freight thereon if the cargo had been carried by the vessel for persons other than her owners.

This was a libel in rem for seamen's wages.

H. W. Hutton, for libellants.

A. P. Van Duzer, for claimants.

DE HAVEN, District Judge. This is a libel by seamen to enforce against a cargo of salmon a claim of lien for their wages. The cargo, consisting of 850 barrels of salmon, was brought by the barkentine Marion from Alaska to the port of San Francisco, upon the voyage described in the amended libel. The Marion has been sold, and, the proceeds arising from such sale not being sufficient to pay the wages of the seamen, it is sought by this proceeding to enforce the balance of their claim for wages against the cargo in question. It was admitted upon the trial that prior to the departure of the Marion on that voyage, which was a voyage undertaken for the purpose of catching fish, C. E. Whitney & Co., the claimants here, advanced to the owners of the vessel money and supplies of the value of \$4,400 for the purpose of enabling her to make such voyage. Upon the return of the vessel to San Francisco the claimants received the 850 barrels of salmon in payment of the advances so made by them to the owners of the vessel. Upon this state of facts, there must be a finding that the owners of the vessel were the owners of the salmon when caught and landed in San Francisco; and, under the law as declared by my predecessor in overruling the exceptions to the amended libel in this case (*The Marion*, 79 Fed. 104), the seamen are entitled to a lien upon such cargo in an amount equal to what would be a reasonable freight thereon if such cargo had been carried by the vessel for persons other than the owners of the vessel. It was agreed upon the trial that \$1 per barrel would be a reasonable charge for freight upon the voyage named. Let a decree be entered in favor of the libellants for the sum of \$850 and costs.

HARLESS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1,050.

CIRCUIT COURTS OF APPEAL—CRIMINAL JURISDICTION—CRIMES IN INDIAN TERRITORY.

In the act of March 1, 1895, creating a court of appeals for the Indian Territory, and giving it full jurisdiction, civil and criminal, the provision of section 11 that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States," conferred upon that court full appellate jurisdiction, including that in cases of infamous crimes, which was theretofore vested in the United States supreme court.

In Error to the United States Court of Appeals in the Indian Territory.

Thomas Marcum, Thomas Owen, J. H. Koogler, John Watkins William M. Mellette, and Edgar Smith, for plaintiff in error.

P. L. Soper, U. S. Atty. (L. F. Parker, Jr., Asst. U. S. Atty., on brief), for the United States.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. Plaintiff in error was indicted in the United States court, in the Indian Territory, for larceny and receiving stolen property, and, upon trial, was found guilty, and sentenced to imprisonment for two years and six months. By appeal he carried the case before the United States court of appeals for the territory, by which the sentence and judgment of the trial court were affirmed; and thereupon a writ of error from this court was sued out to the territorial appellate court, and, the transcript having been duly filed in this court, the United States now moves for a dismissal of the writ, on the ground that a writ of error will not lie from this court to the appellate court of the Indian Territory in cases of infamous crimes, or, in other words, that jurisdiction in this court does not exist in cases of infamous crimes committed in the Indian Territory.

In support of the motion to dismiss, it is argued that under the provisions of the act of March 3, 1891, creating the courts of appeal, jurisdiction in cases of infamous crimes was not conferred upon the courts of appeal, but by section 5 of the act was conferred upon the supreme court, and that it was not until the adoption of the act of January 20, 1897 (29 Stat. 492), amendatory of the act of 1891, that the circuit courts of appeal could entertain jurisdiction in cases of infamous crimes, and that this amendatory act has only the effect of transferring to the several circuit courts of appeal the then existing jurisdiction of the supreme court over cases of infamous crimes, and that, when this act took effect, the supreme court did not have jurisdiction over such cases in the Indian Territory, because the

jurisdiction conferred upon the supreme court over such cases in the Indian Territory, by the act of 1891, had been taken away by the subsequent act of March 1, 1895 (28 Stat. 693), creating an appellate court for the territory, and, therefore, there was no existing jurisdiction in the supreme court in such cases to be transferred to this court by force of the provisions of the act of 1897.

In determining the question of the extent of the jurisdiction of this court over the courts of the Indian Territory, regard must be primarily paid to the acts of congress creating and enlarging, from time to time, the courts and judicial system of the territory.

Previous to the adoption of the act of March 1, 1889 (25 Stat. 783), creating a United States trial court in the Indian Territory, the jurisdiction in criminal cases arising in the territory was apportioned between the United States courts in the Northern district of Texas, the Western district of Arkansas, and the district of Kansas. No appeal or writ of error was provided for until the adoption of the general act of February 6, 1889 (25 Stat. 655), which authorized the issuance of the writ of error from the supreme court to any court of the United States in capital cases. By the act of March 1, 1889, a United States trial court was created for the territory; and by section 5 of the act it was declared "that the court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory, as in this act defined, not punishable by death or by imprisonment at hard labor"; thus leaving the jurisdiction in the latter class of cases in the United States courts of Texas and Arkansas.

The act of May 2, 1890 (26 Stat. 81), enlarged the jurisdiction of the trial court of the territory by putting in force therein the provisions of chapter 45 of the General Laws of the State of Arkansas, entitled "Criminal Law," and conferring jurisdiction over the offenses therein defined upon the territorial court, subject to the proviso that the United States courts in the Eastern district of Texas and Western district of Arkansas "shall continue to exercise exclusive jurisdiction over all crimes and misdemeanors against the laws of the United States applicable to the said territory, which are punishable by the laws of the United States by death or by imprisonment at hard labor, except as otherwise provided in the following sections of this act." These sections, numbered 34, 35, and 36, conferred upon the territorial court jurisdiction over many infamous offenses, so that in effect the jurisdiction over this class of cases was apportioned between the territorial court and the courts of the Eastern district of Texas and Western district of Arkansas, being in some instances concurrent. By section 42 of the act it was declared "that appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act."

The next act in sequence of time, affecting the question, is that of March 3, 1891 (26 Stat. 826), creating the circuit courts of appeals, which provided, in section 5, that writs of error from the supreme

court might be taken to the circuit and district courts in cases of conviction of a capital or otherwise infamous crime, and in other criminal cases jurisdiction was conferred on the proper circuit court of appeals. By section 13 of the act it was provided that appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the supreme court of the United States, or to the circuit court of appeals in the Eighth circuit, in the same manner and under the same regulations as from the circuit and district courts of the United States under this act. In *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, it was held that this act "provides for the distribution of the entire appellate jurisdiction of our national judicial system between the supreme court of the United States and the circuit court of appeals, therein established, by designating the classes of cases in respect of which each of those courts shall respectively have final jurisdiction." It thus clearly appears that, if the case now under consideration had been heard in the trial court of the territory at any time when these provisions of the act of 1891 were in force in the territory, the case could have been carried by writ of error before the supreme court. In other words, when the act of 1891 took effect, the supreme court had jurisdiction, by writ of error, in all cases wherein a conviction for an infamous crime was had in any circuit or district court of the United States or in the United States court in the Indian Territory.

By the provisions of the act of January 20, 1897 (29 Stat. 492), the jurisdiction over cases of infamous crimes is taken away from the supreme court, and is conferred upon the circuit courts of appeals; so that there can be no question that had the conviction in the case now before the court been had in a circuit or district court of the United States, subsequent to January 20, 1897, this court would have had jurisdiction therein. It is contended, however, that this jurisdiction does not exist over infamous cases arising in the Indian Territory, on the ground that the act of March 1, 1895 (28 Stat. 693), had deprived the supreme court of jurisdiction over infamous crimes in the Indian Territory, and therefore the act of 1897 did not confer this jurisdiction on this court, it being in terms limited to cases arising in the district and circuit courts. The act of 1895 was practically intended to create a judicial system for the Indian Territory. It enlarged the civil jurisdiction of the trial court, and by section 9 it deprived the courts of Texas, Arkansas, and Kansas of all criminal jurisdiction after September 1, 1896, over cases arising in the territory, and conferred the entire criminal jurisdiction, after that date, on the territorial court. In *re Johnson*, 167 U. S. 120, 17 Sup. Ct. 735. In section 11 it provided for a court of appeals for the territory, and enacted that all appeals and writs of error in criminal cases should be taken to the appellate court created by the act; and it is by reason of this provision that it is contended that the pre-existing jurisdiction of the supreme court over convictions in infamous cases was terminated, and therefore the act of 1897 did not transfer jurisdiction to this court, in such cases arising in the territory, because no such jurisdiction then existed in the supreme court. But the jurisdiction of this court is not dependent upon the provisions of the act of 1897,

but upon those of section 11 of the act of 1895, which, after creating a court of appeals for the territory and for the taking of all cases, civil and criminal, to that court from the trial court on appeal or writ of error, further enacts that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the Eighth judicial circuit, in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States." Thus, we have a specific grant to this court of jurisdiction over the final decisions of the appellate court of the territory, which may be said to be open to two constructions: First, that it is a grant of jurisdiction over every case finally decided by the appellate court, the latter clause of the paragraph being intended to point out the manner and method for securing the right of appeal created by the preceding portion of the sentence or paragraph; or, second, that it is a grant of jurisdiction over the final decisions of the appellate court in all cases wherein jurisdiction in this court would exist if the decision had been rendered in a circuit court of the United States.

If the first construction is the proper one, then the jurisdiction of this court is beyond all fair question; and we are of the opinion that this is the true meaning of the clause under consideration. Section 11 of the act creates a court of appeals for the territory, and enacts that it shall have the same supervisory power over the trial courts as is possessed by the supreme court of Arkansas over the trial courts of that state; and, appellate jurisdiction in civil and criminal cases having been thus conferred, it is then enacted that writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to this court, in the same manner and under the same regulations as appeals are taken from the circuit courts. The natural construction of this clause makes it include all final decisions of the appellate court. The clause was enacted to confer an appellate jurisdiction upon this court over the territorial appellate court. When this subject-matter was before congress for consideration, two questions would naturally arise: First, what shall be the extent of the jurisdiction proposed to be conferred upon the court of appeals for the Eighth circuit over the decisions of the territorial court; and, second, how shall this jurisdiction be exercised? The first question was answered by enacting that "writs of error and appeals from the final decision of said appellate court shall be allowed and may be taken to the circuit court of appeals for the Eighth judicial circuit"; and the second question was answered by the words, "in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States." The words creating the appellate jurisdiction in this court are general in their import, and it is difficult to see in what way a more unlimited jurisdiction could have been created in this court over the final decisions of the territorial court than is provided for in this clause of the section; and the contention that the addition of the words "in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States" must be construed to be a limitation upon the previously granted jurisdiction is not well founded.

They refer solely to the mode in which the previously granted right of appeal is to be exercised.

The distinction to be made between statutes containing a general grant of jurisdiction and those intended to be limited to particular cases only is well illustrated by the statutes construed by the supreme court in the cases of *In re Heath*, 144 U. S. 92, 12 Sup. Ct. 615, and *Folsom v. U. S.*, 160 U. S. 121, 16 Sup. Ct. 222, cited and relied upon by counsel for the government. In the former case a writ of error from the supreme court of the United States to the supreme court of the District of Columbia was sought under the provisions of section 846 of the Revised Statutes of the District of Columbia, which enacts that "any final judgment, order or decree of the supreme court of the district may be re-examined and reversed or affirmed in the supreme court of the United States upon writ of error or appeal, in the same cases and in the like manner as provided by law in reference to the final judgments, orders and decrees of the circuit court of the United States." This statute, by the use of the apt words "in the same cases," clearly restricted the appellate jurisdiction of the supreme court over the judgments of the supreme court of the District of Columbia to the cases in which appellate jurisdiction existed over judgments of the circuit courts of the United States. In the case of *Folsom v. U. S.*, a case certified from this court to the supreme court, and involving the question whether this court had jurisdiction to review the judgment of the supreme court of the territory of New Mexico in cases of infamous crimes (the case arising before the adoption of the act of 1897), it was held by the supreme court that the question turned upon the construction to be given to section 15 of the act of 1891, creating the circuit courts of appeals, which in substance provides that, in cases wherein the decision of the court of appeals is made final by section 6 of the act, that court shall have the same right to review the final judgments of the supreme courts of the several territories as is conferred by the act to review the judgments of the district and circuit courts. The supreme court held that this section did not include a general grant of jurisdiction, but that it was specific and limited, and did not extend to the decisions of the territorial court of New Mexico, in cases of infamous crimes, because such jurisdiction did not then exist in the court of appeals in cases pending in the district and circuit courts.

The restrictive terms found in the statutes construed in these cases are not found in the act creating the judicial system for the Indian Territory. The provisions of section 11 of the act creating the court of appeals for the territory, and conferring jurisdiction thereon over cases heard in the trial courts, do not refer to the jurisdiction of the district and circuit courts of the United States, and the extent of the jurisdiction of the territorial court of appeals is not in any particular controlled by the statutes creating the jurisdiction of the district and circuit courts; and, when the section proceeds to declare that the final decisions of the territorial appellate court may be reviewed in this court, it can only refer to final decisions rendered by the appellate court in the exercise of the jurisdiction conferred on it by the preceding portions of the section, which jurisdiction, as

already stated, is not in any way measured or limited by the jurisdiction of the district or circuit courts; and therefore, if we give to the words creating the appellate jurisdiction of this court their plain and ordinary meaning, it must be held that the jurisdiction of this court extends to all final decisions rendered in the territorial appellate court. Unless this is the proper construction of the act, it follows that the decisions of the territorial appellate court in convictions for infamous crimes cannot be appealed from, but that an appeal to this court does exist in all cases not infamous. It is true that, if the language of the statute demands this construction, the court is not justified in refusing to follow the plain meaning of the statute, by reason of the apparently absurd result caused thereby. *Folsom v. U. S.*, 160 U. S. 121, 16 Sup. Ct. 222. It is equally true that, if the words of a statute are susceptible of more than one meaning, the absurdity of the result of one construction is a strong argument against its adoption. Thus, in *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, it is said: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." No reason can be assigned in support of the view that congress intended to deny an appeal in cases of infamous crimes, and to confer it in cases of misdemeanor; and therefore no reason exists for construing the clause of section 11 of the act of 1895, which confers jurisdiction upon this court over the final decisions of the appellate court of the territory, in such a manner as to confer jurisdiction in minor cases, while denying it in cases of greater importance. If the language of the section was such as to clearly show that jurisdiction was not conferred upon this court in the latter class of cases, then it could not be inferred simply to avoid an apparently absurd result (*Folsom v. U. S.*, supra); but when, as in this case, the words of the section conferring the jurisdiction are broad enough to include convictions for infamous and noninfamous crimes alike, the court is not required to give an enlarged meaning to the words "in the same manner and under the same regulations as appeals are taken from the circuit courts," in order that the jurisdiction over convictions for infamous crimes shall be denied, while it exists over cases of less gravity. We hold, therefore, that section 11 of the act of 1895 confers upon this court appellate jurisdiction over the final decisions of the court of appeals of the Indian Territory; and, so holding, it follows that the motion to dismiss for want of jurisdiction must be, and is, overruled.

CAMPBELL v. WAITE.

(Circuit Court of Appeals, Eighth Circuit. June 13, 1898.)

No. 1,018.

1 HABEAS CORPUS—PRISONER HELD BY STATE FOR ACTS DONE UNDER FEDERAL AUTHORITY.

The federal courts may, on habeas corpus, release a person after his conviction by a state court, as well as before trial, when he is in custody for an act done in pursuance of a law of the United States lawfully enacted.

2. SAME.

Rev. St. § 753, was designed to give relief to one in custody under a state law, not only when a state statute expressly imposes a penalty for executing a law of the United States or the process of its courts, but also when the state law is general in its terms, and applicable to all persons, and one is in custody under color thereof for an act which was in fact done in pursuance of federal authority.

3. SAME.

When, on habeas corpus, a person claims immunity from arrest and imprisonment, on the ground that he is held for an act done under federal authority, the federal courts may go behind the indictment or information found in the state court, and ascertain by independent inquiry whether the act which furnished the sole basis for the charge was in truth done in pursuance of a law of the United States.

4. SAME.

The arrest, under state authority, of federal officers or other persons for acts lawfully done in discharge of their duties under federal laws, presents a case of urgency, which warrants a discharge of the prisoner on habeas corpus without remitting him to the slower remedy of an appeal to the United States supreme court.

Appeal from the District Court of the United States for the Northern District of Iowa.

Edward F. Waite, the appellee, filed an application for a writ of habeas corpus in the United States district court for the Northern district of Iowa, in which he alleged, in substance, that he was unlawfully restrained of his liberty by A. C. Campbell, the sheriff of Howard county, Iowa, under a warrant issued by the district court of said county; that he was held in custody and wrongfully deprived of his liberty "for an act done in pursuance of the laws of the United States"; and that the restraint so imposed "was in violation of the constitution and laws of the United States, the courts of the state of Iowa having no jurisdiction to arrest or imprison him." A writ of habeas corpus having been duly issued and served, said A. C. Campbell, the appellant, made a return to the writ, stating, in substance, that he held the said Waite in custody by virtue of a warrant of commitment issued on a judgment of the district court of Howard county, Iowa, which was rendered on June 22, 1896, and that said judgment after its rendition had been duly affirmed on appeal by the supreme court of the state of Iowa. Attached to said return were duly-certified copies of the judgment of the district court of Howard county, of the indictment on which the said Waite had been tried, of the judgment of affirmance by the supreme court of the state, and of the warrant of commitment under which the accused was held.

The indictment appears to have been based on section 4767 of the Code of Iowa of 1897, quoted below in the margin,¹ and charged, in substance, that E. F. Waite, at and within said county of Howard, on or about the 4th day of October, A. D. 1894, did willfully, maliciously, unlawfully, and feloniously threaten verbally to accuse one D. P. Andrus, a person then and there being and residing in Howard county, Iowa, of the crime of perjury, and to have him arrested and punished therefor, in order to compel the said Andrus to do an act against his will. To the aforesaid return a reply was filed by the petitioner, wherein he admitted that he had been indicted, tried and convicted in the district court of Howard county, Iowa; that the judgment of said court had been subsequently affirmed by the supreme court of the state (70 N. W. 596); and that he was then in custody by virtue of a warrant issued on said judgment. He averred, however, in substance, that

¹If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another with intent to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be imprisoned in the penitentiary not more than two years or be fined not exceeding five hundred dollars.

the judgment of the state court, by virtue of which he was held in custody, was utterly null and void and of no force or effect, because the acts complained of in the indictment on account of which he had been accused and convicted were acts which he had done and performed as a special examiner of pension claims in the discharge of duties that were imposed upon him as such examiner by the laws of the United States. In support of this general averment, the petitioner alleged, in substance, the following facts: That, at the time of the commission of the alleged offense against the laws of the state of Iowa, he was a special examiner of the pension bureau, and, as such, had authority to administer oaths and take affidavits in the investigation of claims pending before the commissioner of pensions, and was charged with the duty of examining pension claims and aiding in the prosecution of persons appearing on such investigations to be guilty of fraud in presenting or procuring the allowance of claims for pension; that one Daniel P. Andrus, of Howard county, Iowa, was at the time a pensioner of the United States, and an applicant before the pension bureau for an increase of his pension; that three letters had been filed by said Andrus in support of his claim for an increased pension; that the duty had been devolved on the petitioner, by order of the commissioner of pensions, of investigating the merits of said claim; that, in the discharge of that duty, the three letters aforesaid and other evidence in support of the claim came into the possession of the petitioner; that, upon an examination thereof, he had good reason to believe, and did believe, that one or more of said letters were false and fraudulent, in that they had been written long after the time when they purported to have been written; and that it thereupon became his duty, as special examiner in charge of said claim, to visit said Andrus, and ascertain from him, by a statement under oath, the true date when the said letters were written. The petitioner further alleged that, for more than one year prior to the date last aforesaid, he had been engaged with other special examiners in investigating many pension claims originating in Howard county, Iowa, and in that vicinity, in which one George M. Van Leuven, a resident of that county, had acted as attorney in prosecuting said claims before the pension department; that so many frauds had been unearthed in the course of such investigation, many of which had been committed at the instance of said Van Leuven, without any intentional wrongdoing on the part of the applicants, that it was deemed inexpedient and impracticable to prosecute all persons concerned therein; that general instructions had accordingly been given by the commissioner of pensions to obtain all material evidence that could be obtained respecting the conduct of said Van Leuven and other persons who had acted in an official capacity, as examining surgeons, who might have been concerned in said frauds, to the end that they might be duly prosecuted, but that no prosecutions should be recommended or set on foot by special examiners of the pension department against individual pensioners who confessed their fraud, except in extreme cases where the frauds perpetrated appeared to have been gross and willful; that, acting in line with such general instructions of the commissioner of pensions, the petitioner visited said Andrus, in Howard county, Iowa, with a view of ascertaining whether the aforesaid letters which were believed to be fraudulent were in fact written on the date which had theretofore been alleged by the pension claimant, to wit, in the year 1864, or at a much later date; that, on the occasion of said interview, the petitioner requested said Andrus to make a truthful statement concerning said letters and the dates when they were written, and said to him, in substance, "that if he, the said Andrus, should not tell the truth about said letters, and if it should conclusively appear thereafter from other sources that he had made false statements under oath concerning said letters, then he, the said petitioner, would recommend the criminal prosecution of said Andrus for perjury," the fact being that Andrus had theretofore stated under oath, in a deposition taken before a special examiner of the pension bureau in support of his claim for a pension, that said letters were written by him during the year 1864, which statement was material to the allowance of the claim, and constituted the crime of perjury, under the laws of the United States, provided it was false and was known to said Andrus to be false when the same was made. The reply further disclosed, in substance, that the acts aforesaid, as

described by the petitioner, and no other or different acts, constituted the alleged offense for which he had been indicted, tried, convicted, and sentenced in the district court of Howard county, Iowa. The respondent below, who is the appellant here, demurred to the foregoing plea, and also moved to strike out material parts thereof, but each was overruled. A hearing was then had on the issues tendered by the plea; considerable evidence was offered by the petitioner in support thereof; and, at the conclusion of the hearing, the petitioner was discharged from custody. 81 Fed. 359. The case comes to this court on appeal from such order.

Milton Remley, Atty. Gen. of Iowa, for appellant.

Edward C. Stringer, U. S. Atty., Fred W. Reed, and Daniel Fish, for appellee.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended on behalf of the appellant, and it seems to be one of the principal errors which is relied upon for a reversal of the order of the district court, that the facts alleged in the petitioner's reply to the sheriff's return, hereafter termed the "petitioner's plea," were insufficient to warrant his discharge from custody, and that the trial court erred both in overruling the demurrer thereto and in admitting testimony to substantiate the averments of the plea. In support of this contention it is said, in effect, that the plea which was interposed was inconclusive and of no avail, because it did not admit the doing of the acts charged in the indictment, and, furthermore, show by proper averments that they were done in obedience to the laws of the United States, but that the plea merely admitted the doing of certain other acts, quite different from those described in the indictment, and then averred or showed that such other acts were done in pursuance of federal authority. We think, however, that the plea was not bad for the reasons last indicated. It is manifest from an inspection of the pleading that it was not framed with a view of confessing and avoiding the specific charge contained in the indictment, but that it was framed upon an entirely different theory, namely, for the purpose of showing that the petitioner was not guilty of the specific acts described in the indictment; that the acts by him done and performed, which had furnished the sole basis for a criminal charge under the laws of the state, were done by the petitioner in the line of his duty as a federal officer; and that by reason of that fact the federal court, to which the application for a writ of habeas corpus was addressed, was fully empowered by sections 751, 753, and 761 of the Revised Statutes of the United States to release him from imprisonment, notwithstanding his prior conviction as for a crime in the courts of the state of Iowa. The plea seems to have been well conceived for the purpose last indicated, and it admits of no controversy, we think, that the acts which were confessed by the plea, considering all the circumstances under which the petitioner was called upon to act, were within the line of his duty as a special examiner of the pension bureau, the same having been done in accordance with regulations lawfully made and instructions given by the commissioner of

pensions, and therefore having been done and performed in pursuance of the laws of the United States.

It is insisted, however, in behalf of the appellant, that the action taken by the trial court sets at naught the solemn adjudication of the courts of Iowa in a case properly within their jurisdiction, and that, because of this fact, the order discharging the petitioner was erroneous and beyond the power of the trial court. The answer to this contention is found in the fact that by section 7 of the act of March 2, 1833 (4 Stat. 632, c. 57), the substance of which is now embodied in section 753 of the Revised Statutes, the congress of the United States has expressly authorized the federal courts to issue writs of habeas corpus for the release of persons who are confined or imprisoned "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any court or judge thereof." By means of numerous federal adjudications upon this act, which have been cited and approved by the supreme court of the United States, it is now well established: First, that the federal courts may release a person after his conviction by a state court as well as before a trial, when he is restrained of his liberty for an act done in pursuance of a law of the United States lawfully enacted; second, that the statute in question was designed to give relief to one in custody under a state law, not only when a state statute expressly imposes a penalty for executing a law of the United States or the process of its courts, but also when a state law is general in its terms, and applicable to all persons, and one is in custody under color thereof for an act which was in fact done in pursuance of federal authority; and, third, that, when an indictment charging an offense against a state law does not show on its face that the act which forms the basis of the charge was done in pursuance of a law of the United States, that fact may be established by proof aliunde,—in other words, that when, in a proceeding by habeas corpus, a person claims immunity from arrest and imprisonment on the ground that he is in fact held for an act done in pursuance of federal authority, the federal courts may go behind the indictment or information, as the case may be, and ascertain by an independent inquiry whether the act which furnishes the sole basis for the charge was in truth done in pursuance of a law of the United States, or the order, process, or decree of a federal tribunal. If the federal courts did not possess the power last mentioned, the habeas corpus act would in some cases prove ineffective to protect federal officers in the performance of their duties. In *re Hurst*, 2 Flip. 510, 12 Fed. Cas. 1024; *Brown v. U. S.*, 2 Woods, 428, 4 Fed. Cas. 98; *U. S. v. Jailer*, 26 Fed. Cas. 571, 575, 2 Abb. (U. S.) 265; *Ex parte Thompson*, 1 Flip. 507, 23 Fed. Cas. 1015, 1016; *Ex parte Jenkins*, 2 Wall. Jr. 521, 13 Fed. Cas. 445; *In re Bull*, 4 Dill. 323, 328, Fed. Cas. No. 2,119; *In re Neill*, 8 Blatchf. 156, 17 Fed. Cas. 1296. It was also decided in *Re Neagle*, 135 U. S. 1, 75, 10 Sup. Ct. 658, where most of the foregoing cases were cited and approved, that no act done in pursuance of a law of the United States lawfully enacted can be an offense against the laws of a state, and that an act done in obedience to rules or regulations lawfully prescribed by one of the executive departments of the gov-

ernment or in obedience to the directions of one of the heads of such departments, acting within the scope of his authority, is to be regarded as an act done in pursuance of a law of the United States, although no statute of the United States has in express terms directed the doing of the act. It may be conceded that the act of congress of March 2, 1833, which empowers the federal courts to go behind an indictment found in a state court, and determine by an independent investigation of the facts whether the act which forms the basis of the criminal charge was done in pursuance of federal authority, confers a delicate and anomalous power on the federal courts, which should in all cases be cautiously exercised; but, in view of the numerous adjudications cited above, we cannot doubt the existence of such a power, nor the fact that it was intentionally conferred by the law-maker. The act in question owes its birth to an attempt by one of the states of this Union to nullify the action of the congress of the United States over subjects that had been committed to its charge by the federal constitution, and the power thereby conferred on federal courts and federal judges was granted for no other purpose than to prevent interference with the rightful authority of the general government. Owing to the dual nature of our government, it was deemed necessary legislation to accomplish that object.

It follows from what has been said that no error was committed by the trial court in receiving the proof which was offered by the petitioner to show that, in point of fact, he was in custody for acts done in the legitimate discharge of his duties as a federal official, nor in ordering his discharge when fully satisfied that such was the case. For acts of that nature the state court was without power to imprison or fine the petitioner, and its judgment inflicting such punishment was void in the same sense that the judgment of a court is void when it sentences a person to a kind of punishment not authorized by law. *Ex parte Lange*, 18 Wall. 163; *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781.

It is further suggested in the brief of the attorney general, and some stress was laid on that point in argument, that, in any event, the petitioner should not have been discharged on habeas corpus, but should have been remanded to the custody of the sheriff, and required to prosecute a writ of error to the supreme court of the United States. This contention, we think, is without merit. While it is true that the relief prayed for by the petitioner could have been obtained in the usual way by a writ of error, yet, in our judgment, the case at bar does not belong to the class of cases in which a person in custody under the warrant of a state court should be compelled to seek relief by appeal or writ of error rather than by a writ of habeas corpus. In the case of *Ex parte Royall*, 117 U. S. 241, 251, 6 Sup. Ct. 734, it was said, in substance, that when a federal officer is in custody for an act done in pursuance of a law of the United States, or an order, process, or decree of a federal court, and that when a citizen of a foreign state is in custody, under the warrant of a state court, for an act done under an authority claimed to have been conferred by the sovereignty of which he is a citizen, so that our relations with foreign governments are involved in the controversy, such

cases present questions of such importance and urgency that the court which is appealed to for relief may and should discharge the petitioner in a proceeding by habeas corpus, instead of compelling him to resort to the slower remedy by appeal, provided that it finds upon an investigation of the case that the petitioner's complaint is well founded. The arrest of federal officers or other persons for acts lawfully done in discharge of their duties under federal laws impairs to a certain extent the authority and efficiency of the general government; and for that reason no court, so far as we are aware, has ever hesitated in that class of cases to discharge a petitioner from custody by writ of habeas corpus, when it appeared on a hearing of the case that the petitioner was entitled to be released from imprisonment.

No other questions besides those already noticed and decided are presented by the assignment of errors which require consideration at our hands. In the brief of counsel for the appellant it is said, in substance, that the errors complained of consisted in overruling the demurrer to the petitioner's plea; that, on the conceded facts of the case, which we take to mean the facts alleged in the petitioner's plea, inasmuch as there is no special finding of fact contained in the record, the trial court had no jurisdiction to issue a writ of habeas corpus or to discharge the prisoner; and that the court also erred in holding that the petitioner was illegally deprived of his liberty when it appeared that he was in custody under the judgment and sentence of the district court of Howard county, Iowa, upon an indictment alleging an offense under the laws of the state. These, in our opinion, are the only questions presented by the record which are open for review by this court; and, as they have each been considered and the position taken by the appellant adjudged to be untenable, the order discharging the petitioner from custody is hereby affirmed.

LAPP et al. v. RITTER.

(Circuit Court, D. Indiana. June 30, 1898.)

No. 9,568.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATE STATUTES.

A decision by the highest court of a state, construing a statute of the state, is as binding upon the federal courts as though the construction so given had been written in the statute by the legislature itself.

2. REPLEVIN—DISMISSAL OF SUIT BY PLAINTIFF—CHARACTER OF JUDGMENT.

Under the Indiana Code of 1881, when a plaintiff in replevin voluntarily dismisses the suit, after obtaining possession of the property, the only judgment that can be entered is for costs, and a return of the property cannot be directed. This, however, does not leave the defendant without a remedy, since the dismissal is a breach of the condition in the replevin bond requiring the plaintiff to prosecute his suit to effect, and defendant may sue on the bond, and recover the value of the property taken from him. Nor in such case is the burden of showing title to the property shifted from the plaintiff in replevin to the defendant, since, in an action on the bond, the latter would be entitled to judgment on introducing the replevin bond and the proceedings in the replevin suit, unless the replevin plaintiff then showed by preponderance of proof that he was the owner or entitled to possession of the property.

This was an action of replevin by Peter Lapp and others against John K. Ritter.

C. B. Templer, Gregory, Silverberg & Lotz, and Gavin, Coffin & Davis, for plaintiffs.

Frank B. Burke, for defendant.

BAKER, District Judge (orally). This is a suit brought by the plaintiffs against the defendant in this court for the recovery of the possession of certain personal property alleged to be wrongfully in the possession of the defendant, and of which the plaintiffs allege they are the owners and entitled to the possession. The complaint in this case is verified, so that it becomes an affidavit, as required by the statute of the state as a condition precedent to the issuance of the writ of replevin. In order to procure the issuance of the writ of replevin, the plaintiffs were required to, and did, file an undertaking as provided by the statute, signed by themselves and a surety. The undertaking required by law and filed in this case contains three conditions or covenants: First, that the plaintiffs shall prosecute their action with diligence and to effect; second, that they shall return the property, if a return be adjudged by the court; and, third, that they will pay all costs and damages that may be awarded against them. The complaint has been put at issue by the filing of an answer, and on the day preceding the day set for trial of the cause the plaintiffs filed in court a written dismissal of the same. The question presented and argued by counsel is as to the form of the judgment upon such dismissal. On behalf of the complainants the contention is that the dismissal should be followed by a judgment simply for the costs. On behalf of the defendant it is contended that there should be, in addition to a judgment for costs, a judgment awarding the return of the property to the defendant.

By section 914 of the Revised Statutes of the United States it is provided, in substance, that in all common-law actions in courts of the United States the pleadings, procedure, and practice shall be conformable, as nearly as may, to the pleadings, procedure, and practice in the courts of the state in which such United States courts are held. It results from this statutory provision that the question as to the judgment which must follow the plaintiffs' dismissal of their cause of action is to be determined by the law of this state. This is a dry question of law, and, whether the court may feel that it operates with harshness or otherwise, it is without any discretion, but is bound to pronounce the law as it finds the law to be. In *Wiseman v. Lynn*, 39 Ind. 250, the supreme court of this state, reviewing the various provisions of the Civil Code of 1852 relating to the subject of dismissal of causes of action, and other cognate sections, reached the conclusion that, under a proper construction of the statutes of this state, when a suit in replevin was dismissed by the plaintiff the court was without power to award any further judgment than one for costs. This decision was grounded, not upon a review and consideration of the decisions in other jurisdictions for

the purpose of ascertaining what was the true common-law rule in such cases, but was rested exclusively upon the construction of the statutes of this state. It is settled by the decisions of the supreme court of the United States that the construction placed by the highest judicial tribunal of the state upon a statutory or constitutional provision of the state is as binding and conclusive upon the courts of the United States as though the construction so given had been written into the statute by the legislature itself. The statutory provisions found in the Code of 1852 were changed in 1877, and in view of that change a different construction was given by the supreme court of this state; holding, under this statute, that a judgment for the return of the property on the dismissal of a replevin suit was within the power of the court, and was a proper judgment to be entered. But in 1881, when the laws of this state were again codified, the provisions of the act of 1877 touching this subject were dropped out of the statute, and the statutory provisions in regard to the right of dismissal were restored by the act of 1881 to the condition in which they stood under the Code of 1852. In *Hulman v. Benighof*, 125 Ind. 481, 25 N. E. 549, the supreme court of the state, in considering the question as to the form of judgment that it was lawful for a court of the state to enter on the dismissal of a replevin suit, expressly decided that the only judgment that could be awarded on such dismissal was a judgment for costs.

It is suggested that the court ought not to regard itself bound by the construction placed by the supreme court of this state on the various statutory provisions relating to the subject of dismissal of actions, except in so far as the court might regard such interpretation as equitable and just. The court does not so regard its duty, or so understand the law. The court understands that it is bound to accept any construction whatever placed by the supreme court of the state upon the constitution or laws of the state as the true construction, whatever may be the private views of the court on that subject. But the court does not concede that the disastrous consequences suggested by the learned counsel for the defendant will follow from the action of the court in this case in following the decisions of the supreme court of the state. Each of the three conditions of the bond, as against all the parties to it,—principals and surety,—are independent, and not dependent. The first condition of the bond is that the plaintiffs shall prosecute their suit with diligence, and to effect. This covenant is an independent one, and a dismissal of the suit is a breach of its condition; and for such breach the defendant, in a suit upon the bond, is entitled to recover the full value of the property wrongfully taken from him by the writ of replevin, together with costs and damages for its unlawful caption and detention, unless the plaintiff in replevin proves, in mitigation of damages, title to or interest in the property in suit.

It is further suggested that a dismissal of the suit will give the plaintiffs an unconscionable advantage over the defendant, by shifting the burden of the issue. It is suggested, and correctly, that in a suit in replevin the defendant is not required to show title or ownership of the property, but the burden is on the plaintiff to show his

own title to the property, and, unless he establishes a title in himself, he cannot recover, even though the defendant may have no title whatever. If the dismissal of the suit, and driving the defendant to bring an action on the replevin bond, shift this burden from the plaintiffs to the defendant, a court would hesitate long before permitting the dismissal of a replevin suit. But such is not the law. In a suit upon the replevin bond, brought by the defendant against the plaintiffs and the surety after the dismissal of the replevin suit, the plaintiff in the suit will establish a right to recover, *prima facie*, the full value of the property taken, by introducing in evidence the complaint and undertaking in replevin, and by showing the dismissal of the suit, and by introducing the writ of replevin, the sheriff's return, and appraisal, showing the seizure of the property, and the appraised value of it; and, if no further evidence is introduced on either side, it would be the duty of the court to instruct the jury peremptorily that the plaintiff was entitled to recover the full appraised value of the property, with interest upon it, and any damages that were shown beyond that, together with costs. The burden still remains on the replevin plaintiffs in a suit on the bond, where they become defendants. In order to defeat a recovery of the full value of the property as returned by the sworn appraisers, the burden is still upon the plaintiffs in a replevin suit (principals and sureties alike) to establish by a preponderance of the evidence that they—or their principals, rather—were the owners of the property, or had some interest in it, at the time they instituted their suit of replevin; and, failing to show that, they would be liable for the full value of the property, the same as though they had been defeated in the replevin suit for a like failure to show title in themselves. So it results that there is no practical prejudice imposed upon the defendant by the dismissal of the suit, except only the question of delay. The burden of the issue is not shifted in any respect whatever. The replevin plaintiffs, in order to reduce the amount of damages to which the replevin defendant would be entitled in a suit upon the replevin undertaking, are still required, by a preponderance of the proof, to show that they were the owners of the property, or were entitled to some interest therein. The only judgment that the court is competent to pronounce on the dismissal that has been filed is a judgment for costs, and such judgment will be awarded.

MCKENZIE v. POORMAN SILVER MINES OF COLORADO, Limited.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1,053.

1. CODE PLEADING—DENIALS OF ANSWER.

Under the Colorado Code, the plea of the general issue, as known at common law, is abolished, and the answer must contain a denial of each material allegation intended to be denied, and every material allegation not controverted is taken as true.

2. ACCOUNT STATED.

A mere allegation that, on a certain date, plaintiff "rendered to defendant a statement of said account" (being the account sued on), is not equiv-

alient to an averment that the account between the parties had been stated, showing a specific sum due, so as to make the suit one on an account stated.

2 CORPORATIONS—CONTRACTS OF AGENTS—RATIFICATION.

In an action against a corporation on a contract made between plaintiff and a third person, who is alleged to have acted in behalf of the corporation, it is not necessary to show that the contract was made under authority of a resolution of the board of directors; and, if there is evidence tending to show that it was made in the interest of the corporation, which recognized it, accepted its benefits, and acted on its provisions, this is sufficient to warrant the submission of the cause to the jury.

In Error to the Circuit Court of the United States for the District of Colorado.

Willard Teller (H. M. Orahood and E. B. Morgan, on the brief), for plaintiff in error.

Hugh Butler, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. This action was brought by plaintiff for the purpose of recovering from the defendant, a corporation created under the laws of Great Britain, the sum of \$14,005.35, it being averred in the petition that the defendant on the 24th day of October, 1894, was indebted to plaintiff for services by him rendered to defendant as superintendent of its mines and property in Boulder county, Colo., and for money expended, and goods, wares, and merchandise furnished, by plaintiff to defendant, in superintending and prosecuting the work and operations of the defendant; that on the day above named plaintiff rendered to defendant a statement of the account, and defendant thereupon acknowledged said indebtedness, and then and there promised plaintiff to pay the same, but has failed and neglected to pay the same or any part thereof. To this petition an answer was filed, wherein the defendant denied:

"That on the 24th day of October, 1894, or at any other time, it was indebted to the plaintiff in the sum of \$14,005.35, or in any other sum, for services by the plaintiff theretofore or at any time rendered to the defendant, or for money expended, or for goods, wares, and merchandise furnished, by plaintiff in superintending and prosecuting the work and operations of the defendant, or for any other consideration, or at all; and it denied that on said 24th day of October, 1894, or at any other time, it acknowledged that it was indebted to the plaintiff in the sum of \$14,005.35, or in any other sum whatever, or that said sum, or any sum whatever, was due from defendant to plaintiff; and it further denied that it promised to pay to the plaintiff the said sum, or any sum whatever."

When the case was called for trial, and after the jury had been sworn, the plaintiff moved the court for an instruction to the jury to return a verdict in accordance with the prayer of the complaint, on the ground "that the denial of the wording of the indebtedness of the complaint is not a denial under the authorities decided by the supreme court." This motion was overruled by the court, and the case proceeded to a hearing upon the evidence, the plaintiff in the first instance introducing evidence tending to show that he had been in the employ of the defendant company as superintendent of the

mines operated by the defendant company, and had expended certain sums of money and furnished goods and wares in connection therewith, and that on or about the 24th day of October, 1894, he and Thomas W. Goad, who, it is claimed, was acting as the general manager of the defendant company, went over plaintiff's account, and agreed upon the sum of \$14,005.35 as being the amount due, a statement thereof being made and furnished to Mr. Goad, who said he would forward it to the company in Scotland.

Upon the conclusion of the evidence, the court instructed the jury to find for the defendant, and plaintiff now brings the case before this court by writ of error, and the first ground assigned as error is the action of the trial court in overruling plaintiff's motion for verdict and judgment on the pleadings. The position taken by plaintiff is that the action is on an account stated, and that the answer presented no issue, because it did not deny the averment of the petition that the plaintiff on the 24th day of October, 1894, rendered to defendant a statement of said account, and that, in the absence of a denial of this averment, all the other denials of the answer are of no avail. It is admitted by counsel for plaintiff that the Code of Colorado has abrogated the plea of the general issue as known in the common law, and requires either a general or specific denial of the averments of the complaint. At the common law, in an action upon an account stated, the plea would be "non assumpsit," the foundation of the action being the promise, express or implied, to pay the amount shown to be due by the account stated. This denial is found in the answer of the defendant in this case, and, in substance, the denials of the answer amount to the general issue, which would have been available under the common-law system of pleading. But, as the code system of pleading obtains in Colorado, the answer is to be viewed in the light of the code provisions, which are to the effect that the answer must contain a denial of each material allegation intended to be denied, and that every material allegation not controverted by the answer shall be taken as true; and the contention of the plaintiff is that, as the answer did not deny the averment in the complaint "that plaintiff on said last-named day [October 24, 1894] rendered to defendant a statement of said account," this averment must be taken to be true, and therefore plaintiff was entitled to judgment on the pleadings.

If the averment in the complaint had been to the effect that on the 24th of October, 1894, an account between the parties had been stated, showing a specific sum to be due plaintiff, it might be that a failure to deny such statement would be construed to be an admission of the cause of action, but that is not the averment in this case. The mere rendition of an account from one party to another does not constitute an account stated, upon which an action can be maintained.

Thus, in *Toland v. Sprague*, 12 Pet. 300, a case cited by counsel for plaintiff, it is said:

"We agree with the court that the mere rendering an account does not make it a stated one; but that if the other party receives the account, admits the

correctness of the items, claims the balance, or offers to pay it, as it may be for or against him, then it becomes a stated account."

The admission of the account rendered, so as to make it an account stated, may be inferred from retaining the same for a sufficient or reasonable length of time without objecting thereto, but such retention is merely the evidence from which the admission is inferred; and therefore when, as in this case, it is averred in a complaint that an account was rendered, and that it was acknowledged by the defendant, who promised to pay it, the case would not be made out by proving that an account had been rendered. It would be necessary, in addition, to prove that the defendant had either expressly promised to pay the amount, or, by receiving the account and retaining it without objection, had impliedly admitted its correctness, from which admission the promise to pay would be implied.

In this case the answer, while admitting that the account had been rendered, expressly denied that the defendant had ever acknowledged it to be correct, or had ever promised to pay it, and thus an issue of fact was created, putting plaintiff to his proof, and the court did not err in overruling the motion for judgment on the pleadings.

The next question for determination is whether the court below erred in directing a verdict for the defendant upon the evidence in the case. As already stated, the plaintiff is seeking to recover for services alleged to have been rendered to defendant as superintendent of the mining property, and also for money expended and goods and wares furnished to the defendant in carrying on the operations of the mine from 1891 to 1894. From the evidence it appears that the mine was originally owned by plaintiff; that on the 1st day of September, 1891, a written agreement was entered into between the plaintiff and H. A. W. Tabor, which recites that a contract had before that date been entered into between the parties with regard to the sale of the Poor Man Lode Mining Claim, in Boulder county, Colo.; that in pursuance of that contract a corporation had been formed under the laws of Great Britain, named the "Poorman Silver Mines of Colorado, Limited," with a capital stock of 130,000 shares, of £1 each, of which 103,000 were ordinary, and 27,000 were deferred, shares; that 10,000 of the ordinary shares had been sold for \$48,500, which amount had been paid to plaintiff in part payment of the purchase price of the property; that 4,000 shares of the deferred stock were to be issued to the promoters of the company in payment for their services, the remaining 23,000 deferred shares were to be held to procure a working capital for the company, and the remaining 93,000 shares of common stock were to be issued to plaintiff, and, upon the delivery of the deed of the mining property to the corporation, the 93,000 shares of stock issued to plaintiff were to be deposited in the Denver National Bank, Colo., or with its correspondent, the Alliance Bank of London, subject to the order of H. A. W. Tabor, who had the right to withdraw the same from time to time, upon paying into the bank to the credit of plaintiff 80 per cent. of the par value of the stock, and upon the completion of the payment of \$330,000, the agreed purchase price, to the plaintiff, the remaining stock should be delivered to the said Tabor; it being further agreed

"that the said party of the first part, until he shall be paid in full for his said property, as above herein provided for, shall remain as superintendent, in charge and control of the mine, at a salary of three hundred dollars per month, and that T. W. Goad shall be the resident and consulting engineer of said company."

The evidence does not clearly show the relation actually existing between Tabor and the defendant corporation, but it would appear, from the recitals of this contract, that the corporation was organized for the purpose of completing the contract of purchase of the mine existing between plaintiff and Tabor, and by its terms this contract of September 1, 1891, provided for the purchase of the property by the defendant company, and there is evidence tending to show that the defendant corporation took the benefit of the contract. The contract recites that the property has been conveyed to the company by good and sufficient deeds, which by the further terms of the contract were to be delivered to the Denver National Bank or the Alliance Bank of London, to be held until payment of the purchase price had been completed. It is true this contract is signed only by plaintiff and by Tabor, but, if from the entire evidence it should be found that the defendant company accepted its benefits and acted under its provisions, there would be ground for holding that the company had assumed its obligations, which question would be for the jury under the evidence in the case. This contract expressly provides that the plaintiff, until full payment for the property has been made, should remain in charge and control of the mine, as superintendent, at a salary of \$300 per month. The trial judge deemed this to be an absurd and foolish agreement, and held that, before it could be made binding upon the defendant, it ought to be made to appear that it was made by resolution of the board of directors, through and by the constituted authorities, and that it did not appear that Tabor had authority to make such a bargain on behalf of the company. The question is not whether this particular provision of the contract was or was not a wise or foolish provision. It is part of the contract, as plainly stated as it is possible to put it, and it forms part of the consideration for which the plaintiff agreed to sell the mining property to the defendant company. The question to be decided is whether the company is bound by the terms of the contract. The plaintiff testified that this contract of September 1, 1891, was the contract under which the defendant bought the mine; and there was certainly, therefore, some evidence to show that this written contract was made in the interest of the company; and, if the company recognized it, accepted its benefits, and acted on its provisions, this would be evidence showing that it was adopted by the company; and, if in fact it was thus recognized and adopted, it became binding upon the company, the same as though it had been formally executed in the corporate name.

It must be further remembered that the suit is not only to recover the sum claimed to be due the plaintiff, as salary for the time he remained in charge of the mine, but also for money expended by plaintiff in paying expenses incurred in running the mine; and there is evidence tending to show that T. W. Goad directed plaintiff to

operate the mine, after the defendant company had become interested therein, and that money was expended in putting in machinery, in clearing the mine of water, and in paying the wages of the men employed, and that ore of the value of \$70,000 was mined and sold; and there is evidence tending to show that the defendant company received a portion of this money, and to some extent, at least, accepted the benefits of the work done and expenditures made by plaintiff, but the court refused to submit the issue on this branch of the case to the jury. It is not to be denied that upon the questions of the relation of H. A. W. Tabor to the defendant company, of the connection of the company with the contract of purchase of the mining property, of the authority actually possessed and exercised on behalf of the defendant company by T. W. Goad, who in some form and to some extent represented the corporation, the evidence, as presented by this record, is confused and very far from satisfactory, and yet we are of the opinion that it contains some evidence tending to show that the corporation had become bound by the contract of September 1, 1891; that T. W. Goad did to some extent represent and act for the company in managing the affairs of the company in connection with the mining property; that, under the joint management of the plaintiff and T. W. Goad, the mine was operated, expenses incurred, and ore mined of the value of \$70,000, which to a greater or less extent went to the benefit of the defendant company; and therefore there was evidence which should have been submitted to the jury, in order that it might be determined, as matters of fact, whether the company had recognized the contract of September 1, 1891, and by accepting its benefits had become bound by its obligations; whether the acts and contracts of T. W. Goad bound the company, either by reason of previous authority granted him, or by approval of his acts in its behalf; and whether the company, by accepting the benefits of the work done and expenditures made by plaintiff in operating the mine, had become bound to repay the cost thereof.

If there was evidence on these matters for the consideration of the jury, as we hold there was, the court below erred in directing a verdict for the defendant, and its judgment must be reversed, and the case be remanded to the circuit court, with instructions to grant a new trial.

BALTIMORE & O. R. CO. v. HELLENTHAL.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

No. 578.

1. EVIDENCE—ADMISSIBILITY.

Testimony of a witness, acquainted with the situation, that a railroad track is straight at a certain point, and a crossing in plain view for a certain distance, is competent.

2. APPEAL AND ERROR—OBJECTIONS TO EVIDENCE.

Objections to the admission of evidence which do not specifically and distinctly indicate the grounds upon which they are made are of no avail on appeal.

3. CONTRIBUTORY NEGLIGENCE—RIGHT OF ACTION.

Contributory negligence of the party injured will not defeat an action, if the defendant might, with reasonable care, have avoided the consequences of such negligence.

4. NEGLIGENCE—QUESTION FOR JURY.

Where there is conflicting evidence as to the distance at which an engineer on a locomotive saw a child on the track and as to the distance within which the train could be stopped, the question as to whether the engineer was negligent in not stopping the train in time is for the jury.

5. MEASURE OF DAMAGES—INSTRUCTIONS.

When the law in regard to the measure of damages for the killing of a child is correctly given in the general charge, it is not error to refuse a more detailed special instruction covering the same ground.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This action was brought in the court of common pleas of Franklin county, Ohio, against the Baltimore & Ohio Railroad Company, the plaintiff in error, to recover damages for the death of William Bauer, caused, as alleged, by the negligence of plaintiff in error. The case was, upon petition of the defendant, removed into the circuit court of the United States for the Eastern division of the Southern district of Ohio, and the trial resulted in a verdict and judgment in favor of the plaintiff for \$1,500, and the case is brought here for review on writ of error. Deceased was a child 18 months of age, and had escaped from the home of his parents about 9 o'clock a. m., Sunday, April 9, 1894, and had wandered unobserved upon the railroad track of the defendant at a public crossing 50 yards or more from the house, and was sitting with his head down at the edge of the boards which made the highway, and just at the end of the cattle guard, when struck and killed by the locomotive of a passenger train of the defendant going south. This crossing was half a mile or more south of Briggsdale station, on the Midland Division of the defendant's railway system. The view of this crossing was open and unobstructed, and the track straight, from Briggsdale station going south. From Briggsdale station to the crossing is slightly up grade. The day was clear and the track dry. The engineer on the locomotive says the child, when first seen, was thought to be a Plymouth Rock chicken, being dressed, as the proof all shows, in light blue clothes. He says that when he first discovered that the object was a child he was 300 to 400 feet away, and said to the fireman, "My God, Dick, there is a child on the track!" and at once applied the emergency brake, and used all means to stop the train, reversing, as he thinks, the engine. The fireman (Johnson) agrees in the main with the engineer in his testimony, and says positively the engine was reversed, but says that when the engineer told him there was a child on the track they were two, and it may have been three, hundred yards from the child, so far as he can remember. Locomotive engineers were examined as experts, and gave opinions as to the distance required within which to stop a passenger train by application of all available appliances under the circumstances attending the accident,—such as the rate of speed, length of train, grade and condition of track. The necessary distance, as estimated by the different witnesses, varied from 350 to 1,000 feet. The court, in the charge to the jury, eliminated from the case and withdrew from the jury every question except the simple issue of fact whether, after the engineer knew or suspected that the object on the track was a child, he used ordinary care and skill to avoid the accident. The exact language of the court was as follows: "This case presents a very simple issue. The first one is whether the engineer, after he saw the object on the track, and after he knew or suspected that that object was a child, used the care and skill which an engineer of ordinary care and skill would have used to avoid the accident. If he did, then the company is not liable; if he did not, the company is liable. The only evidence on the subject shows that the child was sitting at the edge of the boards which make the highway, with its head down over the rail. It was not using the highway for the purpose of passing or repassing. It was sitting there in a way in which it had no right to use

the highway. Therefore it had not the rights of a traveler upon the highway, and the company was not bound, with respect to it, to use care before its agents should have discovered that it was a child upon the highway. The only issue before you, therefore, is whether, after the engineer or fireman saw the object, and either knew or suspected that it was a child, he used the care and skill which an average engineer—an engineer of average skill and care—would have used to prevent the accident. If he did, the company is not liable; if he did not, the company is." The court denied a motion or request to direct a verdict in favor of defendant upon the whole of the evidence, refused certain special instructions requested by defendant, and error is assigned to the action of the court in denying the motion and special instructions, as well as to the ruling in admitting certain evidence over objection by defendant.

J. N. Collins, for plaintiff in error.

Thomas B. Minehan, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

CLARK, District Judge, after stating the case as above, delivered the opinion of the court.

In considering the grounds relied on for reversal in this court, we shall examine the questions in the order in which they would arise in the progress of the trial, rather than according to importance or the order in which they were discussed at the bar. This brings us to the question made on the admission of certain evidence against exception by the defendant. William Bauer, the father of the deceased child, was permitted to testify that the track was straight, and the track and crossing in plain view for about two miles going south, or going from Columbus. There was objection to this at the trial, and also in the assignment of errors, although this is apparently not pressed or relied on in the brief, and the objection is clearly not well taken. It was obviously competent to show by any witness acquainted with the situation that the track was straight, and the view of the crossing unobstructed, and for what distance. Other witnesses had proved substantially the same facts without objection, except the distance was stated as not being quite so far in which the view was thus plain and open. Other evidence was admitted under exception, which presents a more serious question. Experiments had been made by witnesses after the accident and before the trial, by placing objects on the railroad track at the crossing where the child was, or was supposed to have been, and walking back upon the railroad track to ascertain by observation how far these objects could be seen. A black hat at one time, and a blue dress on a small bush at another, were the objects used for these tests or experiments. The bush was supposed to represent the height of the child, and the dress the color of that on the child when killed. Not only the full substance of the evidence to the admission of which the error is alleged is in accordance with the rules of this court quoted in the assignment of errors, but the same, with the objection, is set out literally as follows: "Q. What object did you place there? (To which question the defendant objected. Objection overruled. Exception by defendant.)"

And the answer thereto as follows: "A. We laid a black hat on the crossing, and went down below the station, and we could see it, and tell what it was." Also the following question asked the witness William Bauer, and the answers thereto: "Q. Did you try more than one object? You used a black hat. Did you try anything else? A. We used a dress there one morning,—one of his little blue dresses. Q. Was it the dress the child had on that morning? A. Another one just like it. Q. How far could you see that dress? A. About three-quarters of a mile. Q. Did you have any difficulty in telling what it was? A. We could tell it was a dress, and the color of it. (To which evidence with reference to the experiments the defendant objected. Objection overruled. Exception by defendant.)" Also the following question, asked the witness Anton Hellenthal: "Q. What did they place on the track to look at? (To which question the defendant objected. Objection overruled. Exception by defendant.) A. It was on the public road crossing. Q. What did you place on the track, to go and look at, to see how far you could see it?" And the answer thereto, as follows: "A. We had a dress just like the child had on. Q. How far could you see that dress? A. Why, we could see it—let me see—over half a mile. (To which question and answer the defendant objected. Objection overruled. Exception by defendant.)" Also the following question asked the witness Solomon S. Moore: "Q. Well, what did you observe about that?" And the answer thereto, as follows: "A. We took a bush,—a small bush,—and put it on the crossing, put a little garment on it, and then went back to the curve. (To which question and answer the defendant objected. Objection overruled. Exception by defendant.)" It will be seen that these objections are general, and no specific grounds for the objections are stated. The learned circuit judge, in the charge, explained to the jury fully and clearly that this evidence was admitted for the sole purpose of enabling the jury to weigh the credibility of the engineer's statement that he did not suspect the presence of the child until too near to avoid the accident. The jury was told that, if the circumstances of these experiments were not sufficiently similar to those of an engineer in the cab above the track, and going at a rate of speed of 40 or 45 miles an hour, then they should be disregarded as evidence. The contention is that the question whether the conditions in the experiments were substantially or sufficiently similar to those of the engineer was one going to the admissibility, and not to the effect, of the evidence, and was, therefore, a preliminary question for the court, and not the jury. We do not find it necessary, however, to decide this question. We have remarked that the objection to the testimony was general. It has been decided again and again that an objection to evidence which does not specifically and distinctly indicate the grounds upon which it is made is of no avail on writ of error. *Mitchell v. Marker*, 22 U. S. App. 325, 10 C. C. A. 306, and 62 Fed. 139; *Toplitz v. Hedden*, 146 U. S. 252, 13 Sup. Ct. 70; *U. S. v. Shapleigh*, 12 U. S. App. 26, 4 C. C. A. 237, and 54 Fed. 126. This assignment, for this reason, cannot be sustained.

The question raised by the assignment of error on the court's

action in refusing to direct a verdict for defendant must now be examined. The contention is that the deceased child, being a trespasser on the railroad track, and so treated in the court's instructions to the jury, it would be necessary for plaintiff, in order to recover, to show that the killing was willful or intentional, while this element of willful injury is neither alleged nor proved. It must be conceded that the case proceeded throughout upon the theory of negligence only, and not of willful wrong; and it is undoubtedly the well-established general rule that with respect to trespassers upon its track the railroad company owes no duty except to do such trespassers no intentional wrong or injury. As was said by this court in *Felton v. Aubrey*, 43 U. S. App. 291, 20 C. C. A. 441, and 74 Fed. 356:

"The law imposes no duty in respect to trespassers upon its track, except that general duty which every one owes to every other person to do him no intentional wrong or injury. The liability of a railway company to discharge this duty can only arise when it becomes aware of the danger in which a trespasser stands. *Railroad Co. v. Cook*, 31 U. S. App. 277, 13 C. C. A. 364, and 66 Fed. 115. The overwhelming weight of authority is in accord with this rule, and no court has more clearly stated the principle than the supreme court of Kentucky. *McDermott v. Railroad Co.*, 93 Ky. 408, 20 S. W. 380; *Hoskins v. Railroad Co.*, 30 S. W. 643; *Brown's Adm'r v. Railroad Co.*, 97 Ky. 228, 30 S. W. 639; *Gherkins v. Railroad Co.*, 30 S. W. 651."

There is, however, a qualification of this general rule as thus stated, as fully established by decisions of the highest authority as the rule itself. This qualification is expressed in the proposition that, if it be shown that the defendant might, after becoming aware of plaintiff's negligence, by the exercise of reasonable care and prudence have avoided the effect of the plaintiff's negligence or trespass, the defendant is liable for the injury. The qualification of the rule is thus stated in *Railway Co. v. Ives*, 144 U. S. 429, 12 Sup. Ct. 687:

"Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 Mees. & W. 546): that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

Among numerous decisions, both state and federal, supporting this qualification of the general rule, we refer to the following: *Patton v. Railway Co.*, 89 Tenn. 370, 15 S. W. 919; *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653; *Railroad Co. v. Harmon's Adm'r*, 147 U. S. 582, 13 Sup. Ct. 557; *Railway Co. v. Whitcomb*, 31 U. S. App. 386, 14 C. C. A. 183, and 66 Fed. 915; *Railroad Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282; *Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co.*, 22 U. S. App. 102, 9 C. C. A. 314, and 60 Fed. 993. Indeed, the principle of this qualification is now the accepted doctrine in the English courts, including the house of lords, and in all the courts of all the states of the Union, so far as the cases presenting the question squarely have come under our

examination. See 7 Am. & Eng. Enc. Law (2d Ed.) p. 387; 1 Shear. & R. Neg. (5th Ed.) § 99.

In view of what has been said, it is hardly necessary to add that the principle of this qualification is based upon the ground of negligence only, and the element of intentional or willful wrong is not essential to render the principle applicable. That this is true is a proposition so clearly deducible from the cases referred to as to admit of no question or discussion. We think this well-established qualification of the general rule was applicable to the facts of this case. There was a conflict in the evidence, as we have seen, as to the distance in which a passenger train, under the circumstances of the one in question, might be stopped, and there was a similar conflict as to the distance at which the engineer first became aware that the object ahead was a child. In view of the extreme limits of the distance in both respects, which appear in the evidence, we are of opinion that the court could not say, as a matter of law, that the jury might not justifiably conclude upon the whole of the proof that the engineer might, by the exercise of reasonable care and skill, have avoided the injury. We think the court properly submitted that question to the jury upon the disputed facts of the case, and that there was no error in the court's refusal to withdraw the case from the jury. *White v. Van Horn*, 159 U. S. 3, 15 Sup. Ct. 1027; *Railroad Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491.

The only remaining assignments of error relied on in argument are based upon the court's refusal to give certain special charges in relation to the measure of damages. The court's instruction to the jury upon this subject was as follows:

"Now, what do I mean by pecuniary loss? I mean that you are to estimate, as far as you may, what, had the child lived, would those who sue here, its parents and next of kin, receive in money from that child and its earnings. Therefore you are to estimate—First, how long it would have been likely to live; second, if it had lived, what would have been its earning capacity; third, assuming that it would have earned money, how much of that money would have come to the relatives. And in that connection you ought to consider the fact that for a number of years, until it was 14 years of age, there was no probability that it would earn anything, and there was every probability that it would be a burden upon the parents."

In this instruction the jury's attention was correctly called to the proper elements of damage, and the purpose of the special instructions seems to have been to have the court apply the principles for the injury in a somewhat mathematical way, by stating an account between the probable income from service of the child and the expense of education and maintenance. The principles under which damages were to be assessed were correctly and explicitly given, and the details of estimating the damages were within the province of the jury. The special instructions were not different in substance or effect from the court's charge upon the same subject, which was not excepted to, nor subject to legal objection. The only difference was in mode of statement and the extent to which details were given. The law having been correctly stated in the general instruction, the court was not required to repeat the same

statement in substance in a special instruction. *White v. Van Horn*, 159 U. S. 3, 15 Sup. Ct. 1027; *Coffin v. U. S.*, 162 U. S. 664, 16 Sup. Ct. 943; *Railroad Co. v. Leak*, 163 U. S. 280, 16 Sup. Ct. 1020.

Two other objections are made in the assignments of error, but these are not discussed in the brief for plaintiff in error, and apparently not relied on. In view of the record, we think they are clearly not well taken, and do not require special consideration. Judgment affirmed.

TUTTLE v. CLAFLIN.

In re LEE et al.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 119.

1. **APPEAL—RECORD—MOTION TO STRIKE OUT.**

Where several different proceedings are pending below, arising in the same original suit, and an appeal is taken from a decree rendered in one of them, matters embodied in the record which relate only to the other proceedings will be stricken out on motion.

2. **SAME—PARTIES.**

An appeal cannot be dismissed on the ground that the appellants are not parties, where, though they are not parties to the record in technical form, they were made parties by an order of the court below, so as to be entitled to appeal from the decree.

3. **SAME—APPEALABLE FINAL DECREE.**

A decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudges that they are entitled to compensation to a definite amount and have a lien therefor on a fund in court, and directs payment thereof, is a final appealable decree, although the residue of the fund may not have been finally disposed of.

4. **ATTORNEY AND CLIENT—LIEN FOR COMPENSATION—AUTHORITY TO RETAIN.**

Where an assignee for benefit of creditors, who was engaged in prosecuting a suit for infringement of a patent belonging to the estate, contracted with a third person, who was suing the same party for infringement on another patent, to unite their interests for their mutual benefit, and authorized such third person to carry on or settle the litigation at his own expense, and divide the net amount recovered equally between them, *held*, that the latter had authority to employ a solicitor and counsel, who should be entitled to a lien for their fees on the fund recovered by their efforts. 86 Fed. 964, affirmed.

5. **ATTORNEYS AND CLIENT—CONTRACT FOR COMPENSATION.**

After entry of a decree in a trial court for merely nominal damages, counsel for complainant entered into a contract with him whereby counsel agreed to prosecute an appeal, and use all reasonable efforts to secure a reversal, complainant agreeing to pay all necessary disbursements, and to give counsel 20 per cent. of the gross amount of any recovery which should be paid, after deducting the expenses and disbursements. A reversal of the decree was thereafter obtained with directions for a substantial recovery, and thereupon the opposite party moved the court for a modification of the proposed mandate, which motion was successfully opposed by complainant's counsel. Application was then made to the supreme court for a writ of certiorari, which motion was also successfully opposed by plaintiff's counsel. *Held*, that the contract for compensation covered, not merely the services rendered in procuring the reversal, but also the subsequent services rendered in both courts.

Appeal from the Circuit Court of the United States for the Southern District of New York.

After the final decree had been entered in the cause of Tuttle, Trustee, against Clafin, for the payment of \$43,557.27 to the complainant, and before April 16, 1897, the Union Trust Company of New Haven, Conn., and other creditors of the estate of the Elm City Company, brought a bill in equity in the circuit court for the Southern district of New York to restrain George H. Wooster, who, under three contracts with Tuttle, trustee, was authorized to collect the judgment, and Mr. Milliken, his solicitor, from collecting it, upon the ground that these contracts were void; and praying, among other things, that the fund, when collected, should be transmitted to the probate court in New Haven, and, in the alternative, that a master should be appointed by the circuit court to ascertain the amount of the sums, which should be immediately payable to Wooster, Milliken, and Lee & Lee, who were made defendants. A motion for a temporary injunction restraining Wooster and Milliken from collecting the judgment was made returnable on April 16, 1897, at which time the circuit court preferred that the judgment should be paid into court, and deposited in the designated depository, than that it should remain unpaid during the pendency of this new litigation, and ordered that the defendants place in the depository of the court, on or before April 19, 1897, the amount of the judgment, which was done, and it was satisfied of record. The motion for preliminary injunction was withdrawn. On June 14, 1887, Benjamin F. Lee and W. H. L. Lee, partners as Lee & Lee, brought their petition in the matter of this fund, averring the facts in regard to their employment in the original suit; their services in the various proceedings and hearings before the circuit court, the master, the circuit court of appeals, and the supreme court; that they have a lien upon the deposited fund for the payment of their reasonable fees, which the complainant in the original suit was unable to pay; and averring the existence of the Union Trust Company litigation, the progress of which had become uncertain by the interposition of demurrers, and praying for an order directing payment of their fees, and a reference to a master to ascertain the amount which was due. In the Union Trust Co. Case an amended bill was filed on April 26, 1897, and additional parties were made. Upon an order upon the parties in Tuttle against Clafin and the parties in the Union Trust Company suit to show cause, an order was made, on September 1, 1897, referring to a master to report in regard to the compensation of Lee & Lee, and W. T. B. Milliken, the solicitor for the complainant in the Clafin Case. The report was made, exceptions were filed and were overruled, the report was confirmed by the circuit court (86 Fed. 972), and an order, dated April 6, 1898, was made directing a payment from said fund of \$11,434.90 to Lee & Lee, and \$3,500 to W. T. B. Milliken, with interest from February 11, 1898, the date of the master's report. The Union Trust Company and others, known as the opposing creditors, appealed from this order.

Edmund Wetmore and John K. Beach, for appellants.

W. H. L. Lee and H. T. Kingsbury, for Lee & Lee.

W. T. B. Milliken, pro se.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Two preliminary motions by the appellees are to be disposed of prior to a consideration of the merits of the appeal. Since the entry of final judgment in the Clafin suit, there have been three independent proceedings at the foot of the decree: (1) The present proceedings at the suit of Lee & Lee. (2) A proceeding upon the petition of George H. Wooster for the repayment of his disbursements in the litigation. (3) A motion to substitute Charles H. Trowbridge, as trustee of the Elm City Company, in the place of Tuttle, as complainant in the Clafin suit. This motion was denied.

There are in the transcript of record, from printed pages 174 to 178, inclusive, copies of a stipulation and of two orders of court, and the opinion of the court relative to the second and third proceedings only. The present motion is to strike from the record that part of it which is included in these pages, because they relate to different proceedings from the one in which this appeal is taken. The position of the appellees is well founded, the papers are not properly a part of the transcript of record, and the motion is granted, except as to the order upon the application of George H. Wooster.

The second motion is to dismiss the appeal because the order was not appealable, and because the appellants are not parties to this cause or proceeding. The history of the application of the appellees, which has been heretofore given, shows that, while they are not parties in technical form, they were in fact made parties by the order of the circuit court, and are properly appellants. That the order of the circuit court of April 6, 1898, was a final decree from which an appeal could be taken, was decided in *Trustees v. Greenough*, 105 U. S. 527. The order, like those in that case, was "a final determination of the particular matter arising upon the complainant's petition for allowance." The motion is denied.

It appears from the master's report that the patent in the *Clafin* Case was owned by the Elm City Company, an insolvent corporation, which made, in 1876, an assignment of its assets to Tuttle, as trustee for its creditors. The suit was commenced on August 1, 1878. In June, 1883, Tuttle, as trustee, and George H. Wooster, who was the owner of patents known as the "Pipo Patents," and upon which he had also a suit against H. B. Clafin & Co., agreed that each would push, at his own expense, the suits to a final determination, and divide the gross proceeds equally. In 1888 another agreement between the same parties was made, by which Tuttle, as trustee, made Wooster his attorney to prosecute the suits, with full power to settle and compromise them and to employ counsel. In the same year another agreement was made, by which Wooster agreed to hold Tuttle, as trustee, harmless from all costs and expenses arising out of said suits, but Wooster was to be reimbursed out of the gross proceeds, and before the division thereof, his expenses and those which he might become liable to pay. The poverty of the Elm City Company's estate induced Tuttle to make these agreements. In 1890, Wooster retained B. F. Lee, Esq., and he had also retained W. T. B. Milliken, Esq. Mr. Lee was the active patent lawyer in the case. Wooster paid the expenses incidental to the suit, amounting, as he says, to \$5,438.31. Tuttle paid nothing and took no part in the litigation, except to tell Milliken that he had no funds and no collectible assets, and that Milliken must look for his compensation alone to the funds which might be recovered.

The appellants insist that the contracts made by Tuttle as trustee were improvident and ultra vires, and that the entire fund should be sent to the probate court at New Haven, which has charge of the settlement of the estate of the Elm City Company, and which should make the proper allowances, if any, for services. Inasmuch as Wooster was fully clothed with the apparent power to employ counsel,

as the trustee took no part in the litigation, paid and proposed to pay nothing, and relieved the estate from all liability in case of non-success, and as the fund was obtained by the disbursements of Wooster and the services of those whom he employed, they have an equitable lien upon it, and the circuit court, which properly has control of the fund, should adjust the amount of the liens for these services before transmitting it to another jurisdiction. *Trustees v. Greenough*, 105 U. S. 527; *Railroad Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387.

The master made a careful report, which considered the value of the services of Messrs. Lee & Lee, based upon a quantum meruit, and found that they were reasonably worth the sum of \$13,000, from which should be deducted \$1,850, a sum already paid by Wooster, leaving a balance due of \$11,150, to which should be added \$284.90 for disbursements which they made. The contest before the master was between Lee & Lee and the opposing creditors, so called. After the payment of \$1,850 had been made, and after a decree in the *Claylin Case* for six cents damages and such an apportionment of costs that a balance would be in favor of the defendants, and after an appeal had been taken, B. F. Lee and Wooster entered into an agreement, dated December 29, 1894. The important part of the agreement, after a recital of the condition of the suit, is as follows: Lee agreed to act as counsel for Wooster in the prosecution of said appeal, and to use all reasonable and proper efforts to secure a reversal of said final decree. Wooster agreed to pay all disbursements connected with said suit and with said appeal that had already been made or incurred, or that might thereafter be incurred, other than fees of solicitor and of counsel, and agreed that Lee should receive 20 per cent. of the gross amount of any recovery which should be paid in said suit, after deducting from said total recovery and payment all expenses and disbursements of litigating said suit therefore, or which might thereafter be expended or incurred, apart from such 20 per cent.

The value of the whole services, estimated upon a quantum meruit, would probably exceed the 20 per cent. mentioned in this contract. The proper construction of the contract is therefore an important question. Was it confined in point of time to the date of the opinion of the first appellate court, or did it include all services before that court, and exclude any possible services before the supreme court? After the decision of the court of appeals, the defendants made a motion to modify the proposed order for a mandate so that the case should be sent back to the master for further evidence. This motion was based upon affidavits which were intended to show that a different state of facts could be proved before the master. Another motion was made upon the ground that Tuttle, as trustee, had no title to the patent in suit. After the denial of these motions, the defendants applied to the supreme court for a writ of certiorari, which was opposed by a brief and an oral statement, and was denied, so that a large amount of work was performed after the opinion of the court of appeals was filed.

We think that this contract should not be construed as limited in point of time to that date, or to a mandate which might forthwith

follow the opinion, but it included whatever contests and arguments should take place in the appellate court. It was to be expected that some motion would be made by the defendant in case of non-success, and the contract looked to a compensation based upon a permanent reversal of the decree of the circuit court, for the new agreement would have been an inadequate benefit to Wooster if a new compensation upon the basis of a quantum meruit was to commence after a successful argument in the court of appeals. We think that the contract meant to include services necessary to render a reversal valuable and remunerative, and to cover those rendered in opposing a writ of certiorari. Mr. Lee entered into a contract for services for a compensation based upon the successful attempt to reverse the decree, which meant to keep it reversed, so as to secure a fund out of which he could be paid, and a defense against the application for a writ of certiorari is one of the not unusual incidents to success in the first appellate court. The compensation to Lee & Lee must, therefore, be governed by the contract, and should be estimated as follows: The amount of interest paid by the depositary, being at the rate of $1\frac{1}{2}$ per cent. per annum, is to be added to the amount of the judgment, from which should be deducted Wooster's claim of \$5,438.31, and Lee & Lee's disbursements of \$284.90, and the amount of 20 per cent. upon the balance, plus \$284.90, with interest from February 11, 1898, the date of the master's report, upon the amount of the fund not heretofore paid to Lee & Lee, should be ordered paid by the clerk of the court to them. If a payment has been made from the fund to Lee & Lee under the order of April 6, 1898, such amount will be regarded as part payment of the sum named in the decree. We do not include Milliken's solicitor's fees in the disbursements to be deducted from the judgment, because the contract provided that these fees were not to be paid by Wooster, and the expenses which were to be thereafter deducted were those which he had paid or was thereafter to pay.

In regard to Mr. Milliken's fees of \$3,500, there was no testimony before the master which characterized this sum as an unreasonable amount. The master has found it to be reasonable, and, without testimony or further knowledge upon the subject, we cannot pronounce it excessive. The order in regard to his fees is affirmed.

The order in regard to the amount to be paid Lee & Lee is modified as hereinbefore specified, and the cause is remitted to the circuit court, with directions to enter a modified decree in accordance with the directions contained in this opinion. The appellants and the appellees will each pay their own costs in this court. The appellants will pay one-half the cost of printing the record, and Lee & Lee and Milliken will each pay one-quarter of said cost.

SELS v. GREENE et al.

(Circuit Court, N. D. California. July 5, 1898.)

No. 12,224.

ACTIONS OF TORT—JOINDER OF DEFENDANTS—AMENDMENT.

In an action against a certain individual and other parties, including a reclamation district, an allegation that defendants entered upon plaintiff's lands against his will, etc., and excavated a ditch, shows that the gravamen of the action is a joint tort; and as an action may be maintained against one or all of the joint tort feorsors, or as many of them as plaintiff chooses, an amendment to the complaint, omitting the reclamation district as a defendant, does not change the cause of action.

This was an action at law to recover damages, and was brought by P. J. Van Loben Sels against Lester D. Greene and others, including reclamation district No. 551. The case was heard on motion to strike from the files the amended complaint, and also on a demurrer to the amended complaint.

Olney & Olney, for plaintiff.

W. A. Gett, Jr., and Elwood Bruner, for defendants.

MORROW, Circuit Judge. This is an action for damages in the sum of \$50,000, claimed to have been caused by the defendants entering upon the plaintiff's lands, and excavating and maintaining ditches thereon, whereby the plaintiff's lands were flooded. A demurrer was interposed to the original complaint, which was sustained on the ground that reclamation district No. 551, one of the defendants, was not liable to actions for damages, under the laws of the state of California; being a "public agency" discharging public functions in the reclamation of swamp and overflowed lands. See opinion of the court, 81 Fed. 555. The plaintiff has amended his complaint by omitting reclamation district No. 551 as a defendant, and by omitting, also, Sol Runyon, one of the original defendants, —it appearing that he had died since the institution of the action, —and substituting his executors as defendants in his stead and place. Some other amendments were made, which are unimportant, and need not here be considered.

A motion is now made by the present defendants to strike the amended complaint from the files of the court, and a demurrer has also been interposed. It is contended that the plaintiff, in omitting the reclamation district from the amended complaint, has introduced a new cause of action. The gravamen of the action, from the allegations both of the original and the amended complaint, is that the defendants have committed a tort on the plaintiff's property. It is averred in the amended complaint that "in the years 1894 and 1895 Sol Runyon, now deceased, and the defendants other than Sol Runyon's executors, entered upon the lands of plaintiff, against his will and in defiance of his protest, and excavated, and have ever since maintained, a large ditch or canal," etc. Other allegations of a similar purport follow. From these the deduction is unavoidable that the gravamen of the action is a joint tort; that is to say, that

there was a community of design and action between the defendants in entering upon the plaintiff's lands, and excavating and maintaining a large ditch or canal, as well as other ditches or canals. What part each of the defendants sued took in the trespass, is not specifically stated. But, to render parties jointly liable on tort, it is not necessary that they should all unite in committing it. However, there must be some unity between the tort feorsors in the commission of the tort; and such unity must be actual, and not casual. *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. 39. See, also, *Tompkins v. Railroad Co.*, 66 Cal. 164, 4 Pac. 1165; *Learned v. Castle*, 78 Cal. 460, 18 Pac. 872, and 21 Pac. 11; *Miller v. Ditch Co.*, 87 Cal. 430, 25 Pac. 550; *Dawson v. Schloss*, 93 Cal. 198, 29 Pac. 31; *Cooley, Torts* (2d Ed.) p. 153, and cases there collated. If it be a joint tort, it is well settled that the plaintiff may sue all of the joint tort feorsors, or some of them, or one or each of them, as he may see fit. See cases cited *supra*. Of course, there is the limitation that he can obtain but one satisfaction of judgment as against all of the joint tort feorsors. Therefore the objection urged by the defendants, that the plaintiff, by omitting the reclamation district, has, in effect, introduced a new cause of action, is devoid of merit. Particularly is this so in view of the fact that the reclamation district was dropped from the case, and omitted in the amended complaint, because of the decision of this court that it was not liable to an action for damages under the laws of this state as they now stand. Furthermore the practice of adding or striking out the name of a party by amendment is permitted by the Code of Civil Procedure of this state. Section 473 of that Code provides that "the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party." To deny the plaintiff the right of dropping the reclamation district from the case would certainly not be in furtherance of justice; for, this court having held that the reclamation district could not be sued for damages, unless the plaintiff is permitted, by an amended complaint, to omit the reclamation district as a defendant, and sue the remaining defendants, he would obviously be unable to sue the other defendants except by bringing separate actions. This he certainly is not required to do.

Some further technical objections are raised by the defendants' counsel, to the effect that the absence from the case of the reclamation district creates a misjoinder of parties, and that the complaint, as amended, indicates that the defendants, if liable at all, are responsible for separate torts committed by each, and that, therefore, they should be sued separately. But these objections are covered substantially by the view I take of the allegations of the amended complaint, viz. that it states the commission of a joint tort. This view is fatal to the objections raised of misjoinder, and that the defendants should be sued separately. It is unnecessary to elaborate further on the objections raised. The motion to strike out will be denied, and the demurrer overruled.

SELS v. GREENE et al.

(Circuit Court, N. D. California. July 5, 1898.)

No. 12,226.

RECLAMATION DISTRICTS—LIABILITY TO SUIT.

A district organized under Pol. Code Cal. §§ 3440-3491, for the reclamation of swamp and overflowed lands, being a public agency, is not liable to be sued at law or in equity for negligence or for a nuisance. *Sels v. Greene*, 81 Fed. 555, followed. It seems, however, that the trustees, under whose control and supervision the district is, may be enjoined if they act without authority, or willfully or maliciously.

This was a bill in equity by P. J. Van Loben Sels against Lester D. Greene and others to abate a nuisance. The cause was heard on demurrer to the amended and supplemental bill.

Olney & Olney, for complainant.

W. A. Gett, Jr., and Elwood Bruner, for defendants.

MORROW, Circuit Judge. This is a demurrer to the amended and supplemental bill. A demurrer to the original bill was sustained by this court on June 7, 1897. For opinion, see 81 Fed. 555. The case at bar is a companion case to No. 12,225, also a suit in equity, and to case No. 12,224, 88 Fed. 127, an action at law. The three cases all relate to the same subject in controversy. The two suits in equity are brought by the complainant to abate a nuisance alleged to have been caused by the defendants, including reclamation district No. 551, in excavating and maintaining certain ditches on complainant's lands, whereby they were flooded and damaged. The action at law is brought to recover damages claimed to have been caused by the defendants in entering on complainant's lands, and excavating and maintaining ditches thereon. The demurrer interposed to the amended complaint in the action at law I have considered separately in an opinion handed down to-day. 88 Fed. 127.

The question raised upon the demurrer to the amended and supplemental bill in this and the other suit (No. 12,225) in equity presents the same question which was argued on the demurrer to the original bills in both cases; and that is whether reclamation district No. 551, organized under the provisions of the Political Code of the State of California (sections 3440-3491, inclusive) for the purpose of reclaiming swamp and overflowed lands, can be sued. It was held by me that a reclamation district could not be sued, either at law or in equity. See opinion, 81 Fed. 555. The arguments ably presented on both sides upon the present demurrer do not change the opinion held and expressed by me on the demurrer to the original bill. Reclamation districts organized under the provisions of the Political Code of California (sections 3440-3491, inclusive), while performing, in a sense, public functions, in the reclamation of swamp and overflowed lands, are not public municipal corporations. It may even be doubted whether they may be termed, with absolute accuracy, "quasi public corporations." They appear to be more properly designated as "public agencies" for certain particular purposes, to wit, reclamation of

swamp and overflowed lands. The nature and functions of reclamation districts organized under the provisions of the Political Code of this state have been carefully considered by the supreme court of the state in *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016 (the same district proceeded against in the case at bar), and in *Hensley v. Reclamation Dist.*, 53 Pac. 401. In the case last cited it was said:

"They [reclamation districts] have been called 'quasi public corporations.' They are at least 'public agencies.' [Citing *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016.] But, if considered corporations, they have only such powers and have only such liabilities as are prescribed by the law which creates them. They are not corporations organized under the provisions of the Civil Code. Their characters are determined by the provisions of the Political Code, from which they derive whatever legal existence they have. The law which creates them does not anywhere provide that they may be sued, and they can sue only for one purpose; that is, to collect assessments. There is no provision for perpetual succession, and there are only two or three usual powers of a corporation granted them. If a judgment against a district could be enforced at all, it could be enforced only as against individual owners of land in the district, many of whom are brought into the district against their will; for a district may be formed upon petition of one-half of the landholders within it. The district has no property out of which a judgment could be satisfied. It is, in its essential character, a mere agency."

The point is, however, made, that unless the reclamation district can be enjoined, the complainant will be without remedy to abate the alleged nuisance. The answer to this is that, while the district itself may not be enjoined, the trustees, under whose control and supervision the district is, may be enjoined, provided that they have acted without authority, or willfully and maliciously. No reason occurs to me why the trustees cannot be enjoined, if a proper case be made out against them. They are the representatives of the district,—the public agents, so to speak, under whose authority and supervision the work of reclamation is carried on after the district is organized. It is significant, in this connection, that section 3490 of the Political Code, providing for the bringing of suits against any person who shall injure any levee or other work of reclamation in any district, specifies that the suit shall be brought in the name of the trustees of the district, or, if there be no trustees, then in the name of any landowner in the district. It will be observed that it is not provided that the suit should be brought by the district itself. The demurrer to the amended and supplemental bill will be sustained, and it is so ordered.

SANDS v. E. S. GREELEY & CO.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 120.

FOREIGN RECEIVERS—COMITY—RIGHTS OF LOCAL AND FOREIGN CREDITORS.

When a foreign receiver is obliged to invoke the aid of the court of another state in asserting his title to assets within its jurisdiction, such court will not, in the exercise of comity, recognize his title to the prejudice of the citizens of its own state, who have fairly acquired title to the assets,

either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens. But the court will make no distinction between foreign and domestic creditors when their claims are of equal validity, and it rests in the court's discretion whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver.

Appeal from the Circuit Court of the United States for the Southern District of New York.

F. G. Dow, for receiver.

H. B. Twombly, for appellant.

E. C. Perkins, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. E. S. Greeley & Co., a corporation organized under the laws of the state of Connecticut, became insolvent, and on the 6th day of October, 1896, receivers of all its property and assets were appointed by the decree of one of the courts of that state, with authority to collect and possess themselves of all the property of the corporation and all the usual powers of receivers of insolvent corporations. The corporation had a place of business in the city of New York, transacted its principal business there, and substantially all of its assets consisted of property there. Upon a bill filed in the circuit court of the United States for the Southern district of New York, alleging the insolvency of the corporation, the existence of assets within the jurisdiction of the court, and the appointment of receivers by the Connecticut court, and praying that receivers be appointed of such assets, ancillary to the Connecticut receivers, the circuit court of the United States for the Southern district of New York by its decree appointed as ancillary receivers the same persons who had been appointed by the Connecticut court, and enjoined all persons from interfering with the assets, for the collection of debts or otherwise. By an interlocutory order in the cause, the ancillary receivers were directed to advertise for claims of the resident creditors of the corporation, and, after collecting the assets, to dispose of them as the court should instruct; and the question of the disposal of any surplus remaining after payment of all resident creditors was reserved by the court. Various resident creditors proved claims against the corporation for debts contracted by it at the city of New York, among them the New York Insulated Wire Company. The New York Insulated Wire Company has appealed from an order made in the cause, transferring the fund in the hands of the ancillary receivers to the Connecticut receivers, and adjudging that such fund should not be appropriated to the resident creditors before turning over the surplus to the Connecticut receivers.

The appeal is based upon the contention that the Connecticut receivers have no title or power to collect the assets of the corporation outside of that state, and that in the state of New York the assets are primarily subject to the claims of its citizens, and will not be surrendered until they are satisfied. There are expressions in the text-books which sanction this contention. Thus, it is stated in Beach on Receivers (section 254) that "a foreign receiver will not be

permitted, as against the claims of creditors resident in another state, to remove from that state the assets of the debtor, it being the policy of every sovereignty to retain in its own hands the property of the debtor until the claims of its citizens have been satisfied."

Similar expressions may be found in some of the opinions of the courts, but an examination of the adjudications will show that the broad proposition has never been ruled, and what has been actually decided is that, when a foreign receiver is obliged to invoke the aid of the court of another state in asserting his title to assets within its jurisdiction, such court will not, in the exercise of comity, recognize his title to the prejudice of the citizens of its own state, who have fairly acquired title to the assets, either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens. *Patterson v. Lynde*, 112 Ill. 207; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Willitts v. Waite*, 25 N. Y. 577; *In re Waite*, 99 N. Y. 433, 12 N. E. 440; *Kidder v. Tufts*, 48 N. H. 121; *Paine v. Lester*, 44 Conn. 196; *Fawcett v. Supreme Council*, 29 Atl. 614; *Eddy v. Winchester*, 60 N. H. 63; *Askew v. Bank*, 83 Mo. 366; *Pinckney v. Lanaham*, 62 Md. 447; *Insurance Co. v. Wright*, 55 Vt. 526; *Baldwin v. Hosmer* (Mich.) 59 N. W. 432; *Hunt v. Insurance Co.*, 55 Me. 290; *Taylor v. Insurance Co.*, 96 Mass. 353; *Bagby v. Railroad*, 86 Pa. St. 291.

A receiver appointed in one state for an insolvent corporation has no title as such to property located in another state, and not actually in his possession. *Whart. Conf. Laws*, § 390. This is because he is appointed by a court which derives its jurisdiction from state laws which have *ex proprio vigore* no extraterritorial force, and the effect of which in other states depends wholly on the comity of the state in which their application is invoked. But by the comity extended by the several states of the Union to one another, not only from motives of respect but from considerations of mutual convenience, the right of a receiver to possess himself of assets located in a state other than that of his appointment is everywhere recognized and enforced, subject to the qualification mentioned. When property in another state has actually been reduced to his possession, he can stand upon his possessory title, and defend his rights against all others who cannot prove a better title. It is only when he is compelled to resort to the courts to obtain possession of assets that he must rely upon that principle of comity upon which alone his title rests.

When the administration extends over assets located in several jurisdictions, it is often convenient to apply, in advance, for the assistance of the different courts; hence the practice has become common of applying for auxiliary or ancillary appointments. When such an application is made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial pro-

ceedings of every other state of the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver. Ordinarily, in comity to the proceeding of another court of co-ordinate jurisdiction, it will appoint an ancillary receiver, and assume administration in aid of the primary receiver. *Trust Co. v. Miller*, 33 N. J. Eq. 155. When it appoints a receiver, the officer becomes its officer, and is completely amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. "Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state." *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773. It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver. *U. S. v. Coxe*, 18 How. 105. It is eminently proper that claimants residing within its jurisdiction should be relieved from the expense and inconvenience of proving their claims in other jurisdictions, and that provision should be made for securing to them equality of distribution in respect to the whole assets of the corporation; but there is no hard and fast rule to control the discretion of the court in making such distribution of the assets as shall be just to all creditors, and ultimately effect a ratable distribution of all the property of the corporation. *Buswell v. Supreme Sitting (Mass.)* 36 N. E. 1065; *Baldwin v. Hosmer (Mich.)* 59 N. W. 432.

Courts of justice make no distinction between foreign and domestic creditors when their claims are of equal validity. After the appointment of the ancillary receivers, all the creditors of the insolvent corporation who had not acquired some priority of lien upon its assets were upon an equal footing. None had previously acquired any, and, under the remedies given by the laws of the state, the domestic creditors could not have secured priority upon the assets in that state over the foreign creditors. *Bank v. Lacombe*, 84 N. Y. 367.

The orders which have been appealed from were a proper exercise of judicial discretion. If they had directed the appropriation of the fund to satisfy the debts of resident creditors, excluding foreign creditors except as to the surplus, the rule that equality among creditors is equity would have been ignored.

The orders are affirmed.

VIRGINIA, T. & C. STEEL & IRON CO. v. BRISTOL LAND CO.

(Circuit Court, W. D. Virginia. January 7, 1898.)

1. RECEIVERS—PROTECTION OF PROPERTY—PROCEDURE.

Proceedings by a receiver to obtain an injunction for the protection of property in his custody may be instituted by petition in the receivership suit.

2. SAME—TAXATION.

Property constructively in the custody of the court through its receiver is not subject to sale for delinquent taxes.

3. SAME—FEDERAL JURISDICTION—STATE AS PARTY.

A sale of property in the custody of a receiver for taxes is void, and, even though the state buys the property in at such sale, it acquires no title; hence a proceeding to enjoin interference with the property by persons who have attempted to redeem it from the state is not open to the objection of being a suit against the state.

J. B. Richmond, for petitioner.

Fulkerson, Page & Hurt and **H. W. Sutherland**, for respondent.

PAUL, District Judge. In this cause the receiver, **John C. Haskell**, appointed by a decree entered on the ——— day of August, 1892, filed a petition praying for an injunction against **J. L. C. Smith**, late treasurer of the city of Bristol, Va., **John D. Thomas**, **H. E. Graves**, and **Charles Burson**. The petition, after reciting the appointment of a receiver, states that the bulk of the assets coming into the hands of the receiver consists of a number of town lots situate in the city of Bristol, and of a number of purchase-money notes secured by vendor's liens on other town lots in the city of Bristol, which had theretofore been sold by said Bristol Land Company to various persons for part cash and part on credit; that there were no funds belonging to said company when the receiver was appointed, nor have any come into his hands, out of which to pay current expenses of the property, taxes on the same, and other charges of the receivership. It further states:

"That a number of the aforesaid town or city lots, some of which are owned by said company and some on which there are liens as aforesaid, have been returned delinquent for unpaid taxes, and your petitioner has not paid these taxes, partly because he is advised that there is a question about the regularity of their assessment, but principally because he has had no funds with which to meet them. Your petitioner further represents that various individuals, particularly **John D. Thomas**, **H. E. Graves**, **Charles Burson**, and others, claiming to proceed under certain statute laws of the state of Virginia, are attempting to defeat the possession, title, and ownership of your receiver in and to said lots by filing applications with the clerk of the corporation court of the city of Bristol, asking to be allowed to redeem said lots from the taxes aforesaid, and seeking thereby to acquire title and possession to said lots. The proceedings under which said parties are now making these attempts are the delinquent tax returns made by one **J. L. C. Smith**, former treasurer of said city, and certain attempted sales made by him to the auditor of the state of Virginia. Your petitioner is informed, believes, and charges that the said parties have taken said proceedings and have done the acts aforesaid with full knowledge of the said receivership. Your petitioner avers that if these parties are allowed to defeat his title to said lots that the assets of the Bristol Land Company will be practically destroyed. Your petitioner is advised that any lien of the state of Virginia

will be amply protected by this court and provided for in the final distribution of the assets, but that during the receivership your petitioner's title and possession will be protected."

The prayer of the petition is that said John D. Thomas, H. E. Graves, Charles Burson, and J. L. C. Smith, former treasurer, and all other persons, "be inhibited and enjoined from doing any such acts as are referred to in this petition, or in any manner interfering with any of the property or assets of the receiver of the Bristol Land Company; and that a rule be issued against said parties" requiring them "to show cause, if any they can, why all their aforesaid acts and proceedings relative to the sale or purchase of any of the lands of the Bristol Land Company for alleged taxes shall not be annulled, why they shall not be permanently enjoined from any further acts therein, and why the said John D. Thomas, H. E. Graves, and Charles Burson shall not be dealt with for their contempt of this court."

A temporary injunction was awarded against the defendants, and a rule requiring them to show cause why the injunction should not be made perpetual, and why they should not be fined and attached for interfering with property in the hands of the receiver.

The defendant J. D. Thomas files a demurrer to the petition. The substance of the grounds assigned in the demurrer is:

"(1) That the plaintiff is not entitled to proceed by petition upon the matters set forth, and is not entitled to bring the defendant into the said cause in which said petition is filed for the purpose of litigating the matters set forth in said petition, but that the plaintiff's proceedings, if he is entitled to proceed as to the matters set forth in said petition, is by a bill in equity. (2) That the commonwealth of Virginia is the owner of the lands mentioned in the petition, and therefore interested in the subject, and, inasmuch as it cannot be made a party defendant in such cause without its consent, this court is without jurisdiction."

To the rule awarded on the petition the defendants Smith, Thomas, and Graves file their separate answers.

The defendant J. L. C. Smith in his answer says:

"This respondent was the treasurer of the city of Bristol, but his term of office as such terminated on the 30th day of June, 1896, and since that time this respondent has not acted as treasurer; that all acts done by him in the premises were done officially as such treasurer; that he has no interest whatever in the subject-matter of said rule, or in the petition upon which said rule was issued. (2) That during the time respondent was treasurer of the said city of Bristol he, under and pursuant to the statutes in such cases made and provided, made sale of certain lots of land standing in the name of the Bristol Land Company, on the — day of December, 1893, and on the — day of December, 1894. Such sales were made under and pursuant to the laws of the state of Virginia providing for the sale of lands returned as delinquent for the nonpayment of taxes, and the sales made by respondent were made after such advertisement as is required by the statute, and otherwise in conformity to the statutes relating to the sale of delinquent lands. (3) That the lands of the said Bristol Land Company so sold by respondent were purchased in the name of the auditor of public accounts, for the benefit of the commonwealth of Virginia and the city of Bristol, and report of said sales made as required by law."

The separate answers filed by the other defendants are substantially the same, and that of John D. Thomas will serve to show the defenses set up by all. The answer of Thomas is as follows:

"(1) Respondent admits that John C. Haskell was appointed receiver in said cause, and that he duly qualified as such, and respondent presumes that he took charge of all the property and assets of the Bristol Land Company, but, not knowing the fact, respondent neither admits nor denies said statement. Respondent admits that said petitioner has continued to act as receiver of said company. (2) Respondent presumes it to be true that the bulk of the assets coming into the hands of the petitioner as receiver consisted of a number of town lots and a number of purchase-money notes secured by vendor's liens on other town lots, but respondent does not know the fact, and therefore can neither admit nor deny said statement. (3) Respondent does not know the condition of the Bristol Land Company at the time of the appointment of the petitioner as receiver, and can therefore neither admit nor deny the statement that at the time of said appointment there were no funds belonging to said company out of which any demands could be paid, and that no funds have come into the hands of the petitioner since his appointment with which to pay the current expenses of the property, taxes upon the same, and other charges of the receivership. (4) It is admitted that a number of the said town or city lots, some owned by said company and some on which said company had liens, have been returned delinquent for unpaid taxes, and it is also admitted that said petitioner has not paid these taxes, but, not knowing the reasons for said failure, respondent cannot admit, but on the contrary denies, that said failure to pay said taxes was 'partly because he is advised that there is a question about the regularity of the assessment'; and, while it may be true that said failure was principally because he has had no funds with which to meet them, yet respondent can neither admit nor deny that such is the fact. (5) Respondent denies that he, claiming to proceed under certain statute laws of the state of Virginia, is attempting to defeat the possession, title, and ownership of said receiver in and to said lots by filing applications with the clerk of the corporation court of Bristol asking to be allowed to redeem said lots for the taxes aforesaid, and seeking thereby to acquire title and possession to said lots. Respondent denies that there is any title or ownership of said lots in the said petitioner, and denies that he is in any manner interfering with the possession of said lots by said receiver. The truth is that respondent, acting under the provisions of the statute laws of Virginia, has filed applications to purchase forty-five or forty-six lots situate in the city of Bristol, which lots were then owned by the commonwealth of Virginia, under and by virtue of a purchase made by the auditor at a sale for delinquent taxes made by J. L. C. Smith, treasurer of the city of Bristol, on the 5th day of December, 1894, which purchase was made by said auditor more than two years before the filing of respondent's said applications. The statute under which respondent filed said applications is to be found in the Acts of the General Assembly (Sess. 1895-96) pp. 219, 220. Respondent herewith files a list of said lots from the records of the corporation court of the city of Bristol. Whilst respondent admits that by said applications he was endeavoring to obtain the legal title to said lots, yet respondent denies that he has made or is making any effort or attempt to interfere with the possession of said lots by said receiver. Respondent further states that he complied with the statute referred to in making said applications, and that notices of said several applications were duly served as required by said statute. (6) Respondent admits that his proceedings in regard to said applications were made and taken after he had been informed that said receiver had been appointed. (7) And, stating new matter, respondent says that the time, thirty days, after the giving of said notices of said applications, has expired, and that said lots have not been redeemed by the payment of the taxes thereon."

The first objection raised by the demurrer to the petition is that the proceedings by the receiver to obtain an injunction cannot be taken by petition. This objection cannot be sustained. Where, in a pending suit, the court has in its custody property which it has by its orders placed in possession of a receiver, and an injunc-

tion becomes necessary to the protection of such possession, the proper course is for the receiver to file a petition in the same suit, invoking the power of the court to protect his possession and control of the property. He is not required to bring a separate suit in equity. Such a proceeding is entirely unnecessary, for "the receiver is the ministerial officer of the court which appoints him, and his possession is exclusively the possession of the court, the property being regarded as in the custody of the law." 20 Am. & Eng. Enc. Law, 137. Such proceeding is necessary as will call the attention of the court to the fact that its jurisdiction is being invaded. This is an interlocutory application, which is a request not incorporated in a bill, but is made to the court for its interference in a matter arising in a cause, either before or after a decree. An interlocutory application is made by motion on petition. *Fost. Fed. Prac.* (2d Ed.) § 193. "Petition and rule for attachment is a proper method to pursue in a proceeding for contempt in disobeying an order of court, although not the only remedy." *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 52 Fed. 937. The receiver in this case has pursued the same course, that by petition and rule, as was taken in *Ex parte Chamberlain*, 55 Fed. 704. The case *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, involved the validity of the proceedings in *Ex parte Chamberlain*, *supra*. The court said:

"The property in question was in the custody of the circuit court in a case within its jurisdiction and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and, in order to sustain the receiver's application, the ordinary grounds of equity interposition were not required to be set forth."

Further citation of authorities on this question is unnecessary.

As to the second ground of demurrer, namely, "that the commonwealth of Virginia is the owner of the lands mentioned in the petition, and therefore interested in the subject, and, inasmuch as it cannot be made a party defendant in such case without its consent, this court is without jurisdiction." The same question was raised before the supreme court in *Re Tyler*, *supra*, and the same argument urged as in this case to convince the court that to restrain an officer of a state to prevent his seizure of property in the custody of the court was a suit against the state itself. But the court said:

"The stress of the argument, however, on behalf of the petitioner, is placed upon the proposition that this proceeding is void because it is in fact a suit against the state, and forbidden by the eleventh amendment. But this begs the question under consideration. The petitioner was either in contempt or he was not. This property was in the custody of the circuit court under possession taken in a cause confessedly within its jurisdiction, and, if such possession could not be lawfully interfered with, the petitioner was in contempt. And, apart from the question of the validity of such legislation, we know of no statute of South Carolina that attempts to empower its officers to seize property in the possession of the judicial department of the state, much less in that of the United States. The object of this petition was, we repeat, to protect the property, but, even if it were regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax, we ought to add that, in our judgment, it would not be obnoxious to the objection of being a suit against the state."

This case is decisive of this question, and settles adversely to the defendants their contention that this is a proceeding against the state. Besides, the defendants Thomas, Graves, and Burson are in no sense officers of the state of Virginia. They are merely private citizens, acting in their individual capacity in their efforts, under the provisions of the Virginia statute, to acquire title to property in the custody of this court which by its orders it has placed in the possession of its receiver. The defense they seek to make in this proceeding against them for contempt, that it is a proceeding against the state of Virginia, is not entitled to serious consideration.

There is no evidence of any irregularity in the assessment of the taxes on these lots, and the question will not be considered.

The defendants in their answers claim that all the proceedings that have been taken by them with regard to any of the lots in the possession of the receiver were taken pursuant to the provisions of the tax laws of the state of Virginia relative to the sale of lands returned delinquent for the nonpayment of taxes. The defendant Smith says in his answer that, as treasurer of the city of Bristol, he sold in the month of December, 1893, and in the month of December, 1894, certain lots in the city of Bristol standing in the name of the Bristol Land Company, and that the same were purchased in the name of the auditor of public accounts. These sales, he claims, were made in pursuance of section 662 of the Code of Virginia, of 1887, which provides: "When any real estate is offered for sale as provided in section six hundred and thirty-eight and no person bids the amount chargeable thereon, the treasurer shall purchase the same in the name of the auditor of public accounts for the benefit of the state and county, city, or town, respectively, * * *." The answers of the other defendants show that they were proceeding to obtain title to a number of these lots so sold to the auditor of public accounts in accordance with the provisions of an act of the general assembly of Virginia. Acts 1895-96, p. 219. This act provides: "When real estate so purchased in the name of the auditor is not redeemed by the previous owner, his heirs or assigns, or some person having the right to charge the same with a debt, within two years from the date of such purchase, any person desiring to purchase it shall file an application with the clerk of the county or corporation court wherein such real estate is situated for the purchase of such real estate for the amount for which the sale to the commonwealth was made;" and the statute provides what further steps shall be taken in order that the person desiring to purchase such real estate may acquire title to the same. It is not necessary, for the purposes of this case, to recite these further provisions.

The questions to be decided in this case fall clearly within the doctrine laid down in *Re Tyler*, supra; the chief difference in the two cases being that in *Re Tyler* the seizure by the tax collector was of personal property, while in this case the property sought to be taken from the custody of the court and sold for taxes is real estate. No reason has been assigned, nor can the court conceive

of any, why the principle which protects personal property in the custody of the court from seizure and sale for taxes is not equally applicable to the protection of real estate in the custody of the court from seizure and sale for the payment of taxes. The reason of the law is applicable to both species of property. The jurisdiction of the court cannot be invaded as to either.

In *Re Tyler*, supra, the court says:

"No rule is better settled than that, when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without leave of the court; and, if any person without leave intentionally interfere with such possession, he necessarily commits a contempt of court, and is liable therefor."—citing *Wiswall v. Sampson*, 14 How. 52; *Taylor v. Carryl*, 20 How. 583; *Davis v. Gray*, 16 Wall. 203; and a number of other authorities.

It further says:

"The general doctrine that property in the possession of a receiver appointed by a court is in custodia legis, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle. The levy of a tax warrant, like the levy of an ordinary fieri facias, sequesters the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and, while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty,—an assumption carrying a contempt upon its face."

The chief defense relied on by the defendants in their answers is that Smith, the treasurer of the city of Bristol, having, under the provisions of the Virginia tax law, sold the lots in question to the auditor of public accounts of the state of Virginia for the benefit of the commonwealth and the city of Bristol, that that was a valid sale, and that the other defendants, in pursuance of the provisions of another section of the tax law touching delinquent lands, are simply endeavoring to acquire the title which vested in the auditor for the benefit of the commonwealth and the city of Bristol. If the treasurer, Smith, had no right to invade the jurisdiction of this court, and take control of and dispose of property in the hands of its receiver; if in doing this he was in contempt of this court,—then the court is at a loss to see on what principle he could make a valid sale of this property to the auditor for the benefit of the commonwealth and the city of Bristol any more than he could make a valid sale to a private person. His authority as

a tax collector to dispose of these lands as delinquent for the non-payment of taxes ceased when the proceedings were instituted for the sequestration of all the property of the Bristol Land Company. After that no person or officer, whether state or federal, not even the receiver himself, could sell any of the property except by an order of the court. A sale made in any other way or by any other person is null and void. It follows that the proceedings taken by the other defendants, Thomas, Graves, and Burson, based on the void sale made by Smith, as treasurer, to the auditor of public accounts, for the benefit of the commonwealth and the city of Bristol, are likewise null and void. The acts of all the defendants have been in contempt of the authority of this court, and are punishable as such. This being the first proceeding in this district in which the questions passed upon have arisen, and it appearing to the court from the answers of the defendants that they have not committed any willful wrong, the court will forego any action in the matter of contempt it might otherwise take. The temporary injunction will be made absolute. A decree will be entered at the present term directing a sale of all of the property of the Bristol Land Company, and providing for the payment, as first liens, of all taxes due the commonwealth of Virginia, the city of Bristol, and any of the counties in which the lands of said company are situated.

UNITED STATES TRUST CO. v. MERCANTILE TRUST CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1896.)

No. 379.

1. EQUITY—CONCLUSIVENESS OF MASTER'S FINDINGS.

Where, by stipulation and order of court based thereon, the cause is referred to a special master to take the proofs "and report the same to the court, with his findings of fact and conclusions of law thereon," the master's findings of fact are conclusive upon the court, so far as they are based on conflicting evidence, or the veracity of witnesses, or so far as there is evidence consistent with the finding. But this rule is confined strictly to findings of fact and does not include the interpretation and legal effect of documents, nor is it applicable when, by subsequent stipulation, additional evidence is introduced before the court.

2. RAILROADS—CONTRACT OF SALE AND LEASE.

One railroad company, by written contract, agreed to sell to another, and the latter agreed to buy, part of its road at a fixed price, but the contract recited that, owing to mortgages on the property, the vendor could not then make a clear title; and it was therefore further agreed that in the meantime it should lease the road to the purchaser at a fixed rental per mile. The provisions in relation to the sale and to the lease were kept distinct throughout the instrument, and a right was reserved to the lessor to re-enter for nonpayment of rent, etc. *Held* that, prior to the time when title could be transferred, the relations of the parties were those of lessor and lessee, and that, even if the contract of sale was *ultra vires* the lease was valid.

3. SAME—LIABILITY OF LESSEE FOR TAXES.

A railroad company leased part of its road to another company, the lessee agreeing to pay all taxes assessed against the leased property. Under the local laws taxes on the leased line were assessed to the lessor, as owner, in the same manner as the taxes upon the part of its road not leased; and

in the course of business the lessor paid all the taxes and then rendered bills to the lessee for the proportion due from the leased line. The assessment of all the property of the lessor, including the leased line, having been raised, it contested the same, and after long litigation the assessment was sustained. In the meantime receivers had been appointed for the lessee company, and they had remained in possession of the leased road, and had raised money to pay other taxes thereon by issuing receivers' certificates. *Held*, that their action was an adoption of the lease, and they were liable, according to its terms, to repay to the lessor their proper proportion of the judgment for the contested taxes.

4. RAILROAD RECEIVERS—ADOPTION OF LEASE—PRIORITY OF CLAIMS—TAXES.

Where one of the conditions on which receivers are appointed in railroad foreclosure proceedings is that they shall pay all claims for taxes, and the receivers adopt the provisions of a lease by continuing in the possession and operation of the leased line, a claim for taxes which the lessor company has been compelled to pay, and which, by the terms of the lease, the lessee is bound to refund, becomes entitled to priority over the mortgage debt.

5. JUDGMENT—COLLATERAL ATTACK—EVIDENCE.

In a suit by a lessor railroad company to recover, under the provisions of the lease, taxes on the leased property which the lessor has been compelled to pay by the judgment of a court of competent jurisdiction, evidence as to the assessable value of the leased line is inadmissible as being, in effect, a collateral attack upon the assessment and upon the judgment in favor of the state for the amount of the taxes.

6. RAILROAD LEASE—CONTEST OF TAXES BY LESSOR—ATTORNEY'S FEES AND COSTS.

Where a lessee railroad company is bound by the provisions of the lease to repay to the lessor taxes paid by it on the leased property, and, upon the subsequent increase of the assessment of the leased line, together with other roads of the lessor, the lessee, through its counsel, assents to a contest thereof by the lessor, which contest results in favor of the state, the lessee company, and its receiver subsequently appointed, are liable for their due proportion of the attorney's fees, costs, and interest incurred in the contest.

80 Fed. 18, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of California.

This case comes up on an appeal by the United States Trust Company, one of the defendants in the court below, from an order of the circuit court for the Southern district of California, made and entered April 7, 1897, upon the petition in intervention of the Southern Pacific Railroad Company. The order appealed from directed the receiver of the Atlantic & Pacific Railroad Company, one of the defendants to the bill brought by the Mercantile Trust Company for the foreclosure of the latter's mortgage upon the properties of the Atlantic & Pacific Railroad Company, to pay to the intervener, the Southern Pacific Railroad Company, the sum of \$48,683.74, the same being the aggregate amount of the proportion of taxes claimed to be due from the Atlantic & Pacific Railroad Company to the Southern Pacific Railroad Company for the fiscal year 1887-1888, together with a certain proportion for attorney's fees, costs of suit, interest, etc., incurred by the Southern Pacific Railroad Company in contesting and litigating the taxes for the fiscal year 1887-1888. The suit in which the intervention was filed was brought by the Mercantile Trust Company, one of the appellees on this appeal, against the Atlantic & Pacific Railroad Company, to foreclose its mortgage

against the properties of that company, executed on September 1, 1887, and known as the second mortgage. Subsequently, on June 14, 1895, an amended and supplemental bill was filed by the complainant, making the United States Trust Company, the present appellant, holder of the first mortgage against the Atlantic & Pacific Railroad Company, a party defendant. Thereafter, on October 7, 1896, the Southern Pacific Railroad Company filed its petition in intervention, asking that the receiver appointed by the court below be directed, by the order of the court, to pay to the petitioner the gross sum of \$48,683.74, claimed to be due for taxes and a portion of the expenses incurred by the intervener in litigating the taxes for the fiscal year 1887-1888, under an agreement existing between the two companies, and dated August 20, 1884. It appears that the receiver himself had previously, on August 25, 1896, filed a petition, stating that the Southern Pacific Railroad Company had made such a demand upon him, and asking for the advice and order of the court as to whether or not he should pay the same. Answers to these petitions were filed by both the United States Trust Company, the present appellant, and the Mercantile Trust Company, one of the appellees. The matter was referred, by the agreement of the parties, to a special master, "to take the proofs of the respective parties, and report the same to the court, with his findings of fact and conclusions of law thereon." On December 11, 1896, the special master duly made his report with his findings of fact and conclusions of law thereon, the effect of which was that he denied and rejected the claim for taxes, etc. Exceptions to some of these findings of fact and to all of the conclusions of law were thereupon filed by the intervener, the Southern Pacific Railroad Company. These came on for hearing before the court below, which sustained all of the exceptions, and made and entered on April 7, 1897, its order and decree, directing the payment of the claim in the full amount of \$48,683.74 and costs. See opinion of the court below, 80 Fed. 18. It is from this order and decree that the present appeal is prosecuted by the United States Trust Company, holder of the first mortgage upon the Atlantic & Pacific Railroad Company. The facts of the case bearing more or less directly on the only question at issue, viz. whether or not the claim for taxes, etc., should be paid by the receiver as against the prior mortgage liens, may best be stated in the clear and concise statement of them contained in the opinion of the court below, as follows:

On the 20th day of August, 1884, a contract was made and entered into in writing by and between the Southern Pacific Railroad Company, a corporation organized under and in pursuance of the laws of the state of California, as party of the first part, the Atlantic & Pacific Railroad Company, a corporation created and organized under the acts of the congress of the United States, as party of the second part, the St. Louis & San Francisco Railway Company, a corporation organized under the laws of the state of Missouri, as party of the third part, and the Atchison, Topeka & Santa Fé Railroad Company, a corporation organized pursuant to the laws of the territory and state of Kansas, as party of the fourth part, which recited that whereas, the party of the first part to the contract was then the owner of a certain line of railway in the state of California, particularly described therein; and whereas, it had then been agreed by and between the parties to the contract that such line of

railway should be sold by the party of the first part thereto, and purchased by the party of the second part, upon the terms and conditions therein stated; and whereas, in consequence of the lien then existing upon such line of railway under the mortgage made and executed by the party of the first part, bearing date April 1, 1875, the party of the first part could not then make clear title to such line of railway, it had then been agreed that until clear title thereto could be made, such line of railway should be leased by the party of the first part to the party of the second part upon certain terms and conditions therein stated; and whereas, the parties of the third and fourth parts were then largely interested pecuniarily in the acquisition of such line of railway by the party of the second part "by lease and purchase as aforesaid,"—the respective parties did thereupon, in consideration of the premises and the mutual undertakings and agreements in the contract stated, and for other good and valuable considerations therein acknowledged, covenant and agree to and with each other as follows:

First. The party of the first part agreed to sell to the party of the second part, and the party of the second part agreed to purchase from the party of the first part, the said line of railway, described as extending from the west end of the bridge over the Colorado river at or near The Needles, in the state of California, 242.37 miles, or thereabouts, to the easterly margin of the grounds or yards of the party of the first part used in connection with the Mojave Junction station, or with the main line of railroad of the party of the first part between Goshen and Yuma, together with the right of way therefor 200 feet in width, and the switches, sidings, turnouts, station buildings, section houses, turntables, and other appurtenances, together with the right to connect at Mojave Junction with the tracks of the party of the first part, but excluding the equipment of the road, and any interference with the right of way and depot grounds of the party of the first part at the junction mentioned, at and for the price of thirty thousand dollars a mile (that is to say, seven million two hundred and seventy-one thousand one hundred dollars), of which purchase price one-sixth part (that is to say, one million two hundred and eleven thousand eight hundred and fifty dollars) to be paid in cash, and the remaining six million and fifty-nine thousand two hundred and fifty dollars to be paid by the party of the second part to the party of the first part either in cash or in first mortgage six per cent. bonds of the party of the second part issued under and secured by its first mortgage, bearing date July 1, 1880, the prompt payment of the principal and interest of which to be legally guaranteed by the parties of the third and fourth parts to the contract, respectively; it being expressly agreed that the sale should be consummated and the purchase price of the line of railway paid whenever the party of the first part should be able to make clear title thereto, discharged from the lien of its first mortgage bearing date April 1, 1875, and from all other liens existing thereon at the time of the contract, or which may be imposed thereon by the party of the first part at any time thereafter.

Second. The contract declared that in the meantime, and until the consummation of such sale and payment of the purchase price of the property, the party of the first part agreed to and did lease and demise to the party of the second part, and the party of the second part agreed to and did hire from the party of the first part, from the 1st day of October, 1884, the said line of railway, together with the appurtenances, in the contract agreed to be sold at and for the annual rental of eighteen hundred dollars per mile,—that is to say, four hundred and thirty-six thousand two hundred and sixty-six dollars, payable semiannually during the continuance of such lease; and the party of the second part covenanted and agreed to and with the party of the first part, for itself and its successors and assigns, to pay to the party of the first part, its successors and assigns, as rental for the line of railway and appurtenances mentioned, until the consummation of the sale and the payment of the purchase price, as provided for, the sum of two hundred and eighteen thousand one hundred and thirty-three dollars on the 1st days of April and October in each and every year; and further, for itself and on behalf of its successors and assigns, to further promptly pay and discharge all taxes and assessments which should thereafter become due upon said property, or any part of it, or which might become in any wise due or owing in respect

to the same, and would maintain, repair, and replace such property so that the same should at all times be and remain in substantially as good plight and condition as it then was, the nature and character of the property being considered.

Third. The contract further provided that in case default should be made in the payment of any installment of such rental at the time stipulated for its payment, and such default should continue for thirty days, the party of the first part, its successors and assigns, might thereupon and without demand or other formality enter upon and take possession of the said line of railway, with its said appurtenances, and should be thereafter entitled to hold, retain, and enjoy the same as of its original estate therein; but, notwithstanding such entry, the party of the second part, its successors and assigns, for any and all damage in any wise resulting from the nonfulfillment of the contract, or any wrongful acts or omissions of the party of the second part, its successors or assigns, in respect to the said property, or any part thereof. The contract contained the further provision that, in case of the happening of any such default in respect to the payment of the rental provided for, and the continuance of such default for thirty days, then, and in that event, at the election of the party of the first part, its successors or assigns, the right of the party of the second part to purchase the premises under the provisions of the contract should cease and determine.

Fourth. The party of the third part and the party of the fourth part to the contract, for themselves and their respective successors and assigns, in consideration of their pecuniary interest in the stock and securities of the party of the second part, and their interest in the opening and maintenance of a through line of freight and passenger traffic over their respective lines of railway and over the line of railway then belonging to the party of the first part (the subject of the contract), and for other good and valuable considerations in the contract acknowledged, guaranteed to the party of the first part, its successors and assigns, the prompt payment to the party of the first part, its successors and assigns, of the several installments of rental, and of the purchase price therein agreed to be paid by the party of the second part to the party of the first part, and that, in case default should be made by the party of the second part in the payment of such installments or rent, or of any, or of any part, thereof, or in the payment of such purchase price at the time or times stipulated for the payment thereof, the parties of the third and fourth parts, for themselves and their respective successors and assigns, would promptly pay to the party of the first part, upon demand, any and all amounts in respect of which the party of the second part should make such default, which amounts so paid by the party of the third or fourth part should be justly chargeable by the party paying the same against all amounts then due or which might become due from it to the party of the second part for traffic over such leased lines, or any line of the party of the second part, and should be otherwise enforceable as a debt of the party of the second part to the party of the third or fourth part who should have paid the same; it being understood and agreed, however, that the parties of the third and fourth parts should not be liable in solido for such amounts, but that each of such parties should be liable only for the one-half part of the several installments of rent and the purchase price thus guaranteed by it.

The contract in question contained other provisions, not important to be specially mentioned. Under and by virtue of this contract the Atlantic & Pacific Railroad Company, on the 1st day of October, 1884, took actual possession of the line of railroad therein described, and its appurtenances, excepting only the equipment thereof, and continued in the actual and exclusive possession, use, and control thereof until the appointment by this court of receivers of the property, since which time the receivers have, respectively, been in such actual and exclusive possession, use, and control. While the Atlantic & Pacific Railroad Company was in possession, use, and control of the line of railroad and its appurtenances extending from The Needles to Mojave, under and by virtue of the aforesaid contract of August 20, 1884, to wit, on the 1st day of September, 1887, it executed a mortgage covering, among other property, its right, title, and interest thereto and therein, to the Mercantile Trust Company of New York, to secure the payment of certain bonds. The

Atlantic & Pacific Railroad Company had previously, to wit, on the 1st day of July, 1880, executed to the Union Trust Company of New York a mortgage to secure the payment of certain other bonds, which mortgage was broad enough to cover, and whose terms did cover, the after-acquired interest of the mortgagor in the line of railroad and its appurtenances constituting the subject-matter of the contract here in question. By virtue of its mortgage, and because the Atlantic & Pacific Railroad Company had made such default in its terms and conditions as entitled it to do so, the Mercantile Trust Company, on the 8th day of January, 1894, commenced suit in this court for the foreclosure of its mortgage and to obtain the appointment of a receiver or receivers of all of the property covered thereby during its pendency. That mortgage covering the entire line of road of the Atlantic & Pacific Company, the principal portion of which is situated in the territories of New Mexico and Arizona, the mortgagee had previously commenced similar suits in the United States courts for those territories, in each of which suits three receivers of the property of the mortgagor there situated were appointed. Of the portion of the mortgaged property situated within this judicial district, this court, in the suit here brought by the Mercantile Trust Company, appointed the same receivers who had been appointed by the court of primary jurisdiction. Those receivers at once qualified, and took possession of such of the line of road as extended from The Needles to Mojave, with its appurtenances. Subsequently, to wit, on June 14, 1896, the Mercantile Trust Company filed an amended and supplemental bill in its suit in this court, in which the United States Trust Company of New York was made a party defendant, as the holder of the first mortgage on the said line of road extending from The Needles to Mojave, with its appurtenances. To that amended and supplemental bill the United States Trust Company appeared by counsel. Later in the proceedings in the suit, one of the original receivers having deceased, and the remaining two having tendered their resignation, this court, following the similar action of the court of primary jurisdiction, accepted their resignations, to take effect upon the appointment and qualification of a successor or successors. Thereupon this court, still following the similar action of the court of primary jurisdiction, appointed C. W. Smith receiver of the property situated within this judicial district, who qualified as such and received from the former receivers herein the possession of said property, since which time he has been, and now is, in its actual and exclusive possession, use, and control. On the 25th day of August, 1896, the receiver, Mr. Smith, filed in and presented to this court his petition, setting forth the contract of August 20, 1884, made and entered into between the Southern Pacific Railroad Company, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railway Company, and the Atchison, Topeka & Santa Fé Railroad Company, and the continuous and exclusive possession, under that contract, of the line of road extending from The Needles to Mojave, with its appurtenances, by the Atlantic & Pacific Railroad Company and the receivers of its property ever since; and further alleging that the receivers so appointed have not disavowed that contract, but, on the contrary, during the receivership, have expressly acknowledged and admitted its terms and conditions, so far as the receivership is concerned. The petition of the receiver further states: That the receivers have at all times promptly paid to the Southern Pacific Railroad Company all taxes paid by it, or claimed to have been paid by it, upon the line of railroad described in the contract of August 20, 1884, including not only taxes assessed and levied for the years in which the receivers have been in possession of that line of road, but also for taxes which were levied and reassessed against the Southern Pacific Railroad Company for the years 1885, 1886, and 1887. That the state board of equalization of the state of California, in August, 1887, for the purposes of state and county taxation for the fiscal year ending June 30, 1888, assessed the Southern Pacific Railroad Company, as the owner and operator of a line of railroad running in more than one county in said state, consisting of 1,022.33 miles in the state of California, together with the franchises, roadway, roadbed, rails, and rolling stock, at the sum of \$16,500 per mile, and that included in that assessment and valuation was the line of railroad described in said contract of August 20, 1884. That thereafter, and in due time, the state board

of equalization of California apportioned of said total assessment of the franchises, roadway, roadbed, rails, and rolling stock of the defendant to the county of Kern the amount of \$2,476,945 of said total assessment of the railroad therein of 153.47 miles, and to the county of San Bernardino the sum of \$4,220,022 for the railroad therein of 261.47 miles. That at that time, of the line of road described in said contract of August 20, 1884, there was situated 35.64 miles in Kern county, California, and 206.87 miles in the county of San Bernardino, which constituted a part of the said 1,022.33 miles. That from the time of the execution of the said contract of August 20, 1884, to the present time the line of road described in that contract, because of the revenue laws of the state of California, has been assessed by the state board of equalization of the state of California to the Southern Pacific Railroad Company, which has, whenever it saw fit to do so, paid the taxes due upon the line of road described in said contract of August 20, 1884, and made bills therefor against the Atlantic & Pacific Railroad Company and the receivers thereof. That neither the receivers nor the Atlantic & Pacific Railroad Company have ever attempted to pay the taxes thereon, but have always waited until the Southern Pacific Railroad Company should pay the same, for the reason that in each county there were additional taxes against the balance of the lines of railroad belonging to the Southern Pacific Railroad Company, and therefore there was no way of paying the amount due upon the portion of road extending from Mojave to The Needles without paying the entire amount due from the Southern Pacific Railroad Company in each county. That when the taxes became due which were levied and assessed upon said lines of railroad of the Southern Pacific Railroad Company for the year 1888 [1887], the Southern Pacific Railroad Company failed to pay the same, and that said taxes became delinquent on the last Monday of December, 1887, at six o'clock p. m. That the total amount of taxes levied for the fiscal year ending June 30, 1888, against the Southern Pacific Railroad Company for its railroad in the county of Kern was \$34,479.07, and that upon the failure to pay the same there was added to it by the comptroller of the state the sum of \$1,723.95 as penalty. That there was levied for the same year, in the county of San Bernardino, upon said assessment upon the total lines of railroad belonging to the Southern Pacific Railroad Company the sum of \$30,468.56, and that there was added to said amount as a penalty, upon its becoming delinquent, the sum of \$1,523.42. That on the 2d day of January, 1891, the state of California caused an action to be brought in the superior court of the state of California in and for the city and county of San Francisco against the Southern Pacific Railroad Company to recover the entire amount of taxes which had been levied in the various counties upon the lines of railway owned and operated by it, including the line of railroad mentioned and described in the written contract of August 20, 1884, and seeking to recover the total sum of \$251,134.26, with 5 per cent. penalty thereon, which included the sums so levied in Kern and San Bernardino counties, as aforesaid; and that afterwards, to wit, February 3, 1893, a judgment was duly rendered in the action for the total sum of \$251,134.26, together with interest thereon from the 27th day of December, 1887, at the rate of 7 per cent. per annum, amounting to \$89,654.91, together with 5 per cent. penalty upon said principal sum, amounting to \$12,556.66, and the further sum of \$18,835.06 for attorneys' fees, and \$42.16 costs against the Southern Pacific Railroad Company. That thereafter an appeal was duly taken from that judgment to the supreme court of California, which court affirmed the judgment (38 Pac. 912) except as to the amount allowed for interest, namely, the sum of \$89,654.91, and as to the sum of \$6,278.31 allowed as attorney's fees to one A. R. Cotton. That afterwards the Southern Pacific Railroad Company appealed from that judgment to the supreme court of the United States, pending which appeal the operation of the judgment was stayed. That pending the appeal to the supreme court of the United States, and in 1894, the state board of equalization, under an act of the legislature of the state of California approved March 23, 1893, made a reassessment of the taxes due from the Southern Pacific Railroad Company on its system of railroads for the year ending June 30, 1888, and taxes having been duly levied thereon upon that reassessment, the Southern Pacific Railroad Company, in the fall of 1894, paid the first half of the taxes upon such reass-

assessment, and made a bill to the receivers of the Atlantic & Pacific Railroad Company for their proportion, amounting to the sum of \$14,902.86, which bill the receivers paid in due time. That thereafter, and in the spring of 1896, the supreme court of the United States affirmed the judgment so appealed from (16 Sup. Ct. 794), after which the Southern Pacific Railroad Company paid the amount thereof, and on the 8th day of June, 1896, made and presented to the present petitioner, as receiver, a bill for the proportion of the taxes which it claimed to be due from the receiver under the contract entered into between the Southern Pacific Railroad Company, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railway Company, and the Atchison, Topeka & Santa Fe Railroad Company. That included in the bill so made is the sum of \$5,981.87, as the portion of attorneys' fees collected by the state of California, which the Southern Pacific Railroad Company claims that the receiver should pay, and that there is also added to said bill the sum of \$12,580.36 as and for interest on the judgment from the date of its rendition to the date of its payment, at seven per cent. per annum, and being the proportion which the Southern Pacific Railroad Company claims that the receiver should pay. The petition of the receiver further alleges that the action of the Southern Pacific Railroad Company in permitting a penalty to be added to the said tax and in permitting attorneys' fees, costs, and interest to accrue thereon, was without the knowledge or consent of the Atlantic & Pacific Railroad Company or its receivers, in that neither the Atlantic & Pacific Railroad Company nor its receivers had any voice in the matter, nor was that company or its receivers ever consulted about the same. The petition of the receiver further states that the United States Trust Company objects to the payment by the receiver of any part of the bill so presented by the Southern Pacific Railroad Company, and he therefore asks the advice and order of this court as to what he shall do in the premises. The bill presented by the Southern Pacific Railroad Company, concerning which the controversy arises, is as follows:

"San Francisco, Cal., June 8, 1896.

"Atlantic and Pacific R. R. Co. to Southern Pacific Company, Pacific System.

"Amended Bill.

"Charged in
Month of
1896.

June 8. For state and county taxes as paid by Southern Pacific Company under judgment of U. S. supreme court, March, 1896, for the year ending June 30, 1888, on the franchise, roadbed, rails, rolling stock, etc., of the line from Mojave to The Needles.

Valuation returned by the So. Pac. R. R. Co. in 1887..... \$ 9,570,200

Roadbed, etc \$8,182,900

Rolling stock 1,387,300, or 14.50 pr. c.

Original assessment of So. Pac. R. R. Co. in 1887:

Amount of tax, \$25,134.26..... \$16,139 60 per mile.

Less 14.50 per cent..... 2,340 24

\$13,799 36

Kern Co., 35.64 miles R. R. at \$13,799.36 per mile, \$491,809.19,

at \$2.00 per \$100..... \$ 9,836 18

San Bernardino Co., 206.57 miles R. R. at \$13,799.36 per mile,

\$2,854,673.60, at \$1.33 per \$100..... 37,937 15

\$47,803 33

Proportion of \$47,803.33 to total tax (\$251,134.26), 19.03 per cent.

Add penalty \$12,556 66

Add attorney fees..... 18,877 22

\$31,433 88

19 per cent. of \$31,433.88..... 5,981 87

\$53,785 20

Amount brought forward.....	\$53,785 20
Interest from date of judgment, Feb. 5/93, to June 8/96, 3 years, 4 mos., 3 days, at 7 per cent. per annum.....	12,580 86
	<hr/> \$66,365 56

Less payments by company:

Bill rendered and paid, 1st Inst. of reassessment, Nov. 22, 1894.....	\$14,902 86
Interest Nov. 22/94, to June 8/96, 1 year, 6 mos., 16 days, at 7 per cent.....	1,611 16
Interest on tender of 2d Inst. of reassessment, Apr. 25/95, to June 8/96, 1 year, 1 mo., 13 days, at 7 per cent	1,167 80
	<hr/> 17,681 82
	<hr/> \$48,683 74

"I certify the above to be correct. E. B. Ryan.

"Examined. George T. Klink.

"Approved. E. C. W.

"Payment should be made to the treasurer S. P. Co., San Francisco, Cal. If any item is questioned, or explanation is required, address General Auditor, San Francisco, Cal."

The Mercantile Trust Company and the United States Trust Company each filed an answer to the petition of the receiver. By its answer the former objected to the payment of any portion of the penalty or attorney's fees included in the bill in question, and the latter protested against the payment of any portion of the bill on the ground that the tax in question became delinquent and the penalty accrued prior to the appointment of either of the receivers, and that, while the claim may be valid against the Atlantic & Pacific Railroad Company, it is invalid as against its mortgage, and consequently not a proper charge against the receiver. Thereafter the Southern Pacific Railroad Company filed an intervening petition, asking the court to direct the payment of the bill rendered by it, to which the receiver and the United States Trust Company filed answers. The matters at issue were thereupon referred to a special master to take the proofs of the respective parties, and report the same, together with his findings of fact and conclusions of law, to the court. The report of the master was filed December 11, 1896, and to the report the Southern Pacific Railroad Company filed exceptions January 4, 1897. Thereafter the report and the exceptions thereto came on regularly for hearing, at which time the receiver, by leave of the court, amended his petition by so changing the clause therein in relation to the acknowledgment and ratification by the receivers of the contract of August 20, 1884, as to make it read as follows: "And that the receivers have not disavowed said contract; neither have said receivers affirmed said contract in any manner whatever, unless their acts with reference thereto shall in law be deemed to amount to an affirmation thereof."

The first and third findings of the special master are to the effect that the Southern Pacific Railroad Company leased the line of railroad extending from The Needles to Mojave, with its appurtenances, to the Atlantic & Pacific Railroad Company, which company entered into possession thereof under such lease, and continued in such possession until the appointment of the receivers. To these findings the Southern Pacific Railroad Company excepted, on the ground that they are contrary to the terms and legal effect of the written contract of August 20, 1884.

The sixteenth finding is as follows: "The value of the leased property for the purposes of taxation for the year 1887, considered separately from any franchises or rolling stock (and taking into consideration the fact, which I find to be true, that the cost of operating the leased property has for many years prior and subsequent to the appointment of the receivers herein exceeded its earnings), was \$4,000 per mile, or a total of \$969,480, which is 5.39 per cent. of the entire valuation of the franchises, roadway, roadbed, rails, and rolling stock of the Southern Pacific Railroad Company in California, as fixed by the state board of equalization for that year." To this finding the Southern

Pacific Railroad Company excepted on the ground that all of the testimony upon which it is based was erroneously admitted, and was objected and excepted to by the intervener at the time, and upon the ground that the finding is unsupported by the evidence as given, and is not a finding of the value of the property for the purpose of taxation for the year 1887, considered separately from any franchises or rolling stock, and, further, is in entire disregard of the contract of August 20, 1884.

The nineteenth finding is as follows: "I find that 5.89 per cent. of \$251-154.26, the amount of the original tax for 1887, without interest or penalties, amounts to the sum of \$13,536.13." To this finding the intervener excepted, upon the ground that it is not within the issues presented by the pleadings.

The twenty-second finding is as follows: "I find that the action of the intervener, the Southern Pacific Railroad Company, in refusing to pay the said taxes levied and assessed for the fiscal year of 1887, ending June 30, 1888, and in defending the said suit of the state of California therefor, was wholly voluntary upon its part, and was in no manner induced or caused by any request, consent, or advice upon the part of the defendant the Atlantic & Pacific Railroad Company, represented by W. C. Hazeldine, its general attorney, or other attorney, officer, or agent having authority in the premises, or upon the part of the present or former receivers herein, or of any attorney or representative of such receivers." To this finding the intervener excepted, upon the ground that it is not only unsupported by, but is directly contrary to, the evidence in the case.

The twenty-third finding is as follows: "I find that while the original receivers and the present receiver have continued to operate and use the leased line of road since their respective appointments, the contract of lease dated August 20, 1884, has not been expressly or impliedly affirmed or adopted by them in such manner as to require the present receiver to pay the account of the intervener in question." To this finding the intervener excepted, on the ground that it is in conflict with the petition of the receiver, and with the answer filed thereto by the United States Trust Company of New York, and with the orders theretofore made by the court in the cause, and with the evidence in the case.

Exceptions were also taken by the Southern Pacific Railroad Company to all of the conclusions of law reported by the special master, the first of which is to the effect that the evidence offered and introduced before him, showing the respective amounts of taxes levied and assessed for the years 1883, 1884, 1885, and 1886, and subsequently reassessed and paid by the intervener, was irrelevant and immaterial, and should, together with the findings of fact based thereon, be disregarded. The second is to the effect that, although the amounts shown by the bill rendered by the intervening petitioner to the receiver were not paid until June 6, 1896, yet, inasmuch as such payments were made exclusively on account of taxes due for the fiscal year 1887, ending June 30, 1888, upon the assessment made by the state board of equalization for that year on all of the property of the Southern Pacific Railroad Company, including the Mojave Division, such payments do not, under the orders appointing the receivers, and under the facts shown by the evidence and found, constitute such an equitable claim, charge, or lien, as against the United States Trust Company, upon the property, or the earnings thereof in the hands of the receiver, as to require or justify the payment of the account, or any part thereof by the receiver. The third conclusion of law is to the effect that the evidence introduced by the respective parties before the master in reference to the justice and fairness of the total taxes levied for the year 1887 and other years upon the property of the intervener, which was charged by that company against the Atlantic & Pacific Railroad Company under the contract of August 20, 1884, was irrelevant and immaterial, and should, together with the findings of fact thereon, be disregarded. The fourth and last conclusion of law is to the effect that an order should be made and entered directing the receiver not to pay any part of the bill rendered by the intervening petitioner, the Southern Pacific Railroad Company, and that its petition in that behalf be dismissed.

The findings of the special master to which no exceptions were taken show, among other things, that the receivers originally appointed in this suit took

possession of the property described in the contract of August 20, 1884, and continued to operate it as a part of the Atlantic & Pacific Railroad until the appointment and qualification of the present receiver, who thereupon took possession of the property, and has ever since continued to operate it as a part of the Atlantic & Pacific Railroad; that the Southern Pacific Railroad Company returned its franchises, roadway, roadbed, rails, and rolling stock situated in the state of California, and subject to taxation by the state board of equalization, at the following valuation for the following years:

(A) For the franchise, roadway, roadbed, and rails, for the year 1885.....	\$ 8,991,350
For the rolling stock.....	1,383,050
Total	<u>\$10,374,400</u>
(B) For the year 1886, for the franchises, roadway, roadbed, and rails	\$ 9,991,300
For the rolling stock.....	1,387,300
Total	<u>\$11,378,600</u>
(C) For the year 1887, for the franchises, roadway, roadbed, and rails	\$ 8,992,592
For the rolling stock.....	1,427,350
Total	<u>\$10,419,942</u>

That the state board of equalization of the state of California increased the valuation as returned by the Southern Pacific Railroad Company for the years 1885, 1886, and 1887, as follows: "For the year 1885, the value of the franchises, roadway, roadbed, rails, and rolling stock was fixed by the state board of equalization at \$17,000,000. For the year 1886 the value of the same property was fixed by the same board at \$17,000,000. For the year 1887 the value of the same property was fixed by the same board at \$16,500,000." That the valuations so fixed by the state board of equalization of the state of California were so fixed for each year, respectively, as an entirety, and that the state board of equalization did not attempt to assess separately the value of either the franchises, the roadbed, roadway, or rails, or of the rolling stock, and that the evidence falls to show upon what, if any, particular class of property returned by the Southern Pacific Railroad Company for taxation for these years the increase in valuation was made. That the Southern Pacific Railroad Company successfully resisted in the courts the collection of the taxes assessed against it for the years 1885 and 1886 by the state board of equalization of the state of California. That in pursuance of legislation authorizing such action the state board of equalization of the state of California reassessed the property of the Southern Pacific Railroad Company in California for the years 1885 and 1886, and attempted to reassess the same property for the year 1887. That as a result of such reassessment the valuation of the said property as fixed by the state board of equalization for the years 1885 and 1886 was reduced as follows: "For the year 1885, to \$9,570,200; for the year 1886, to \$9,570,200." That the Southern Pacific Railroad Company paid the taxes so reassessed for the years 1885 and 1886, and the former receivers of the Atlantic & Pacific Railroad Company, appointed by this court January 8, 1894, paid to the Southern Pacific Railroad Company such proportion of said taxes as was demanded by the Southern Pacific Railroad Company, and at the time here stated; that is to say:

March 21, 1894.....	\$15,074 10
June 4, 1894.....	15,074 10
January 11, 1895.....	14,870 60
May 13, 1895.....	14,870 60
Total	<u>\$59,889 40</u>

That of the taxes of the Southern Pacific Railroad Company for the year 1885 the amount apportioned to the Atlantic & Pacific Railroad Company as the

taxes of the Mojave Division, by the representatives of the Southern Pacific Railroad Company, on the basis of the original assessment would have been \$52,517, and that interest on that sum at seven per cent. per annum to the date of actual payment would amount to \$29,409; making a total amount of \$81,296. That the apportionment for the year 1886 on the same basis would have been for taxes, \$52,517, and for interest \$29,400, making a total of \$81,296, or a total for the two years of \$162,592,—while, under the reassessment, the total amount paid by the Atlantic & Pacific Railroad Company for the years 1885 and 1886 was \$59,889.40. That at the time the taxes for the years 1885 and 1886 were originally assessed, and for many years thereafter the Atlantic & Pacific Railroad Company was a solvent and going concern, while at the time of the reassessment in the years 1893 and 1894 it was insolvent, and in the hands of the receivers. The findings also show that of the amount of taxes, attorneys fees, interest, and penalties originally adjudged to be paid by the superior court of the city and county of San Francisco there was a deduction of interest amounting to \$89,654.91, and of counsel fees amounting to \$6,278.31, upon a review of that judgment by the supreme court of California, which was affirmed by the supreme court of the United States. That the total value of the franchises, roadway, roadbed, rails, and rolling stock of the Southern Pacific Railroad Company in California for the year 1887, as fixed by the state board of equalization, was \$16,500,000. That of the taxes assessed against the Southern Pacific Railroad Company in California for the year 1887 the former receivers paid to the Southern Pacific Railroad Company, on the 11th day of January, 1895, the sum of \$14,902.86, which sum was paid within a reasonable time after demand made therefor, and that no subsequent demand for payment of any portion of the remainder of the taxes for 1887, as claimed by the Southern Pacific Railroad Company, was ever made until the presentation of the bill here in question. The special master further found that on the 23d day of May, 1892, the Southern Pacific Railroad Company refunded to the Atlantic & Pacific Railroad Company the sum of \$25,924.39 upon a demand by the Atlantic & Pacific Railroad Company, and upon a voucher made by the representatives of the latter company, for excessive taxes theretofore paid by the Atlantic & Pacific Company to the Southern Pacific Railroad Company, as follows:

For the year ending June 30, 1885.....	\$ 1,926 66
For the year ending June 30, 1889.....	6,871 29
For the year ending June 30, 1890.....	9,181 17
For the year ending June 30, 1891.....	7,945 27

Making a total of..... \$25,924 39

Upon the hearing of the exceptions it was stipulated and agreed by and between counsel for the respective parties that all papers referred to or mentioned in the exceptions should be considered to the same extent and with the same force and effect as if offered upon the hearing before the master, and that, in addition to the papers mentioned in those exceptions, the petition of the United States Trust Company of New York, filed in this court, praying leave of the court to institute suit against the receivers appointed in this cause, with the bill of complaint attached to that petition, and the order of the court made thereon, should be considered with the same effect as if offered in evidence before the master, and that the petition of the receivers of the Atchison, Topeka & Santa Fé Railroad Company to the court originally appointing them, and the order of that court based thereon, asking leave to disaffirm the contract of lease attached to the petition of the receiver herein, and also the petition of the receivers of the St. Louis & San Francisco Railway Company to the court originally appointing them, and the order of that court based thereon, for like leave to disaffirm the said contract, and also the answer and objections of the United States Trust Company of New York to the application of the receivers for leave to borrow money, which answer and objections were filed in this court on the 14th day of May, 1895, should be considered with the same effect as if offered in evidence before the master. It was further stipulated that none of the parties to the present record were parties to the proceedings in which the attempted disaffirmance took place

nor had any notice thereof; the stipulation, however, reserving any and all objections to the materiality, relevancy, and admissibility of any of such papers and evidence. 80 Fed. 18-31.

As previously stated, the court below sustained all of the exceptions taken by the Southern Pacific Railroad Company to the findings of fact and the conclusions of law of the special master, and directed the payment of the amount claimed by the intervener as taxes, from which order and decree the present appeal is prosecuted by the United States Trust Company. There are 14 assignments of error.

C. N. Sterry and Neill B. Field, for appellant.

Harvey S. Brown and J. E. Foulds (J. S. Chapman, of counsel), for intervener and appellee Southern Pac. R. Co.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge, after stating the case as above, delivered the following opinion:

The ultimate question presented for determination on this appeal is whether or not the claim of the intervener and appellee, the Southern Pacific Railroad Company, against the Atlantic & Pacific Railroad Company, an insolvent corporation, for a just proportion of the taxes paid by the Southern Pacific Railroad Company for the fiscal year 1887-1888, under its agreement of August 20, 1884, with the Atlantic & Pacific Railroad Company, should be paid by the receiver of the Atlantic & Pacific Railroad Company in preference to the mortgage lien of the United States Trust Company, the appellant. The determination of this question depends upon the consideration of three leading propositions, to wit: (1) Is the Atlantic & Pacific Railroad Company liable to the Southern Pacific Railroad Company, under the conditions of the agreement of August 20, 1884, for its just proportion of taxes for the fiscal year 1887-1888? (2) If so liable, does such a claim for taxes constitute a preferential claim to that of the mortgage lien? (3) If it does, in what amount should such taxes be allowed, and should a just proportion of the sum paid by the Southern Pacific Railroad Company for attorney's fees, costs of suit, interest, etc., incurred in litigating and contesting the taxes for the fiscal year 1887-1888, be also allowed and reimbursed to the latter company by the receiver of the Atlantic & Pacific Railroad Company? Before entering into a consideration of these propositions, there is a preliminary question to be disposed of, and that is as to the effect to be given to the findings of fact of the special master. It is contended, at the outset, by the counsel for the appellant, that this court and the court below are bound by the findings of fact made by the special master. It will be observed that the reference, by the court below, to the special master, of the claim for taxes made by the intervener, the Southern Pacific Railroad Company, was not that of an ordinary reference to take and report testimony, but it was stipulated and agreed between counsel representing all the parties that the special master should "take the

proofs of the respective parties, and report the same to the court, with his findings of fact and conclusions of law thereon." The effect of this stipulation was undoubtedly to constitute, to a certain extent, the special master as the judge of the facts presented to him. The scope and effect of such a stipulation is tersely stated by Mr. Justice Brown, delivering the opinion of the United States supreme court in *Davis v. Schwartz*, 155 U. S. 631, 636, 15 Sup. Ct. 237, 239, in the following language:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his findings, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. St. § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but, so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable,"—citing *Wiscart v. D'Auchy*, 3 Dall. 321; *Bond v. Brown*, 12 How. 254; *Graham v. Bayne*, 18 How. 60, 62; *Norris v. Jackson*, 9 Wall. 125; *Insurance Co. v. Folsom*, 18 Wall. 237, 249; *The Abbotsford*, 98 U. S. 440.

See, further, *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821.

So far, therefore, as the findings of fact by the special master, under the stipulation referred to, are based upon conflicting evidence, or upon the veracity of witnesses, or so far as there is evidence consistent with the finding, they are conclusive and binding upon the court. But, in so far as other and additional evidence is introduced before the court, the rule is inapplicable. In this case it appears that after the special master had reported, and filed his findings of fact and conclusions of law, it became necessary to introduce further evidence. To obviate a re-reference, the parties entered into a stipulation consenting to the introduction of certain documentary evidence, referred to above in the statement of the case, and stipulated further that none of the parties in this case were parties to the proceedings in which the attempted disaffirmance took place, nor had any notice thereof. The effect of this stipulation and of the introduction of the documentary evidence referred to was to render the rule inapplicable so far as the evidence may be deemed material and relevant to any of the findings of fact by the special master. Furthermore, the rule is confined strictly to questions of fact. It does not include questions of law, nor, generally speaking, the interpretation and construction of the legal effect of documents. In the case at bar the special master interpreted the agreement of August 20, 1884, to be a lease, and made findings of fact to that effect. Upon exceptions taken to these findings, the court below interpreted the agreement as a contract of sale, thereby overruling the special master. It is plain that the findings of fact of the special master as to the legal effect of the instrument in question were no more binding upon the court below than is the interpretation placed by the court below on the same

instrument conclusive on this court upon the present appeal. In this view it follows that findings of fact (Nos. 1 and 3) of the special master, in which he found that the agreement of August 20, 1884, was a lease, were not binding on the court below, and that that court was correct in exercising its own independent judgment as to the interpretation to be given the agreement. In so doing the learned judge held that the agreement was a contract of sale, and that the lease features of the agreement were merely incidental; but in arriving at this conclusion we think he did not give the lease features of the agreement the importance and prominence they deserve, and which the parties intended. The agreement of August 20, 1884, was of a dual character. It was a contract to sell and a lease. That it was intended to be, and was, an executory contract of sale, is plainly deduced from the language employed, as appears from the terms set forth in the statement of the case. The Southern Pacific Railroad Company agreed to sell to the Atlantic & Pacific Railroad Company, and the latter agreed to buy from the former, the line of railway extending from the west end of the bridge over the Colorado river, at or near The Needles, to the easterly margin of the grounds or yards of the Southern Pacific Railroad Company used in connection with the Mojave Junction station, or with the main line of road of the Southern Pacific Railroad Company between Goshen and Yuma, in the state of California, some 242.32 miles in length. But it affirmatively appears from the agreement itself that the Southern Pacific Railroad Company could not, at that time, owing to the existence of a certain mortgage covering the property in question, transfer a clear title to the road. Nor does the agreement state, in this particular, when it could or would be able to convey a clear title. It therefore simply contracted to transfer a good title when it was able to do so. This part of the agreement is what constitutes it an executory agreement or contract of sale. Then the agreement further specifically provides that meanwhile, and until the consummation of the sale, and payment of the purchase price of the property, the Southern Pacific Railroad Company would lease and demise to the Atlantic & Pacific Railroad Company, from the 1st day of October, 1884, the said line of railway, together with the appurtenances, in the contract agreed to be sold, at and for the annual rental of \$1,800 per mile,—that is to say, \$436,266,—payable semiannually during the continuance of the lease. For the purposes of the lease, the Atlantic & Pacific Railroad Company was put in full possession of the line of railway. It was further distinctly provided that, in the event of any default by the Atlantic & Pacific Railroad Company in its payment of the rental for the lease as agreed, the Southern Pacific Railroad Company should retake possession. All through the agreement it will be found that there is a clear, distinct and unequivocal intent that the railway should be leased until the consummation of the sale, and full provision is made as to the rights and liabilities of the respective parties with reference to the sale of the property and as to its lease. The distinction between the sale and lease features of the agreement is maintained throughout. The eighth clause, in

particular, exemplifies this, for it provides that "the said party of the first part covenants and agrees to and with the party of the second part that upon the arrival of the time for the consummation of the sale hereinbefore agreed upon it will convey the property sold to the party of the second part by good and sufficient deed with usual covenants of warranty; and that during the term of said lease, the rent reserved being paid and all other terms of said lease being fulfilled, it will warrant and defend the peaceful occupation and enjoyment of the demised premises, and of every part thereof, to the party of the second part against the lawful claims of all persons." But it is unnecessary to elaborate further on the double nature and purpose of the agreement. A careful reading of it will demonstrate without doubt that, until the consummation of the sale, the line of railway was to be leased. The distinction between these two features of the agreement is too plain to justify us in holding with the learned judge of the court below that the lease was a mere incident of the contract. There is no good reason why, if parties choose so to contract, they may not agree to lease a property, and, upon the happening of a future act or contingency, mature the lease into a sale. We conclude, therefore, that the agreement of August 20, 1884, was of the dual character referred to, and had a twofold purpose; or, in other words, it operated as an executory contract of sale, but until the consummation of the sale it was agreed that there should be a lease of the property. This view disposes of the contention of counsel for appellant, earnestly pressed on the court, that, if the agreement be regarded as a contract of sale, it is void, because under the laws of California, as is contended, railroad companies have no power to sell their roads, or any part thereof. But, whatever may be the law of California on that question, and assuming, for the purposes of the case, although not deciding, that such is the law, this would not affect and invalidate the agreement of August 20, 1884, in so far as it operates as a lease. That a contract may be void in part and valid in part is elementary law. We have seen how studiously the two features of the agreement, viz. that of sale and of lease, were kept separate and distinct. Assuming, therefore, that the agreement is void as a contract of sale, still it would be valid as a lease. *Chicago, St. L. & N. O. R. Co. v. Pullman South. Car Co.*, 139 U. S. 79, 91, 11 Sup. Ct. 490; *Erie Ry. Co. v. Union Locomotive & Express Co.*, 35 N. J. Law, 240, 246; *Treadwell v. Davis*, 34 Cal. 601; *Lumber Co. v. Hayes*, 76 Cal. 387, 393, 18 Pac. 391. That railroad companies have the power to lease their roads, or any part thereof, is expressly provided for by the act of 1880. St. Cal. 1880, p. 21. Under section 17 of its charter, the Atlantic & Pacific Railroad Company had the "power" to lease. Act July 27, 1866 (14 Stat. 292). One of the provisions of the agreement, in so far as it was a lease, was that the Atlantic & Pacific Railroad Company should "promptly pay and discharge all taxes and assessments which should thereafter become due upon said property, or any part of it, or which might become in any wise due or owing in respect to the same." This provision was binding on the lessee so long as the lease endured. When the receivers were

appointed, they did not disaffirm the lease. On the contrary, it was affirmed by their continued use and occupation of the line of railway. Such being the fact, the Atlantic & Pacific Railroad Company was bound to perform its agreements under the lease, and, among others, to pay its just proportion of taxes. In fact, one of the conditions of the receiverships was that all taxes then due should be paid. This disposes of the first question, viz. whether the Atlantic & Pacific Railroad Company was liable to the Southern Pacific Railroad Company, under the conditions of the agreement of August 20, 1884, for its just proportion of taxes for the fiscal year 1887-1888, and brings us to the second and third propositions involved on this appeal, which will, for the sake of convenience, be considered together. The second proposition is whether or not such claim for taxes constitutes a preferential claim to that of the mortgage liens; and the third is, if it does constitute a preferential claim, in what amount should it be allowed?

With reference to the second proposition, we think there is no room for doubt that this claim for taxes constitutes a preferential claim to that of the mortgage liens. In the first place, it was made a condition of the receivership. In the order appointing the original receivers, the court below directed them, among other things, to pay "all amounts now due from the defendant (the Atlantic & Pacific Railroad Company) on its roads or properties constituting part of its system for taxes and assessments upon the property, or any part thereof." The subsequent order, appointing the present receiver, contained similar directions. In the second place, the agreement of August 20, 1884, under which the taxes were due, never having been disaffirmed by the receivers, it follows that it still continued in force, and the Atlantic & Pacific Railroad Company was subject to all the obligations thereunder just as much as it was entitled to all the advantages and benefits thereunder. The language of the learned judge of the court below, in this connection, is pertinent. He said:

"The evidence in the case, as well as those findings of the special master not excepted to, show that the receivers not only paid, from time to time, every installment of rental that has become due under the contract of August 20, 1884, but also all of the taxes that have become due on the property therein described, except the portion of the taxes for the year 1887 here in controversy. And the evidence also shows that several of these installments of rental were paid with money borrowed by the receivers upon receivers' certificates authorized to be issued for that purpose by this court, upon representations made by the receivers, not only showing the necessity of borrowing because of a lack of funds, but also showing that the line of road forming the subject of the contract of August 20, 1884, is an essential part of the Atlantic & Pacific Company's railroad system, and constitutes the only western outlet and inlet by rail for traffic moved over that system, and has been in the continuous and exclusive possession, use, and control of that company, and the receivers of its property, from the time that company first took possession of the property under the contract in question. Those representations by the receivers are, in effect, admitted to be true by the various pleadings filed in the cause by the Mercantile Trust Company and the United States Trust Company, respectively. If, therefore, it be conceded that the contract of August 20, 1884, ever admitted of disaffirmance by the receivers, it has been affirmed over and over again by them, and it is now too late for either of the parties to the present suit to here set up any right of election in respect thereto."

It further appears that on January 11, 1895, the former receivers of the Atlantic & Pacific Company paid the sum of \$14,902.86 on account of the very taxes now in question. The present claim is, therefore, merely for the balance claimed to be due. We think, on the whole, that the taxes for the fiscal year 1887-1888 were due, although the precise amount thereof may not have been ascertained until the decision of the United States supreme court (162 U. S. 167, 16 Sup. Ct. 794) in the case involving the liability of the Southern Pacific Railroad Company for the taxes was rendered, and that the orders appointing the receivers were broad enough to include the proportion of taxes due by the Atlantic & Pacific Railroad Company to the Southern Pacific Railroad Company for that year, and that such proportion of taxes is entitled to preference over the mortgage lien.

We next inquire as to the proportion of the taxes for 1887-1888 which the Atlantic & Pacific Railroad Company was called upon to reimburse to the Southern Pacific Railroad Company under its agreement of August 20, 1884. Undoubtedly, the laws of the state of California, under which the taxes were assessed and collected, entered into and became part of the agreement with respect to the payment, by the Atlantic & Pacific Railroad Company, of the taxes assessed upon the leased line of railway. By the law of the state the taxes are assessed against the owner. The taxes for the fiscal year 1887-1888 were, therefore, assessed against the Southern Pacific Railroad Company, the lessor of the line of railway involved in the present controversy, and not against the Atlantic & Pacific Railroad Company, the lessee. The valuation returned by the Southern Pacific Railroad Company on its franchise, roadbed, rails, rolling stock, etc., within the state of California, including the line of railway from The Needles to Mojave, was \$9,570,200. This valuation was raised by the state board of equalization to \$16,500,000. The Southern Pacific Railroad Company contested this increase, but the tax was upheld by the courts. 38 Pac. 912; 162 U. S. 167, 16 Sup. Ct. 794. No question, therefore, of the validity or legality of the tax can now be indulged in, nor can the amount thereof be inquired into. The only question with which the court below was concerned, and which is involved on this appeal, is as to the proportionate amount which the Atlantic & Pacific Railroad Company is to repay to the Southern Pacific Railroad Company. The amount of tax imposed on the valuation of \$16,500,000 for 1,022.33 miles of railway was \$251,134.26, or at the rate of \$16,139.60 per mile, which of course, included rolling stock, etc. The number of miles of railway leased by the Atlantic & Pacific Railroad Company from the Southern Pacific Railroad Company was some 242.37 miles, of which 35.64 miles were in Kern county and 206.87 miles were in San Bernardino county. As the Atlantic & Pacific Railroad Company did not lease the rolling stock of the Southern Pacific Railroad Company, but only its line of railway in the two counties referred to, a certain percentage was allowed by the Southern Pacific Railroad Company in computing the amount due from the Atlantic & Pacific Railroad Company for the proportion of taxes due from the latter company to the former under their agree-

ment of August 20, 1884. This percentage for the year 1887-1888 was fixed by the Southern Pacific Railroad Company at 14.50 per cent., which amount has not been questioned in this controversy, and must, therefore, be taken as correct. Allowing for this percentage for rolling stock, would make the tax per mile the sum of \$13,799.36, and the amount due from the Atlantic & Pacific Railroad Company to the Southern Pacific Railroad Company would be as follows:

Kern county, 35.64 miles railway at \$13,799.36 per mile, \$491,809.19	
at \$2 per \$100.....	\$ 9,836 18
San Bernardino county, 206.87 miles railway at \$13,799.36 per mile,	
\$2,854,673.60, at \$1.33 per \$100.....	37,967 15
	<hr/>
	\$47,803 33

This total of \$47,803.33, according to the rate of taxation fixed by the law of the state of California, through its assessing officers, and confirmed by the tribunals of the state and of the United States supreme court, fixes the amount due from the Atlantic & Pacific Railroad Company as its just proportion of taxes due to the Southern Pacific Railroad Company, and this was the amount paid by the latter company to the state. The special master, in this connection, found (finding No. 16) that:

"The value of the leased property, for the purposes of taxation for the year 1887, considered separately from any franchises or rolling stock (and taking into consideration the fact, which I find to be true, that the cost of operating the leased property has for many years prior and subsequent to the appointment of the receivers herein exceeded its earnings), was \$4,000 per mile, or a total of \$969,480, which is 5.39 per cent. of the entire valuation of the franchises, roadway, roadbed, rails, and rolling stock of the Southern Pacific Railroad Company in California, as fixed by the state board of equalization for that year."

Upon exceptions, this finding was overruled by the court below. In this, we think, the court was entirely correct. The evidence objected to and admitted, tending to show what the earnings of the Atlantic & Pacific Railroad Company were for the year 1887 and prior thereto, was erroneously admitted, and was irrelevant, and incompetent to fix the tax due by the Atlantic & Pacific Railroad Company to the Southern Pacific Railroad Company for the year 1887-1888. The taxes which were comprehended and contemplated by the agreement of August 20, 1884, were those fixed by law. The taxes in the present instance are based upon the assessment and apportionment made by the state board of equalization, under the provisions of the constitution and laws of the state of California, and that assessment and apportionment were held to be valid by the superior court of the city and county of San Francisco, by the supreme court of the state of California, and finally by the supreme court of the United States. The admission of the evidence tending to show any other basis or rate of taxation was, in effect, a collateral attack upon the assessment and apportionment of the state board of equalization, and also upon the judgment and decision of the courts, which sustained the validity of the assessment. Unsupported by the evidence which, we hold, has been erroneously admitted, the findings cannot stand. The nineteenth finding of the special

master was to the same effect, was overruled by the court below, and, we think, properly so.

Several other objections are presented by counsel for appellant as to the validity of the tax, but, as we consider them untenable, it is not necessary, in our opinion, to protract this already lengthy opinion, by a detailed consideration of them. It follows, from the views stated, that the taxes for which the Atlantic & Pacific Railroad Company was liable to repay and reimburse the Southern Pacific Railroad Company under its agreement of August 20, 1884, and the laws of the state of California with reference to the taxation of the line of railway in question, as sustained by the decisions of the courts previously referred to, was the sum of \$47,803.33, less any sum which the Atlantic & Pacific Railroad Company may have previously paid on account of these taxes. It appears that it had paid to the Southern Pacific Railroad Company the sum of \$14,902.86 on a reassessment for the fiscal year 1887-1888. This amount, with certain items of interest credited by the Southern Pacific Railroad Company, would amount to the sum of \$17,681.82, which should be deducted from the amount of taxes as stated above, leaving a balance as follows: \$47,803.33, amount of taxes for fiscal year 1887-1888; \$17,681.82, amount credited; \$30,121.51, balance due for taxes.

The next and final question is whether the Atlantic & Pacific Railroad Company should reimburse the Southern Pacific Railroad Company for a just proportion of the attorney's fees, costs of suit, interest, etc., incurred by the latter company in contesting and litigating the taxes for the fiscal year 1887-1888. When the taxes for the year 1887-1888 were assessed by the state board of equalization at the increased valuation of \$16,500,000, the Southern Pacific Railroad Company contested the same. It was, however, unsuccessful in the litigation, and, in addition to having to pay the full amount of the tax imposed, amounting, as stated, to \$251,134.26, incurred certain additional expenditures, such as accrued penalties, costs of suit, attorney's fees, interest, etc. In the bill presented by it to the Atlantic & Pacific Railroad Company, it sought to charge that company with a certain proportion of these additional costs. The proportion charged was fixed at 19.03 per cent. that being the percentage which the sum of \$47,803.33, the amount of taxes charged to the Atlantic & Pacific Railroad Company, bore to the total tax of \$251,143.26, charged as taxes against the Southern Pacific Railroad Company. The special master found that the Atlantic & Pacific Railroad Company was not called upon to reimburse the Southern Pacific Railroad Company for its expenses incurred in that behalf, as he found the fact to be that the "action of the intervener, the Southern Pacific Railroad Company, in refusing to pay said taxes levied and assessed for the fiscal year of 1887, ending June 30, 1888, and in defending the said suit of the state of California therefor, was wholly voluntary upon its part, and was in no manner induced or caused by any request, consent, or advice upon the part of the defendant the Atlantic & Pacific Railroad Company, represented by W. C. Hazeldine, its general attorney, or other attorney, officer, or

agent having authority in the premises, or upon the part of the present or former receivers herein, or of any attorney or representative of such receivers." The court below, in passing upon the exception taken to this finding, sustained the exception, and held that the Atlantic & Pacific Railroad Company was liable for a proportionate share of the penalty, costs, attorney's fees, interest, etc., incident to the litigation, and fixed such proportion at 19.03 per cent. as charged in the bill presented by the Southern Pacific Railroad Company to the Atlantic & Pacific Railroad Company. The learned judge based this determination on the ground that the evidence tended to show that Mr. Hazeldine, as solicitor for the Atlantic & Pacific Railroad Company, had authority to act as such solicitor for the company in respect to the matter of these taxes, and that he, as such solicitor, consulted with the legal representatives of the Southern Pacific Railroad Company in connection with the very taxes in question, and acquiesced in and consented to the contest made by the Southern Pacific Railroad Company against the taxes in question. In this, we think, the learned judge was correct. Had the Atlantic & Pacific Railroad Company desired to avoid the additional penalty, attorney's fees, interest, and costs incurred by a failure to pay the taxes when due and when contested, it could have offered its part of the taxes, and thereby absolved itself from any liability in that direction. From the foregoing opinion it follows that the claim of the Southern Pacific Railroad Company for taxes for the fiscal year 1887-1888 should be allowed and paid by the receiver, amounting, after crediting certain sums previously stated, to the balance of \$30,121.51, and that that part of the claim which relates to the proportion claimed for interest, costs of suit, attorney's fees, etc., be allowed as charged in the bill. The judgment and decree of the circuit court will be affirmed.

LIVERPOOL & LONDON & GLOBE INS. CO. et al. v. OLUNIE. HARTFORD FIRE INS. CO. et al. v. SAME. HANOVER FIRE INS. CO. et al. v. SAME. AMERICAN FIRE INS. CO. et al. v. SAME. SPRINGFIELD FIRE & MARINE INS. CO. et al. v. SAME.

(Circuit Court, N. D. California. June 27, 1898.)

Nos. 12,557, 12,563, 12,564, 12,566, and 12,567.

1. **EQUITY JURISDICTION—MULTIPLICITY OF SUITS—PARTIES—MULTIFARIOUSNESS.**
A court of equity will, in a single suit, take cognizance of a controversy, determine the rights of all the parties, and grant the relief requisite to meet the ends of justice, in order to prevent a multiplicity of suits, where a number of parties have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in one action brought by all these uniting co-complainants.
2. **SAME—INEQUITABLE CONDUCT OF COMPLAINT.**
The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of the

defendant which the complaining party states as his ground of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect of which judicial protection or redress is sought.

3. SAME—ILLEGAL COMBINATIONS.

The fact that a number of foreign insurance companies doing business in a state are members of an alleged illegal combination to suppress competition, etc., will not prevent them from maintaining a suit to enjoin the state insurance commissioner from illegally revoking their certificates of authority to do business in the state, and canceling their bonds.

4. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The federal courts are bound by the decision of the supreme court of California that a statute of that state is void, because, in disregard of an express constitutional limitation on the power of the legislature, it attempts to impose a tax for municipal purposes.

5. FOREIGN INSURANCE COMPANIES—POWERS OF STATE INSURANCE COMMISSIONER.

The power of the insurance commissioner of California to revoke the certificate of authority under which a foreign company is doing business in the state arises only (1) when such a company removes an action to a federal court, and (2) when it becomes insolvent. Pol. Code, §§ 595, 600. He can cancel its bond only when defective in form or substance, or when the sureties are financially insufficient; and he has no power or discretion to do either merely on the ground that such company is a member of an illegal combination to raise insurance rates, or because it refuses to pay a tax which it claims is illegal.

6. SAME—CONSTRUCTION OF STATUTE.

Pol. Code Cal. § 595, after enumerating certain duties of an insurance commissioner, further requires him to "perform all other duties imposed upon him by the laws regulating the business of insurance in this state, and enforce the execution of such laws." *Held*, that this does not enlarge his jurisdiction, or confer on him any authority to perform a duty not specified or to execute a purpose not sanctioned by the law.

T. C. Coogan (Wilson & Wilson, W. S. Goodfellow, and John Garber, of counsel), for complainants.

Bridgford & Clunie and Andrew J. Clunie in pro. per. (George D. Collins and Eugene F. Bert, of counsel), for defendant.

MORROW, Circuit Judge. Five bills in equity have been filed by 62 fire insurance companies, doing business in the state of California, against Andrew J. Clunie, insurance commissioner of the state of California, to restrain him from doing certain acts which, it is alleged, will cause the complainants irreparable injury. In bill No. 12,557 the complainants are 34 foreign corporations, viz. 21 incorporated under the laws of Great Britain and Ireland, 2 under the laws of the dominion of Canada, 7 under the laws of the empire of Germany, 2 under the laws of the republic of Switzerland, 1 under the laws of the colony of New Zealand, and 1 under the laws of the kingdom of Sweden. In bill No. 12,563 the complainants are 6 corporations incorporated under the laws of the state of Connecticut. In bill No. 12,564 the complainants are 10 companies incorporated under the laws of the state of New York. In bill No. 12,566 the complainants are 5 companies incorporated under the laws of the state of Pennsylvania. In bill No. 12,567 the complainants are 7 companies incorporated under the laws of the states of Massachusetts, New Jersey, Missouri, Minnesota, Wisconsin, Rhode Island, and Louisiana. The questions presented for deter-

mination in these several bills are substantially the same, and will therefore be considered together.

The bills allege that the complainants are corporations formed for the purpose of insuring against loss or damage by fire, and are engaged in carrying on the business of fire insurance in the state of California; that, before commencing the business, each of them, in accordance with the law of the state, procured from the insurance commissioner of the state, then in office, a certificate of authority, authorizing it to transact insurance business in the state, and paid to the commissioner therefor the sum of \$20 for each certificate as required by law; that these certificates are still in force, and have not been canceled, revoked, surrendered, or in any wise impaired; that each of the complainants, at all the times mentioned in the complaint, was, and has continued to be, and is, fully solvent; that they have not at any time transferred or caused to be transferred to the United States circuit court any action commenced against them, or any of them, in a court of the state of California; and that they have at all times complied with the laws of the state. The bills allege, further, that in the year 1885 the legislature of the state of California passed an act entitled "An act to require the payment of certain premiums to counties, and cities and counties, by fire insurance companies not organized under the laws of the state of California, but doing business therein, and providing for the disposition of such premiums"; that, by its terms, this act purported to require the agents of corporations not incorporated under the laws of this state, but carrying on the business of fire insurance therein, to pay to the county treasurer of every county, or city and county in this state, for the use and benefit of the firemen's fund of said county, or city and county, on the first Monday in December of each year, a sum equal to 1 per cent. upon the amounts of all premiums which, during the year or part of a year ending on the last preceding Monday of September, should have been received by such agent or person, or any other person or agent, acting during such period for such corporation so engaged in such business, or should have been agreed to be paid to such corporation or its agents, for any insurance effected or agreed to be effected by such corporation within the limits of such county, or city and county; that this act is in violation of the constitution of the state of California, and is null and void, and has been so adjudged by the supreme court of the state of California; that, notwithstanding the invalidity of such act, the defendant, as insurance commissioner, claims and asserts that the act of the legislature is valid, and that all foreign corporations carrying on the business of fire insurance in this state are under obligations to pay said taxes, and claims and asserts that, in case of failure so to do, such foreign corporations may and should be prevented from carrying on the business of fire insurance in this state; that the defendant, as insurance commissioner, further claims and asserts that he has power and authority conferred upon him by the laws of the state, as such insurance commissioner, to enforce the payment by said foreign corporations of such taxes, or, failing in such payment, to exclude

such corporations from carrying on the business of fire insurance in this state; that none of the complainants have paid any taxes or percentages required to be paid by the act of the legislature since the year 1885; that the amount of such taxes and percentages remaining unpaid, and which would be due and payable by the complainants if the said act of the legislature were valid, is the sum of \$278,000 and upward; that the defendant, as insurance commissioner, demanded from each of the complainants, in respect to the business respectively transacted by them, the payment of said taxes accrued since the year 1885, and demanded that such payment be made, or that each of the complainants cease the transaction of insurance business in this state on or before the 1st day of February, 1898; that the defendant threatens and intends, in case said taxes be not paid as demanded, to revoke the certificates of authority held by the complainants, and forbid them from transacting the business of fire insurance in this state, and threatens and intends, after revoking said certificates of authority, to give notice to the public, by advertisements in newspapers, that said certificates have been revoked, and that complainants are forbidden to transact the business of fire insurance in this state, and that all policies of insurance and contracts made by them thereafter will be null and void; that complainants have been transacting the business of fire insurance in this state for a number of years; that each of them has established agencies throughout the state of California at divers places, and that each of them has expended large sums of money in establishing said agencies, and in advertising their business, and in providing supplies therefor; that each of the complainants has a large and valuable business in the state of California, of the value of \$20,000 and upward; that if the defendant be permitted to carry his threats into execution, and revoke said certificates of authority, complainants, and each of them, will be obstructed in the conduct of their business, their customers and the public will be deterred from accepting their policies of insurance, and will insure their property with other insurance companies, and that the business of each of the complainants, at present large and valuable, will be utterly ruined and destroyed; that if the defendant be not restrained by injunction, and be permitted to carry his threats into execution, multiplicity of suits will result, in that each of the complainants will be compelled to commence an action for damages against the defendant, and in that the defendant will commence actions to recover penalties against the agents of each of the complainants continuing to transact business, pursuant to the provisions of section 596 of the Political Code of the state of California; that the complainants are without adequate remedy at law in the premises; that the injury threatened to them is irreparable; and that the damages which will be sustained by them are difficult or impossible of exact ascertainment. The prayer of the bill in case No. 12,557 is that it be adjudged by the decree of the court that the act of the legislature of 1885 is null and void, and that the complainants are not under any obligation to pay the taxes or percentages therein mentioned, either as a tax or as a condition of their

doing the business of fire insurance in this state; that the defendant be enjoined and restrained from revoking the certificates of authority, or any of them, issued to the complainants, or from in any manner obstructing or interfering with the complainants, or any of them, or their agents, in the transaction of fire insurance business in the state of California, and for a writ of injunction pendente lite, restraining the defendant from doing any of the acts mentioned in the bill of complaint.

The bill of complaint in case No. 12,557 was filed January 27, 1898, and on the same day an order was issued requiring the defendant to show cause, on February 7, 1898, why an injunction should not issue as prayed for in the bill of complaint, and in the meantime the defendant was restrained from doing any of the acts or things mentioned in the bill of complaint, and threatened by him, and from revoking any of the certificates of authority theretofore issued by the insurance commissioner of the state of California to the complainants, or any of them, and from interfering with or obstructing the complainants, or any of them, or their agents, in the transaction of fire insurance business in the state of California. After the filing of the bill, and after the order to show cause had been issued and served, to wit, on the 28th day of January, 1898, the defendant appeared before the judge of this court in chambers, and asked for and obtained a modification of the restraining order, striking therefrom the provision restraining the defendant from interfering with or obstructing the complainants, or any of them, or their agents, in the transaction of fire insurance business in the state of California.

On February 7, 1898, the complainants appeared, and filed a supplemental bill of complaint, in which it is alleged that the modification of the restraining order was obtained at about the hour of 3 o'clock p. m. on Friday, the 28th day of January, 1898, and that at the hour of 12:30 o'clock p. m. on Saturday, the 29th day of January, 1898, the defendant made and filed in his office an official order or document, wherein he recited that it appeared to him that the bonds theretofore given by the complainants, and each of them, were insufficient and invalid, and that he, as insurance commissioner, by virtue of the powers vested in him by the laws of the state, did thereby adjudge and determine each and every of said bonds to be invalid and insufficient, and, accordingly, that each and every of the complainants and their agents were therefore required to forthwith renew said bonds by substituting valid and sufficient bonds duly approved by him in place thereof; that said order contained no other matter or information than as herein stated, save the names of the companies whose bonds were declared to be invalid, their agents, and the dates of filing the same, and that it in no wise indicated wherein or for what reasons the said bonds were found or determined to be invalid or insufficient; that, upon the complainants being notified by the defendant that he claimed that their bonds were invalid and insufficient, their attorneys called upon the defendant, and inquired in what respect their bonds were invalid and insufficient; that the defendant refused to give any reply other than to refer to the order which he had made; that inquiry was made as to whether it was claimed

by him that any of the sureties upon any of the bonds were insolvent or insufficient in point of financial capacity, to which inquiries the defendant refused to make answer save to refer to the order he had made; that the defendant was requested to furnish a form of a bond or specify the terms of a bond which would be satisfactory to him) with which request the defendant refused to comply. It is further alleged that on the 30th day of January, 1898, the defendant made the following statement, well knowing and intending that it would be published in the newspaper, and thus give widespread circulation throughout the state:

"I have made my order, and my future action depends upon what the insurance companies may have to say. Do I think they will furnish new bonds? I think they will, but whether I will approve them is another question. If the bond is not acceptable, I have the right to reject it, and deny to the company a certificate to do business in the state. I shall certainly refuse the bond of any company which is in arrears for the tax provided by the law of 1885. They claim, of course, that this has been declared unconstitutional by the supreme court. Well, I don't dispute that. I am aware that the supreme court decided against the law on the ground that it was an attempt on the part of the legislature to levy a municipal tax. Of course, under that ruling it would be absurd to undertake the collection of the tax by process of law; but, if the companies don't desire to comply with what the law intends, there is no reason why they should not be barred from doing business here."

It is alleged that the bonds were in strict accordance with the laws of the state, and in all respects valid and sufficient, and each for the sum of \$2,000; that prior to making the order of January 29, 1898, the defendant did not make investigation of the facts concerning the alleged invalidity or insufficiency of such bonds, and did not, in fact, exercise any judgment or discretion in relation thereto; and that no fact or circumstance showing, or tending to show, the invalidity or insufficiency of said bonds, or any of them, was ascertained by or brought to the knowledge of the defendant, or existed in fact. The bill contains further allegations denying the good faith of the defendant in his statements and actions respecting the validity and sufficiency of the bonds, his refusal to approve new bonds, and his expressed intention to refuse to approve any of the new bonds prepared and executed by the complainants unless they shall first pay the taxes attempted to be imposed by the act of 1885. The prayer of the supplemental bill is that the defendant be enjoined and restrained from further declaring or asserting to be invalid or insufficient the complainants' bonds, or any of them, and from instituting or causing to be instituted, or from inciting others to institute, any suits, actions, or proceedings against complainants, their agents or brokers, or any of them, and from in any way obstructing or interfering with complainants, or any of them, or their agents, in the transaction of fire insurance business, and for a writ of injunction pendente lite restraining the defendant from doing any of the acts mentioned in the supplemental bill. A second order was thereupon issued, requiring the defendant to show cause, on February 14, 1898, why a writ of injunction should not issue as prayed for in the supplemental bill; and, pending the hearing, the defendant was restrained from further declaring or asserting the invalidity or insufficiency of complainants' bonds, and from in any manner obstructing or interfering

with the complainants, or any of them, or their agents, in the transaction of fire insurance business.

It is insisted on behalf of the defendant that the act of the legislature of 1885 is not null and void, and is not in violation of the constitution of the state of California, or of the constitution of the United States, but that it is a valid and subsisting condition precedent to the transaction of business in said state by the corporations which it affects. The defendant has, however, in response to the order to show cause, filed a voluminous affidavit, in which he alleges, among other things, that, as insurance commissioner, he does not claim or assert, and never has claimed or asserted, that he has power and authority conferred upon him, by the laws of the state of California, to enforce the payment by foreign corporations of the taxes provided for by the said act of the legislature, or, failing in such payment, to exclude such corporations from carrying on the business of fire insurance in the state; that, as insurance commissioner, he does not threaten or intend, and has never threatened or intended, in case said taxes be not paid on or before the 1st day of February, 1898, to revoke the certificates of authority held by the complainants, or to forbid them from transacting the business of fire insurance in the state; that he will not carry any of the threats referred to in the bill into execution, nor will he revoke any of the certificates of any of said complainants, nor will he give public notice that he will carry such threats into execution or revoke such certificates, or any of them, nor warn all or any persons that policies of insurance or other contracts made by them thereafter will be null and void. With respect to the matters set forth in the supplemental bill of complaint, defendant alleges that no one of the complainants gave a bond pursuant to the provisions of section 623 of the Political Code of California; that defendant, in rejecting the bonds offered and tendered by the complainants, and in holding them to be insufficient and invalid, did so after due examination and investigation into the matter, and in the exercise of discretion conferred upon him by law. This allegation is repeated in other forms, but, in substance, the claim of the defendant is that, in declaring the bonds of the complainants to be invalid and insufficient, he made full and complete investigation of the facts concerning their invalidity and insufficiency, and did, in fact, exercise his official judgment and discretion in relation thereto, and did ascertain facts and circumstances showing, and tending to show, the invalidity and insufficiency of each and all of said bonds, and that he is ready and willing to approve of valid and sufficient bonds when furnished by insurance companies authorized to do business under the laws of the state. The defendant further alleges that the complainants should not be heard nor permitted to prosecute or maintain these actions against the defendant, for the reason that the complainants are now, and have been for many years, transacting insurance business in the state of California as members of a certain illegal combination and compact known and designated by the name of the "Board of Fire Underwriters of the Pacific"; that the main purpose of this organization is to prevent and suppress competition in the insurance business, to control the fixing of, and to fix, the

rates of premiums to be charged on insurance, to regulate and prevent rebates, to fix the compensation for insurance business, to regulate premium collections, and to appoint agencies; that seven-eighths of the insurance companies authorized to transact business in this state are members of this combination. The defendant sets forth in full the constitution of the Board of Underwriters of the Pacific, and claims that it necessarily results therefrom that the complainants are engaged in carrying on business in an unlawful manner, and that the action of the complainants against the defendant is in furtherance of such unlawful interference; and, as evidence of the truthfulness of this charge, he refers to a circular dated February 24, 1898, addressed to the local fire insurance agents in this state by the Board of Fire Underwriters of the Pacific, concerning the action of the insurance commissioner in declaring the bonds of the complainants invalid, the proceedings in this court, and the fact that the companies are conducting business as usual.

A preliminary objection has been made by the defendant that the bills are multifarious, on the grounds that, while it appears that the complainants are all interested in the question involved in the controversy, their interests are otherwise severable, distinct, and independent, and that they are therefore not entitled to unite in these several actions. As this objection is directed to matters appearing on the face of the bills, it should properly be raised by demurrer. It is, however, urged as a parol exception to the legal sufficiency of the bills under rule 67 of this court. The exception cannot be sustained. A court of equity will, in a single suit, take cognizance of a controversy, determine the rights of all the parties, and grant the relief requisite to meet the ends of justice in order to prevent a multiplicity of suits, where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in one action brought by all these persons uniting as co-plaintiffs. *Pom. Eq. Jur.* §§ 243, 245, 255, 269; *Libby v. Norris*, 142 Mass. 246, 7 N. E. 919; *Osborne v. Railroad Co.*, 43 Fed. 824; *Railroad Co. v. Gibson*, 85 Ga. 1, 11 S. E. 442; *Sang Lung v. Jackson*, 85 Fed. 502, 504; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418.

The case of *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, cited by the defendant as sustaining his objection, is, in my opinion, not opposed to this doctrine. It appears in that case that James Donald, a citizen of the United States and of the state of South Carolina, in his own behalf and on behalf of all other persons in the state of South Carolina as importers for their own use and consumers of wines, ales, and spirituous liquors, the products of other states and foreign countries, filed a bill in equity against J. M. Scott et al., claiming to act as constables of the state of South Carolina, and all other persons whomsoever claiming to act as constables, or as county sheriffs, municipal policemen, or executive officers or county sheriffs, or in any capacity whatsoever under or by virtue of a certain act of the legislature of the state of South Carolina. The action was to restrain the defendants from forcibly entering or attempting to search

the dwelling house of the plaintiff for liquors of the character mentioned, and from hindering and preventing the plaintiff or any other person from importing, holding possession, and using the said liquors so imported. A preliminary injunction was issued as prayed for in the bill of complaint, and afterwards, upon the pleadings and agreed statement of the facts, the injunction was made perpetual. In the supreme court of the United States, upon a writ of error, the decree was affirmed, but restricted to the parties named as plaintiffs and defendants in the bill. The objection to the decree as to parties not named as plaintiffs was that as to them the complainant assumed to act in a representative capacity for a class of numerous persons situated like himself with respect to the matter in controversy. The court held that such a state of facts was too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction, meaning, of course, an injunction in favor of plaintiffs, and binding upon defendants not named in the bill; for the court expressly held that the complainant was entitled to an injunction against those defendants who had despoiled him of his property, and who were threatening to continue to do so, and upheld the decree of the circuit court to that extent. In the present case the plaintiffs do not act in a representative capacity, but all are parties to the several bills, by a classification under which the plaintiffs in each suit have the same corporate rights and are under the same corporate obligations with respect to the business in which they are engaged.

In *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, the supreme court had before it three cases involving the constitutionality of an act of the legislature of the state of Nebraska, regulating railroads, classifying freights, fixing reasonable maximum rates, etc. There, as here, all the plaintiffs were interested in the subject-matter of the controversy, but were classified in three suits with respect to their rights under certain corporate franchises. The opinion of the court with respect to the question as to what community of interests will entitle plaintiffs to unite in one action to avoid a multiplicity of suits is peculiarly applicable to the facts in the cases at bar, and appears to determine the question beyond controversy. The court says:

"In these cases, the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation, upon the ground that the statute prescribing them is repugnant to the constitution of the United States. Under the principles which in the federal system distinguish cases in law from those in equity, the circuit court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter, or thing required to be done, but to a fine of from \$1,000 to \$5,000 for the first offense, from \$5,000 to \$10,000 for the second offense, from \$10,000 to \$20,000 for the third offense, and \$25,000 for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each sep-

arate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency, and determine once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway, and in the administration of the affairs of the quasi public corporation by which such highway is maintained."

It is further objected by the defendant that the complainants should not be allowed to come into a court of equity for relief; and in support of this objection he invokes the maxim that he who comes into a court of equity must do so with clean hands. The inequitable conduct charged against the complainants is that they are members of an illegal combination and compact known and designated by the name of the "Board of Fire Underwriters of the Pacific"; that the main purpose of this association is to prevent and suppress competition in the insurance business in this state, to control the fixing of premium rates to be charged on insurance, to regulate and prevent rebates, to fix compensation for insurance, to regulate premium collections, and to appoint agencies; that seven-eighths of the insurance companies authorized to transact business in the state are members of this confederation. In opposition to this charge, the affidavit of Rolla V. Watt, who is the general manager of the Royal Insurance Company and the Queen Insurance Company, and also a member of the executive committee of the Board of Fire Underwriters of the Pacific, alleges that the last-named association is not an incorporation or association formed for business purposes, and is not conducting any independent business on its own behalf; that it is merely the agent of the several insurance companies carrying on business in this state which are members thereof for the more convenient transaction of business between themselves; that it has not nor does it attempt to exert any influence or control over persons or corporations who are not members thereof; that its purpose is not to stifle competition, nor to restrict the amount of insurance business done, but, by co-operation, to induce owners of property to take greater precautions to avoid loss and damage by fire, and to adopt inventions and other means to that end, such inducement being effected by reducing rates of premium; also to prevail upon the several municipalities of the state to maintain fire departments, and adopt means and inventions of preventing and suppressing loss by fire, to assist the public authorities to prosecute and condemn persons guilty of arson, and by divers other means and ways to decrease the amount of loss by fire, and to reduce the hazards of the fire insurance business, and also to establish rates of premium which are reasonable and uniform and only fairly remunerative, based upon the combined experience of all the members thereof; that a large number of insurance companies doing business in this state are not members of said Board of Fire Underwriters; that said insurance companies so doing business in this state, and which are not members of said association, have in fact the capacity to transact all the insurance business in this

state if the same were intrusted to them, and might do so with safety to themselves, by reinsuring with other insurance companies in the United States, in which there are, in number, 175 or thereabout. It will not be necessary to enter into a discussion of the facts thus presented for the purpose of determining the legality of the Board of Underwriters in this action, or to ascertain how far its acts are open to just criticism. It is manifest that, if such a controversy is disclosed, it is foreign to the one now before the court. The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought. *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424; 1 Pom. Eq. Jur. 399.

The declarations of the defendant, in his affidavit, disclaiming all power and authority as insurance commissioner to enforce the payment of the taxes provided for by the act of the legislature of 1885, and the power to exclude foreign insurance corporations from the state who fail to pay such taxes, and his further disclaimer of any intention to revoke their certificates of authority to transact fire insurance business in the state, would dispose of that feature of the controversy, but for the fact that the defendant insists that the act of 1885 is constitutional, and a valid and subsisting condition precedent to the transaction of business by the corporations to which it relates, and the fact that prior to the commencement of these suits he had so notified the 34 foreign insurance companies constituting the complainants in case No. 12,557, officially in writing, and had demanded that they should forthwith comply with the terms of the law, and make the payments therein required, or that they should cease the transaction of fire insurance business in this state. This notice called the attention of the insurance companies to section 595 of the Political Code of the state, providing that "the insurance commissioner * * * must issue a certificate of authority to transact insurance business in this state to any persons in a solvent condition, who have fully complied with the laws of this state, and are in no wise in arrears to the state, or to any county or city of the state, for fees, licenses, taxes, or penalties accrued upon business previously transacted in the state." The notice also called attention to the fact that in the same section it was made the duty of the insurance commissioner to perform "all other duties imposed upon him by the laws regulating the business of insurance in this state, and enforce the execution of such laws," and that in section 596 of the same Code, it was provided that "no person or company must transact insurance business in this state without first procuring from the insurance commissioner a certificate of authority, as in this chapter provided." This notice was issued from the office of the commissioner on December 31, 1897, and does not appear to have been recalled or

suspended except in so far as it may be deemed to be inconsistent with the declarations contained in the defendant's affidavit on the present hearing. Moreover, the defendant, in declaring the bonds of all the complainants insufficient and invalid, on the 29th day of January, 1898, without previous notice, undertook to deprive the complainants of their authority to transact business in this state, and to compel them to furnish new bonds and to procure new certificates. No reason was given in the order for this action, and the charge that it was an arbitrary proceeding is supported by the fact that the bonds which the defendant declared insufficient and invalid were made out on forms prescribed by the insurance commissioner of the state, and two of them had been previously accepted and approved by the defendant himself. It appears, further, that, on the 30th day of January, 1898, the defendant made this declaration:

"I have made my order, and my future action depends upon what the insurance companies may have to say. Do I think they will furnish new bonds? I think they will, but whether I will approve them is another question. If the bond is not acceptable, I have the right to reject it, and deny to the company a certificate to do business in the state. I shall certainly refuse the bond of any company which is in arrears for the tax provided by the law of 1885. They claim, of course, that this has been declared unconstitutional by the supreme court. Well, I don't dispute that. I am aware that the supreme court decided against the law on the ground that it was an attempt on the part of the legislature to levy a municipal tax. Of course, under that ruling it would be absurd to undertake the collection of the tax by process of law. But, if the companies don't desire to comply with what the law intends, there is no reason why they should not be barred from doing business here."

It is manifest from this statement that the original purpose of the defendant was to compel the insurance companies not incorporated by or under the laws of this state to pay the taxes provided for in the act of March 3, 1885; and, notwithstanding the positive assertions of the defendant in his affidavit to the contrary, it is not clear that he has entirely abandoned that purpose. There is, indeed, some ground for believing that he is endeavoring to accomplish indirectly what he is not able to accomplish directly, and it therefore becomes important to determine preliminarily the validity of the act of March 3, 1885.

The constitution of the state of California, adopted in 1879, provides, in article 11, § 12, that:

"The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Pursuant to this provision of the constitution, the legislature established a uniform system of county and township governments by the act approved March 14, 1883 (St. 1883, p. 299), and provided for the organization, incorporation, and government of municipal corporations by the act approved March 13, 1883 (St. 1883, p. 93). By these acts, the legislature, as required by the constitution, vested in the county and municipal corporations of the state full power and authority to assess and collect taxes for county and municipal

purposes. Notwithstanding this distribution of the power of taxation for local purposes, the legislature, by the act of March 3, 1885, undertook to exercise that power for the purpose of raising a revenue from foreign insurance companies to establish a firemen's relief fund, to be disbursed locally. The first section of the act provided that every agent of every fire insurance corporation or company not incorporated under the laws of the state should pay into the hands of the treasurer of the county, or city and county, in the state, a sum equal to 1 per centum upon the amount of all premiums which, during the year, or part of a year, ending on the last preceding first Monday of September, shall have been received by such agent or person, or any other person or agent acting during such period for said corporation or company so engaged in said business, or which shall have been agreed to be paid such corporation or company, or his or their agents, for any insurance effected, or agreed to be effected, by such corporation or company, against loss or injury by fire upon property situate within the limits of said county, or city and county. The second section required that the tax provided for by the act, when paid or collected by the person or officer entitled thereto, should constitute a fund, to be known and designated as the "Firemen's Relief Fund," of the county, or city and county, in which the property insured, or agreed to be insured, is situated. The third section provided that such fund should be under the exclusive control of the fire commissioners, or other governing body of the fire department or fire departments of such county, or city and county, under such regulations as the board of supervisors thereof might prescribe. The other sections of the act provided for the disposition of the fund thus raised, authorizing them to be disbursed by officers and to members of the fire department of the city, or the city and county, to whose treasurer they were required to be paid. St. Cal. 1885, p. 13.

In 1886 the city and county of San Francisco brought suit in the superior court of the city and county of San Francisco to recover from the Liverpool & London & Globe Insurance Company the sum of \$441.36, alleged to be due under the provisions of this act. The defendant demurred to the complaint, on the ground that the act was unconstitutional and void. The demurrer was overruled, and a judgment entered in favor of the plaintiff. On appeal to the supreme court of the state, the judgment was reversed, the court holding that the act attempted to impose a charge for the purpose of revenue, and was a tax imposed by the legislature of the state for municipal purposes, and therefore unconstitutional and void, and that, as a condition upon which foreign corporations might be permitted to do business in the state, it was void, for the reason that the legislature could not exercise a power clearly denied to it by the constitution of the state. *San Francisco v. Liverpool & L. & G. Ins. Co.*, 74 Cal. 113, 15 Pac. 380. This decision certainly disposes of the contention that the terms of the act may be enforced as a condition, if not as a tax; and, as it is a construction placed by the highest court of the state upon its own constitution and statute, it is binding upon this court, and must be followed. *Forsyth v. Hammond*, 166 U. S. 506, 518, 17 Sup. Ct. 665.

In *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121, certain persons who undertook to act as county commissioners were adjudged to be usurpers as against others who were lawful officers; and it was held by the supreme court that, as the act of the legislature which created the board of commissioners was unconstitutional, there were no *de facto* officers, and therefore no *de jure* officers; and, answering the argument that a legislative act, though unconstitutional, might in terms create an office, and that nothing further than its apparent existence was necessary to give validity to the acts of the assumed incumbent, Mr. Justice Field, speaking for the court, said:

"An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

But, as the defendant does not now claim that he can enforce this law against the complainants, this feature of the case may be dismissed without further comment, except to say that the defendant's action, on January 29, 1898, in declaring that the complainants' bonds were insufficient and invalid, cannot be justified for the reasons given by him in his statement of January 30, 1898. He then declared that he would certainly refuse the bond of any company that was in arrears for the tax provided by the act of 1885. This declaration was, in effect, a notice that the bonds of the 83 insurance companies, which he had adjudged insufficient and invalid on the 29th day of January, 1898, had been so adjudged by reason of such arrearage.

We come now to the consideration of the defendant's action in declaring the bonds in question insufficient and invalid, aside from the reasons given by him for such action on January 30, 1898. It is contended, on behalf of the defendant, that the complainants were not entitled to know his reasons; that he was exercising quasi judicial powers in passing upon the sufficiency and validity of their bonds; and that his action in that respect cannot be reviewed by the court in this proceeding.

Section 595 of the Political Code of California provides that:

"The insurance commissioner must receive all bonds and securities of persons engaged in the transaction of insurance business in this state, and file and safely keep the same in his office, or deposit them as provided in this article. He must examine and inspect the financial condition of all persons engaged, or who desire to engage, in the business of insurance; issue a certificate of authority to transact insurance business in this state to any persons in a solvent condition, who have fully complied with the laws of this state, and are in no wise in arrears to the state, or to any county or city of the state, for fees, licenses, taxes, or penalties accrued upon business previously transacted in the state; determine the sufficiency and validity of all bonds and other securities required to be given by persons engaged, or to be engaged, in insurance business, and cause the same to be renewed in case of the insufficiency or invalidity thereof. * * *"

Section 623 of the same Code provides that:

"The commissioner must require every company, association, or individual, not incorporated under the laws of this state, and proposing to transact insurance business by agent or agents in this state, before commencing such business to file in his office a bond, to be signed by the person or firm, officer or agent, as principal, with two sureties, to be approved by the commissioner, in the penal sum of two thousand dollars for each insurance company, association, firm, or individual for whose account it is proposed to collect premi-

ums of insurance in this state, the conditions of such bonds to be as follows: (1) That the person or firm, agent or officer, named therein, acting on behalf of the company, association, firm or individual named therein, will pay to the treasurer of the county, or city and county, in which the principal office of the agency is located, such sum per quarter, quarterly in advance, for a license to transact an insurance business, or such other license as may be imposed by law, so long as the agency remains in the hands of the person or firm, officer or agent, named as principal in the bond. (2) That the person or firm, officer or agent, will pay to the state all stamps or other duties on the gross amounts insured by them, in the manner and at the time prescribed by law, inclusive of renewals on existing policies. (3) That the person, firm, agent, or corporation named therein will conform to all the provisions of the revenue and other laws made to govern them."

It is alleged in the bill of complaint that the bonds of the complainants, which the defendant adjudged to be insufficient and invalid, were each of them given pursuant to the provisions of this section of the Political Code; that no previous notice was given to the complainants of the alleged insufficiency or invalidity of said bonds, or any of them, nor was any opportunity given to the complainants, or any of them, to renew said bonds, or any of them; that the bonds were in fact according to the form which had been provided for many years last past by successive insurance commissioners of this state, and were in form and substance such as had been accepted and approved by the defendant himself since he had been insurance commissioner. A copy of the form of the bond furnished by each of the complainants is attached to the bills of complaint, from which it appears that the terms and conditions of the bonds are strictly in accordance with the requirements of the statute. It appears, further, that the defendant was appointed insurance commissioner March 3, 1897, and again on May 18, 1897. He qualified on May 19, 1897, under the last appointment; and from the last date, if not before, he discharged the duties of insurance commissioner. From May 19, 1897, to January 29, 1898, without any objection whatever, he treated complainants' bonds as valid and subsisting obligations, securing the state against any default on account of taxes, and entitling the complainants to transact insurance business in this state. But, assuming that after investigation the defendant did discover that the securities of these bonds were not sufficient, or that the conditions of the bonds were not in accordance with the statute, was it not his duty, as an officer of the state, charged with the administration of the laws regulating the business of insurance, to notify the complainants of the defect, and require that the law should be observed? He was authorized to cause a renewal of insufficient and invalid bonds; but how could the complainants furnish sufficient and valid bonds by renewal unless they were advised in what particular they were defective? The practical difficulties arising out of a refusal to give such a notice is well illustrated by the proceedings which took place before the commissioner after he made his order of January 29, 1898, declaring the bonds insufficient and invalid. He was asked by the complainants in what respect the bonds were insufficient and invalid, and he refused to reply other than to refer to the order he had made. He was asked if the bonds were defective in form, or

whether he claimed the sureties were insolvent or insufficient in point of financial ability. He was also asked to furnish the form of a bond, or specify the terms of a bond that would be satisfactory, but to all these inquiries he gave no further information than to refer to the terms of his order. It appears, however, that the defendant did, as insurance commissioner, on the 1st day of February, 1898, accept from the Continental Insurance Company of New York a bond in the identical form of the bonds adjudged to be insufficient and invalid on January 29, 1898; and on the 2d day of February, 1898, he accepted the American Surety Company of New York as a surety on the bond of the United States Fidelity & Guarantee Company of Baltimore. The complainants, acting upon the supposition that bonds in the form and with the surety of the bonds which the commissioner had accepted would also be accepted from them, prepared renewal bonds in such form and with such surety, and on February 3, 1898, deposited them with the defendant, as insurance commissioner. On the 7th day of February, 1898, the defendant made an order adjudging and determining that each and every one of these renewal bonds was invalid and insufficient, and declined to approve or file the same. The order is preceded with a written opinion, in which the commissioner states his objections to these renewal bonds. These objections are, in substance, as follows:

(1) It is objected that each of the companies executing the bonds is a member of the organization or association known as the "Board of Underwriters of the Pacific"; that the purpose and effect of this association is to create a monopoly of the fire insurance business in this state, which, in the opinion of the commissioner, is unlawful, and against public policy and the interests of the state; and that no foreign corporation can come into the state, and enter into such an agreement, become a member of such association, and lawfully continue to transact business in this state.

(2) It is objected, against the bonds of the 34 foreign insurance companies, that the whole of the capital stock of such companies had not been paid up.

Section 15 of article 12 of the constitution of this state provides that:

"No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

And section 424 of the Civil Code of the state provides that:

"The entire capital stock of every fire or marine insurance corporation must be paid up in cash within twelve months from the filing of the articles of incorporation, and no policy of insurance must be issued or risk taken until twenty-five per cent. of the whole capital stock is paid up."

The commissioner holds, under these constitutional and statutory provisions, that no foreign corporation organized for more than one year is entitled to transact business in this state unless its entire subscribed capital stock has been paid up.

(3) It is objected that the consent of the stockholders of the for-

eign corporations had not been obtained for their individual and personal liability for the debts and liabilities of the corporations, as provided in section 322 of the Civil Code of the state. That section provides:

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. * * * The liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this state."

(4) It is objected that complainants do not maintain an office or place in this state for the transaction of their business, where transfers of stock can be made, and in which shall be kept (for inspection by every person having an interest therein, and legislative committees), books in which shall be recorded the amount of capital stock subscribed, and by whom, the names of the owners of the stock, and the amounts owned by them respectively, the amounts of stock paid in, and by whom, the transfers of stock, the amount of their assets and liabilities, and the names and places of their officers, as provided in section 14, art. 12, of the constitution of the state. That section provides:

"Every corporation other than religious, educational, or benevolent, organized or doing business in this state, shall have and maintain an office or place in this state for the transaction of its business, where transfers of stock shall be made, and in which shall be kept, for inspection by every person having an interest therein, and legislative committees, books in which shall be recorded the amount of capital stock subscribed, and by whom; the names of the owners of its stock, and the amounts owned by them respectively; the amount of stock paid in, and by whom; the transfers of stock; the amount of its assets and liabilities, and the names and place of residence of its officers."

(5) It is alleged: That in certain states of the Union the certificates of authority or license to transact insurance business in such states are of annual duration. That section 622 of the Political Code of California provides that:

"When by the laws of any other state or country, any taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations, or prohibitions, are imposed on insurance companies of this state, doing business in such other state or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of securities, or other obligations or prohibitions, imposed upon insurance companies of such other state or country, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind must be imposed upon insurance companies of such other state or country doing business in this state. * * *"

—That the effect of this retaliatory law upon the insurance companies, from such states as provide for an annual certificate, is to limit the certificate of authority issued to them under the law of the state to one year. It is accordingly objected that all such companies who have not procured renewed certificates within one year are transacting business in this state contrary to law.

The commissioner concludes his opinion with the statement that:

"There are many other objections, founded upon the laws of this state, which I believe to be sufficient to justify me in withholding approval from these bonds, and in denying the applications to file same. I have carefully examined the said bonds, and the manner of their execution, and, with the exception of those furnished by the Home of New York and Phoenix of Hartford, I believe them to be insufficient in form and substance; and as to the two excepted, while not open to all the objections to which the others are subject, I am not satisfied as to their execution."

The commissioner thereupon adjudged and determined that each and every of said bonds was "invalid and insufficient."

We have in these objections the opinion of the commissioner concerning the renewal bonds, but he says nothing whatever about the original bonds, the sufficiency and validity of which are the essential questions involved in this controversy. It was assumed, however, upon the argument, that the objections of the commissioner to the renewal bonds were also applicable to the original bonds, and they will be so considered.

With respect to the first objection, it is sufficient to repeat what has been said before,—that the question raised is immaterial. It is a fact, however, that the question whether the Board of Fire Underwriters of the Pacific is an unlawful association or its purpose illegal was before this court in *Continental Ins. Co. v. Board of Fire Underwriters of the Pacific*, 67 Fed. 310. The subject was there discussed by Judge McKenna (now Mr. Justice McKenna of the supreme court) with great care, and the authorities relating to unlawful combinations elaborately reviewed. The learned judge arrived at the conclusion that the association was lawful and its purpose legal.

With respect to the other objections, it will not be necessary in these proceedings to ascertain to what extent the complainants in the transaction of insurance business in this state are subject to the constitutional and statutory provisions upon which the objections are based. The scope of the commissioner's power to declare bonds insufficient and invalid must be determined on other grounds.

It will be observed that no objection is made by the defendant to the sufficiency of the sureties on any of these bonds, and, with the exception of the general objection that the commissioner believes the bonds "to be insufficient in form and substance," no objection is made to their form. He points out no defect in the terms of any of the bonds, and does not claim that any of the conditions required by the statute have been omitted therefrom. The objections he has made, and which appear to have been prepared with some degree of care, are directed to matters that in no way affected the sufficiency or validity of the bonds under which the complainants were transacting insurance business in this state on the 29th day of January, 1898. The claim made on behalf of the defendant, that the statute clothes the insurance commissioner with a discretionary power in determining the sufficiency and validity of the bonds furnished by insurance companies, and that, in the exercise of this discretion, his acts cannot be reviewed by the courts, is not controverted by the complainants. They admit that if the solvency of the sureties to these

bonds was disputed, and the commissioner should in good faith institute an inquiry to determine that fact, and, upon the evidence, should adjudge that the bonds were not sufficient in point of financial ability to secure the state in the full principal sum of the bond, the judgment of the commissioner would be final, and not subject to review by the courts. It may be admitted, further, that, if the conditions of these bonds were such that they did not conform to the requirements of the statute, the judgment of the commissioner acting in good faith upon the question of their validity would be final, and not subject to review by the courts. But here we have the question whether the commissioner has the power to adjudge that the bonds of the insurance companies are insufficient and invalid for other and different reasons, and because, in his opinion, the companies have associated themselves together in an unlawful combination, or have not complied with some law of the state. These bonds contain the condition that the insurance company will "conform to all the provisions of the revenue and other laws made to govern them." Is it possible that upon the breach of this condition, and for that reason, the commissioner has the power to declare these bonds invalid? Manifestly not. The validity of the bond is the security which the state has for the enforcement of the law. But it may be said that the action of the commissioner had reference to the future, and not to the past; that, having discovered that the insurance companies were not complying with the law, he proposed to terminate their disobedience by canceling their bonds, and, by refusing to approve and file renewal bonds, compel them to leave the state. This is, in effect, exercising the power of revoking their certificates of authority to transact business in this state. If the commissioner has this power under such conditions, it must be found in the law in plain and explicit terms. It ought not to be matter of inference or the subject of mere conjecture. It should be positive and distinct, and in accordance with the manifest intent and purpose of the legislature. The commissioner has the power to revoke certificates of authority under which insurance companies are entitled to transact business in this state. This power is clearly and distinctly given in the statute, but the conditions under which it may be exercised are also clearly stated. By section 595 of the Political Code of California it is provided that the commissioner may revoke the certificate of any foreign corporation or company authorizing it to do business in this state whenever "such corporation or company shall transfer or cause to be transferred an action to the United States circuit court." By section 600 of the same Code it is provided that, "whenever the commissioner ascertains that any person engaged in the insurance business is insolvent within the meaning of this chapter, he must revoke the certificate granted, and send by mail to such person, addressed to him at his principal place of business, or deliver to him personally, notice of such revocation," etc. These are the only conditions under which the commissioner is authorized by the laws of the state to revoke a certificate, and, by a well-known rule of interpretation, the authority cannot be extended to other conditions or circumstances not mentioned in the statute. *Suth. St. Const. Law*, § 392.

We find, then, that, while the power of the commissioner in dealing with the bonds of the insurance companies and with the certificate of authority granted them to transact business in the state is clearly defined, it is, nevertheless, limited in its scope, and does not include the authority to declare complainants' bonds insufficient and invalid for any of the reasons disclosed in the defendant's affidavit. How, then, can it be said that he was acting within his jurisdiction in the exercise of a legal discretion? It is true that in section 595 of the Political Code, after enumerating certain duties of the commissioner, he is required to "perform all other duties imposed upon him by the laws regulating the business of insurance in this state, and enforce the execution of such laws." But this provision certainly does not enlarge his jurisdiction, or confer upon him any power or authority to perform a duty not specified, or to execute a purpose not sanctioned by the law. *U. S. v. Doherty*, 27 Fed. 730, 733; *U. S. v. Kirby*, 7 Wall. 482, 486. "Notwithstanding the words of the commission give authority to the commissioners to do according to their discretion, yet their proceedings ought to be limited and bound with the rule of reason and law." *Rooke's Case*, 5 Coke, 99.

The duty the commissioner is required to perform in enforcing the execution of the laws against domestic insurance companies is clearly pointed out in section 601 of the Political Code, where it is provided:

"In case any person, upon the requisition of the commissioner, fails to make up the deficiency of the capital in accordance with the requirements of this chapter, or to comply in all respects with the laws of this state, the commissioner must communicate the fact to the attorney-general, who must, within twenty days after receiving such communication, commence an action in the name of the people of this state in the superior court of the county where the person in question is located or has his principal office, against such person, and apply for an order requiring cause to be shown why the business should not be closed," etc.

If the only purpose of this section is to close up the business of the delinquent corporation, and not to distribute its effects to the stockholders and creditors, as determined in *State Inv. & Ins. Co. v. Superior Court of City and County of San Francisco*, 101 Cal. 135, 146, 35 Pac. 549, it is not perceived why the section is not applicable to all insurance companies alike, whether foreign or domestic. If a foreign corporation fails to comply with the laws of the state, is there any reason why that fact should not be determined by the court upon the suit of the attorney general, as in the case of a domestic corporation, when the remedy for the delinquency is to compel the corporation to cease doing business in the state? There is certainly no reason in the general administration of the law, and none has been disclosed in any of the facts of the present case.

The conclusion to be drawn from these various provisions of the statute is that the duties of the insurance commissioner have been carefully prescribed and regulated. If a foreign insurance corporation removes an action from the state court to the United States court, or becomes insolvent, the commissioner is required to revoke its certificate of authority to transact business in the state. If the bond of such a corporation is discovered to be invalid by reason of the conditions being defective in form or substance, or if it be found

that the sureties are insufficient, in a financial point of view, to secure to the state the penal sum of the bond, then it is the duty of the commissioner to cause the bond to be renewed. If the commissioner discovers that such a corporation had failed to comply with the laws of the state in any respect, and no specific method of procedure has been prescribed by the statute, then the commissioner is required to communicate the fact to the attorney general of the state, who may proceed on the bond, or take such other action as may be appropriate under the circumstances. What can be more clear than the fact that it is not necessary to enlarge the commissioner's powers in one direction to secure an enforcement of the law in another?

In *Com. v. City of Philadelphia* (Pa. Sup.) 35 Atl. 195, a contract had been made by the board of education of the city of Philadelphia for a matter within their department, and they had issued a warrant for payment of the claim thereunder, and an alternative writ of mandamus had issued to compel the city comptroller to sign a warrant for the payment of the claim. The comptroller answered that it did not appear that the contract was made in accordance with an act governing such contracts; that the binding of the books, which were the subject of the contract, was so unsuitable as to render them unserviceable for public use; and that the relator was allowing a very large commission to the agent who secured the contract. The judgment of the court of common pleas of Philadelphia was in favor of the defendants. The supreme court, in passing upon the sufficiency of this answer on appeal, said:

"The answer appears to be based on a very exaggerated and erroneous idea of the controller's powers and authority, and the claim that he is 'not subject to the order or direction of the court' is not to be tolerated. The duties of the controller, as was held in *Com. v. George*, 148 Pa. St. 463, 24 Atl. 59, 61, are partly ministerial and partly discretionary; and, while the courts will not review his discretion, exercised in a proper case, yet he is not above the law, and his discretion is not arbitrary, but legal. When, therefore, he is called upon by the courts, the facts must be made to appear sufficiently to show that they bring the case within his discretion, and that it was exercised in obedience to law. On this subject the courts are the final authority, and their jurisdiction cannot be ousted by simply putting forth the assertion of discretionary power, without showing that the matter was properly within such discretion. * * * The only contest comes from the controller, and his grounds of objection, set out at length in his answer, show that none of them were founded on matters within his discretion. Had any of them been valid, the court would not review his decision in regard to the facts; but when, admitting all the facts, none of the reasons are sufficient, the courts, and not the official, must determine the rights of the parties. This is the rule even in cases of discretion vested in strictly judicial tribunals (In *re Johnson's License*, 156 Pa. St. 322, 20 Atl. 1066; *Gross' License*, 161 Pa. St. 344, 29 Atl. 25; *Gemas' License*, 169 Pa. St. 43, 32 Atl. 88); and a fortiori must it be the rule where the discretion, though ample and exclusive, is reposed in a tribunal or an official who is only quasi judicial within prescribed limits."

The judgment of the lower court was accordingly reversed, and mandamus directed to be issued.

Applying the doctrine of this case to the case at bar, and it appears to dispose of all the objections which the defendant has raised to the present proceedings. The duty of the commissioner is partly minis-

terial and partly discretionary. With respect to the performance of those duties in which he exercises his discretion in good faith, the courts will not review his judgment or restrain his action; but the discretion he may thus exercise must be a legal discretion, and within the limitations of his authority. He cannot act arbitrarily or capriciously, or in disregard of the established rules of law; and, when he is called upon by the court to answer the charge that his conduct is illegal, oppressive, and injurious, he should be able to present such facts as will clearly show that he is acting under authority and within the jurisdiction of his office. It is true, the defendant alleges in his affidavit that in rejecting the bonds offered and tendered by the complainants, and in holding them to be insufficient and invalid, he did so after an examination and investigation into the matter, and in the exercise of the discretion conferred upon him by law; but, from other facts alleged by the complainants, and not denied by the defendant, this allegation appears to be in the nature of an opinion which the defendant himself formed as to the character of his own acts in the premises. That there have been evils in the administration of the insurance law may be admitted; that the defendant believes it to be his duty to make the office of commissioner efficient and of substantial benefit to the public may also be conceded; but it does not follow that he may adopt any course or pursue any method that will accomplish the purpose he has in view. The law furnishes the guide and regulates the performance of official conduct, and will be construed as conferring those powers only which are expressly imposed or necessarily implied. Mechem, Pub. Off. § 511. A temporary injunction will issue, in accordance with this opinion.

MOSS v. DOWMAN.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,041.

1. PUBLIC LANDS—HOMESTEADS—RELINQUISHMENT—BONA FIDE SETTLERS.

When, on the relinquishment of a homestead entry, the land is, and for some time past has been, in the possession of another, who is a bona fide settler, his rights as such immediately attach to the exclusion of a third person, who procures the relinquishment to be made, and who simultaneously with the relinquishment tenders an application for entry of the lands, and immediately enters thereon and makes improvements.

2. SAME—RULINGS OF LAND DEPARTMENT—EQUITY JURISDICTION.

It is only when it is made plain that the officers of the land department have, by a mistake of law, deprived a party of land to which he is rightfully entitled, that a court of equity is justified in setting aside the action of the department.

Appeal from the Circuit Court of the United States for the District of Minnesota.

The bill in this case was filed in the circuit court for the district of Minnesota, for the purpose of determining the ownership of 160 acres of land situated in that state, as between the complainant and defendant, it appearing that the legal title of the land is vested in the defendant, Richard Dowman, under a patent of the United States duly issued to him under date of March

17, 1897. A demurrer to the bill was filed, and, after argument, was sustained by the circuit court, the bill being dismissed for want of equity, and the complainant now seeks to obtain a reversal of the decree dismissing the bill. From the facts recited in the bill and the exhibits attached thereto, it appears that on May 7, 1890, one Robert H. Doran had made a homestead entry of the land in the United States land office at Duluth, Minn., which he subsequently relinquished, and thereupon the complainant filed this relinquishment in the land office, and made application to be allowed to enter the same in her own behalf. On November 18, 1890, Richard Dowman, the defendant, filed in the land office an application for the entry of the land as a homestead, accompanied with an affidavit stating that he had made an actual settlement on the land on the 19th of September, 1890, having built a house thereon, and that he was in exclusive possession of the premises when Doran's entry was relinquished, on the 24th of October, 1890. For the purpose of determining the rights of the parties, hearings were had before the receiver and register of the local land office, who did not agree in their conclusions, and the case then went before the commissioner, who decided in favor of the complainant, Moss, and thereupon an appeal was taken to the secretary of the interior, before whom the matter was fully heard, and by whom the facts were determined, and stated as follows: "The land involved in this controversy lies in the First school district of Cook county, state of Minnesota. This county is a very large one, being fifty miles long east and west, and eighteen miles wide north and south at the east end, and fifty miles wide north and south at the west end. The northern line of the county is the southern line of Canada. The land in controversy lies in the northern central part of Cook county, near the Canadian line. To use a description made by Miss Moss, the defendant, 'the land was situated in the wildest and most unbroken wilderness, without roads, or even foot trails, through Minnesota for the settlements, distant by rail from Duluth over nine hundred miles. The nearest post office is fifty miles away, and telegraph nearly one hundred miles distant.' Richard Dowman, the settler and contestant in the case, had lived for a number of years in Grand Marais, the county town of Cook county, distant fifty miles southeast of the land, and in the same school district. He was a member of the First district school board, a county commissioner, was unmarried, and his occupation, besides the two county offices, appears to have been that of an explorer and guide for parties going through that part of the country. The evidence does not show that he had any other visible means of support or possessed much money. Although numerous persons have made homestead entry of this land, none appear to have done so in good faith, for none appear to have made any settlement during the period of five years it was entered and relinquished every six months. Dowman, according to his own testimony, knowing the land had been thus entered and relinquished a number of times without any of the entrymen attempting to make settlement thereon, went on the land September 19, 1890, and began the construction of a house, which he finished October 10th following. From that time he made the land his home, actually living there continuously until November, 1890, with the one exception of a trip to the county town for provisions, which he made October 19, 1890, returning October 24, 1890, the day Doran's relinquishment was filed. From November 1, 1890, to the date of the hearing, he has been temporarily absent for days at a time in Grand Marais, the county town of Cook county, a village of one hundred and twenty inhabitants, but which, although fifty miles distant, lies in the same school district as does the land in controversy. This absenteeism appears owing largely to the fact that Dowman was a member of the school board and a county commissioner, two distinct offices, and to fulfill the duties of which he was compelled to go to the county town. The county town was also the nearest point at which provisions could be obtained. Owing to the distance, the absence of transportation, and the difficulties of the route, it required two days to make the trip, and Dowman appears to have on occasions been absent quite a number of days at a time from his claim. But this does not necessarily show bad faith, and the department always presumes temporary absences to be for good reasons, and, before a contrary reason will be accepted, facts must be disclosed which prove it. In this case no such facts

have been produced, and nothing to show Dowman had any other home than that on the land in controversy, beyond a room, over the store of a friend, which he occupied in the county town on these visits. Moss was a school teacher in Grand Rapids, Mich., and had taught school in cities for a period of twenty years. She was unmarried, about forty years of age, and had \$4,000 in cash, and a farm in Dakota yielding an income of from \$100 to \$250 per annum, while her salary was \$60 per month. She bought the relinquishment of the land solely on the representations of her Dakota agent, from Doran, who, as previously shown, had been erroneously allowed to make entry of the land. Without knowing anything of the land except from her agent, and without ever having been nearer than one hundred and sixty miles on an air line, and nine hundred miles by rail, she paid \$1,000 for the relinquishment. The evidence shows that at that time Dowman was a settler living upon the land. Returning to Grand Rapids, Mich., over one thousand miles from the land by the nearest route, although she had sworn she made entry on the land with the purpose of making settlement thereon, Moss continued to teach school until the latter part of March, five months after her entry, and after she had been served with a notice of Dowman's contest. The following month she made the trip to the land, arriving there two days before the expiration of the first six months after her entry. Pitching a tent within sight of Dowman's house, in which he was living, she began the erection of improvements so near to Dowman's cabin that the clearings joined, erecting a residence that cost \$700, and all the furniture and conveniences that money could buy to make it comfortable for a woman to reside in. All this expenditure and improvement were made in the face and with a knowledge of Dowman's claim and prior settlement, and therefore made at Moss' own risk, and it would appear, for the purpose of defeating his claim, if possible, by means of superior improvements, in spite of the long-established and well-known ruling of this department in such cases. The character or value of Moss' improvements gives her no advantage. Because she had more money than Dowman to expend on improvements does not detract from his rights. In view of these facts, and that no evidence has been introduced which shows that Dowman's settlement was not made in good faith, under the established ruling of this department, the settler Dowman's right attaches instantly on the filing of Doran's relinquishment, and is therefore superior to Moss' entry." Based upon this decision, the land department issued a patent of the land to Richard Dowman, and thereupon the present bill was filed, in which it is prayed that complainant be adjudged to be the owner of the land, and that the defendant holds the legal title as trustee for complainant.

James K. Redington (Warren N. Draper, on brief), for appellant.
L. C. Harris, for appellee.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge, after stating the case as above, delivered the opinion of the court.

In the brief filed by counsel for appellant, it is admitted that it is well settled that "all questions of fact presented and decided in a controverted proceeding, where both parties are heard, are concluded by the department decision, and are binding on the court. But where the officers of the land department have, by a mistake of law, given to one man the land which, upon the facts found, belongs to another, equity will grant relief by putting the title where of right it ought to be." In this case it appears that a controverted proceeding was had between the parties before the secretary of the interior, in which it has been decided that at the time, to wit, October 24, 1890, when complainant made application to enter the land, Dowman was then a settler thereon in good faith, and, this being true as a matter of

fact, the only question of law arising thereon is whether the complainant could make a homestead entry thereof which would be effectual against the pre-existing actual occupancy of Dowman. On behalf of appellant it is argued that Dowman cannot be permitted to take advantage of the entry and occupation by him initiated September 19, 1890, because the land was not then open to homestead entry by reason of the then pending application of Doran; that, the land being thus segregated from the public lands open to entry, the attempt of Dowman to obtain a settlement was illegal, and, the attempted entry being illegal, no rights can grow out thereof, on the principle that no person should be permitted to obtain an advantage by reason of his own wrong or illegal acts. The action of Dowman in going upon the land, for the purpose of making a homestead thereon, was not illegal or wrongful, within the meaning of the rule invoked. When Dowman's entry was made no one was upon the land, and there was nothing to show that any one claimed it, except the entry of Doran's application on the records of the land office at Duluth, some hundreds of miles distant. If Doran's application had ripened into a title, Dowman's actual entry on and settlement of the land would have been ineffectual to defeat it, but it would be effectual and legal against all parties whose rights were acquired subsequent to the entry thus made. By the relinquishment of Doran's claim, the land became again subject to entry, and Dowman's actual possession and occupancy at once became effectual in his favor. His action in taking possession in September, and continuing the same thereafter, might have been ineffectual as against Doran, but such action was not illegal and wrongful in such sense that he cannot claim the benefit thereof as against the appellant, whose entry was not made until the 24th day of October, 1890. The facts show that Doran's entry was relinquished on that day, and the land was then restored to the unappropriated public domain. When this restoration of the land took place, Dowman was a settler thereon in good faith, living on the land, and his rights attached as soon as the land became subject to entry. The facts, as found by the secretary of the interior, show that Dowman was in possession of the land, in good faith, for homestead purposes, during the whole of the 24th day of October, 1890; and, as a matter of fact, it is impossible for the appellant to show that, when she filed her application in the land office on that day, the land was not then in the possession of Dowman, and she is of necessity driven to claim, as matter of law, that Dowman's entry was illegal and wrongful, and that, as her application was filed in the land office at the same time she filed the Doran relinquishment, she becomes entitled to the benefit of the Doran entry, as against the effect of the existing possession by Dowman. The evidence shows that appellant paid Doran \$1,000 to relinquish his entry, but by this payment she did not become the assignee of Doran's rights or entry. The payment was made in consideration of Doran relinquishing his entry, in order that thereby the land might be restored to the unappropriated public domain, and thus become open to other entries. It is not open to appellant to insist that she is, in any sense, the successor to, or assignee of, the Doran

entry. The payment to Doran of the sum named created no equity or right in favor of appellant as against Dowman, and the only legal effect that can be given to the relinquishment executed by Doran is that thereby the land became again open to appropriation under the homestead act, and, being thus released from the effect of the Doran entry, the appellant made application at the land office to enter the land, which application is in law effectual from its date; but the fact, as found by the secretary of the interior, is that, when this application was made, the land was then occupied by a bona fide settler, and there is no legal or equitable ground for holding that the right conferred by such prior possession and occupancy must be postponed to the right created by the application filed in the land office.

Counsel for appellant claim that their position is sustained by the ruling of the supreme court in *Wood v. Beach*, 156 U. S. 548, 15 Sup. Ct. 410. In that case it appeared that Wood, in 1870, had occupied certain lands in Kansas, seeking to make a homestead thereof, which were within the indemnity limits of a railroad grant then existing, and under which the land had been withdrawn from sale or entry by proper orders of the land department, entered in 1867. The final selection of the land under the railroad grant was made in 1872, and the deed from the state to which the title passed under the act of congress was made, in 1873, to the defendant Beach. The supreme court held that the withdrawal orders in 1867 were sufficient to defeat a settlement for homestead purposes taking effect while the orders were in force, because thereby the land was in fact withdrawn from sale or entry, and, as the railway company subsequently perfected its right to the land and made selection thereof, its rights could not be defeated by any supposed equities existing in favor of Wood, who made his homestead entry with full knowledge of the facts. This case would be an authority in point, if the present contest was between Doran, claiming under his entry in the land office, and Dowman, claiming under an actual settlement made after the Doran entry had been filed; but it is not applicable to the question at issue between the present litigants. In the brief submitted for appellant, counsel have cited many decisions of the land department for the purpose of showing that from 1859 to 1885 it was uniformly held "that no right upon cancellation of an entry inured by reason of a settlement made during its existence; that to hold otherwise would be to enable a trespasser to benefit by his own wrong;" and it is therefore claimed, under the rule of *stare decisis*, that the secretary made a mistake of law in not following the doctrine claimed to be established by the decisions cited; but counsel further show in their brief that, since 1885, modifications of the previous ruling have been made, and recognition has been given to settlements made under circumstances similar to those existing in the present case, and that since August 20, 1890, the rulings of the department are to the effect that a settlement made in good faith and prior in time will be held good as against a filing or application tendered simultaneously with the relinquishment or cancellation of a pre-existing entry. It thus appears that if the secretary in this case had held that

Dowman's entry and settlement, though made in good faith, were not available to him upon the relinquishment of Doran's entry, such ruling would have been contrary to that established by the later decisions of the department; and certainly it cannot be said that, in following the later rulings, the secretary violated any recognized rule of law; and it is only when it is made plain that the officers of the land department have, by a mistake of law, deprived a party of land to which he is rightfully entitled that a court of equity is justified in setting aside the action of the department. *Moore v. Robbins*, 96 U. S. 530; *Marquez v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420.

Being of the opinion that the facts set forth in the bill herein filed do not make a case for the intervention of a court of equity, within the rule laid down in the cases cited, it follows that the trial court did not err in dismissing the bill on the merits, and the decree to that effect is affirmed.

INTERSTATE COMMERCE COMMISSION v. WESTERN & A. R. CO. et al.

(Circuit Court, N. D. Georgia. June 15, 1898.)

No. 524.

1. THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE.

If a greater charge be made for a shorter than for a longer distance over the same line, etc., and the circumstances and conditions at the longer distance point are substantially similar to those at the shorter distance points, it is a violation of the fourth section; but if the circumstances and conditions at the longer distance point are substantially dissimilar, within the meaning of the act, to those at the shorter distance point, the fourth section is not violated.

2. SAME.

If the circumstances and conditions at the longer distance point are substantially dissimilar from those at the shorter distance point, then the fourth section of the act is inapplicable. Cases cited and followed: *In re Louisville & N. R. Co.*, 1 Interst. Commerce Com. R. 57; 1 Interst. Commerce Com. R. 278; *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 Fed. 300; *Behlmer v. Railroad Co.*, 71 Fed. 839; *Interstate Commerce Commission v. Alabama M. Ry. Co.*, 18 Sup. Ct. 45, 168 U. S. 144. Case cited and disapproved: *Interstate Commerce Commission v. East Tennessee, V. & G. Ry. Co.*, 85 Fed. 107.

3. SAME—SIMILARITY OF CIRCUMSTANCES AND CONDITIONS—COMPETITION.

Competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed dissimilar, and as such must have been in the contemplation of congress in the passage of the act to regulate commerce. Case cited: *Interstate Commerce Commission v. Alabama M. Ry. Co.*, 18 Sup. Ct. 45, 168 U. S. 144.

4. SAME—COMPETITION BETWEEN RAILWAYS.

Railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. The fourth section declares that the carrier shall not make the higher charge to the nearer point under substantially similar circumstances and conditions. If the circumstances and conditions are not substantially similar, then the section does not apply, and the carrier is not bound to regard it in the making of its tariffs. If railway competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate at the

intermediate point, and the higher rate is not prohibited by the fourth section. Cases cited: Savannah Bureau of Freight & Transportation v. Charleston & S. Ry. Co., 7 Interst. Commerce Com. R. 479; 11 Ann. Rep. Interst. Commerce Com. pp. 37-43.

5. SAME—POWER OF COURTS AND COMMISSION IN REGARD TO RATES.

Where the circumstances and conditions at the longer distance point are substantially dissimilar, the carrier may judge of this for itself, in the first instance, and fix the rates for the longer distance point without violating the fourth section of the act; but this does not preclude the courts or the commission from inquiring as to whether the rates to the shorter distance points are unjust or unreasonable, or whether they constitute undue preference for, or unjust prejudice against, any locality. Case cited: Interstate Commerce Commission v. Alabama M. Ry. Co., 21 C. C. A. 51, 74 Fed. 723; Id., 18 Sup. Ct. 45, 168 U. S. 173.

6. SAME.

In order to constitute dissimilarity under the fourth section of the act, the competition must be real, and not imaginary or trifling.

7. THE THIRD SECTION OF THE ACT TO REGULATE COMMERCE—UNDUE PREFERENCE.

Railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. Case cited: Interstate Commerce Commission v. Baltimore & O. R. Co., 12 Sup. Ct. 844, 145 U. S. 283.

8. SAME—COMPETITION.

If the lesser charge to the longer distance point results from dissimilar circumstances and conditions brought about by competition, it cannot be said to be a preference which is undue or unreasonable.

9. SAME.

All the evidence shows is that the rate to Atlanta, the longer distance point in this case, is forced on the railroad officials by competition. There is no evidence of any improper desire on the part of these officials to give Atlanta a lower rate or the local shorter distance points a higher rate. The matter is controlled by existing competitive conditions. Unless the rates complained of, as compared with each other, violate the fourth section of the act, there seems to be very little ground for claiming that they violate the undue-preference provision of the third section. Case cited: Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 947, 948.

10. SAME.

Government should not undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another. It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate and increase commerce. The act to regulate commerce has no such purpose. Case cited: Brewer v. Railway Co., 84 Fed. 258.

11. THE FIRST SECTION OF THE ACT TO REGULATE COMMERCE—REASONABLENESS OF RATES IN AND OF THEMSELVES.

The first section provides that all charges for the transportation of property, etc., shall be reasonable and just. There is no evidence to justify a finding that the rates charged to the shorter distance points in this case are unjust and unreasonable in and of themselves. The mere fact that lower rates which are charged to a longer distance competitive point pay something above the cost of the service of carriage does not show that the shorter distance rates are unreasonable.

12. SAME—COMBINATION RATES.

The rates to the shorter distance points in this case are made up of a highly competitive rate from point of shipment to Chattanooga, added to a local rate to destination fixed by the Georgia Railroad Commission. The rates in question, when separately considered, are not unreasonable or

unjust. On the contrary, the testimony is that each is reasonable of itself. Case cited: *Interstate Commerce Commission v. Alabama M. Ry. Co.*, 21 O. C. A. 51, 74 Fed. 723.

18. THE SECOND SECTION OF THE ACT TO REGULATE COMMERCE.

The second section deals with preferences as between shippers, and not as between localities, and it is conceded to be wholly inapplicable to this case.

Geo. L. Bell, Asst. U. S. Atty. (L. A. Shaver, of counsel), for complainant.

Ed. Baxter and Payne & Tye, for defendants.

NEWMAN, District Judge. On the 16th day of October, 1891, L. N. Trammell, Allen Fort, and Virgil Powers, constituting the railroad commission of Georgia, filed with the interstate commerce commission a petition setting up a violation on the part of the above-named defendants of section 4 of the act of congress, entitled "An act to regulate commerce" (24 Stat. 379). The petition, after setting out that the defendants are common carriers engaged in transporting goods from Cincinnati, Ohio, to points in Georgia, and therefore subject to the act to regulate commerce, complains that the rates charged on freight from Cincinnati and other Ohio river points to Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta, local stations on the line of the Western & Atlantic Railroad in Georgia, are greater than the rates charged to Atlanta, the eastern terminus of the Western & Atlantic Railroad, and a longer distance point. It was alleged that the transportation to Atlanta and to the local stations named was under substantially similar circumstances and conditions. The petition further stated that Marietta is 20 miles west of Atlanta and 118 miles east of Chattanooga, that Acworth is 35 miles west of Atlanta and 103 miles east of Chattanooga, that Cartersville is 48 miles west of Atlanta and 90 miles east of Chattanooga, that Kingston is 59 miles west of Atlanta and 79 miles east of Chattanooga, that Adairsville is 69 miles west of Atlanta and 69 miles east of Chattanooga, and that Calhoun is 78 miles west of Atlanta and 60 miles east of Chattanooga; that the rates of freight charged, collected, and received by the defendants for freight transportation by continuous carriage from the city of Cincinnati and other Ohio river points to the towns and stations above named were more and greater on each class than the amount charged and received for freight to the city of Atlanta, which is a greater distance from the city of Cincinnati; that, therefore, the rates were unreasonable and discriminating in their nature; that they have called the attention of the officials of the Western & Atlantic Railroad Company to the fact, and that they have refused and declined to change the same. The prayer of the petition is as follows:

"Whereupon petitioners, as the railroad commission of the state of Georgia, come and present the facts as aforesaid, and appeal to the interstate commerce commission for relief, and aver and charge that the aforesaid through rate of freight into the state of Georgia and to the different towns and stations on the Western & Atlantic Railroad, so made, charged, and collected by the carriers as aforesaid, is unreasonable and discriminating in its nature, and is in direct violation of section 4 of the act of congress entitled 'An act to regulate commerce.'"

Answers were filed by the defendants, in which substantially they denied that the transportation to Atlanta and the other points named was under substantially similar circumstances and conditions, or that the rates were unjust and discriminating. After hearing the parties, the interstate commerce commission, on November 11, 1892, filed its report and opinion, and made an order in which it required the railroad companies to desist from the acts complained of in the petition of the Georgia railroad commission. On the 27th day of May, 1893, the interstate commerce commission filed its bill in this court, alleging that the defendant railroad companies had refused, and still refuse, to comply with the order so made by it, asking that said order be enforced, and that the defendant railroad companies be enjoined in accordance with its decision and order. The particular act, therefore, which it is claimed constitutes a violation of section 4 of the act to regulate commerce, is the charging and receiving greater compensation in the aggregate for the transportation of a like kind of property from Cincinnati and other points, called and known as "Ohio river points," for a shorter distance to Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta, in the state of Georgia, than for a longer distance over the same line in the same direction to Atlanta, also in the state of Georgia; the shorter being included within the longer distance. The claim, of course, is, and the conclusion of the commission was, that freight carried from Cincinnati, etc., to Atlanta, is carried under substantially similar circumstances and conditions as freight carried to the shorter distance points named. And this violation of section 4 has been the only question raised prior to this hearing, as shown by the record. If the circumstances and conditions at Atlanta are substantially similar to those at Marietta and the other shorter distance points named, it is conceded to be a violation of section 4 of the act to regulate commerce; if the circumstances and conditions at Atlanta are substantially dissimilar, within the meaning of the act, to those at the shorter distance points, then it is conceded that the fourth section is not violated. As bearing upon this question, and, indeed, as determining it, the question discussed in this case, as in several other cases, has been whether or not competition with other carriers subject to the act to regulate commerce at longer distance points is sufficient to make the carriage to such points under dissimilar circumstances and conditions. The record in this case shows that the rates on first-class goods per 100 pounds, in 1892, and at present, are as follows: From Cincinnati to Chattanooga, 76 cents; to Calhoun, \$1.09; to Adairsville, \$1.12; to Kingston, \$1.15; to Cartersville, \$1.18; to Acworth, \$1.24; to Marietta, \$1.27; and to Atlanta, \$1.07. The rate to the six local points named is made up of the through competitive rate to Chattanooga, Tenn., with the local rate authorized by the Georgia railroad commission from Chattanooga to the points named added. The plan of rate-making in Georgia to local noncompetitive stations is to add to the through competitive rate the local rate authorized by the Georgia railroad commission; and when made in this way the above rates are the result.

After the case was at issue in this court, evidence was taken both for the commission and the railway companies. The evidence for the commission was that of merchants at the local stations on the

Western & Atlantic Railroad. Their evidence tended to show that they were put at a disadvantage at their respective places of business by reason of the lower rate to Atlanta, and that injury had resulted to business at these points by reason of the Atlanta rate. The evidence for the railway companies was taken for the purpose of showing, and tends to show, that the rate to Atlanta is the result of active competition; also that the rate to the local stations named on the Western & Atlantic Railroad were just and reasonable rates in and of themselves; also that a lower rate to the local stations would not materially affect the amount of goods carried to those stations, or the volume of business transacted. The testimony is of considerable length, and no attempt will be made to quote from the evidence for either side except from the testimony of one witness out of a number, as to competition existing at Atlanta. Mr. J. M. Culp, the general traffic manager of the Southern Railway, was a witness for the defendants, and the following extract is taken from his testimony, by questions and answers:

"Q. State whether the rates of freight from Ohio river points to Atlanta are controlled by any, and, if so, to what, extent, by competition. A. They are entirely controlled by competition. They are controlled by competition between the railroads themselves, the railroads leading from the Ohio river themselves, and controlled by competition from the Eastern seaboard. The adjustment of rates on certain of the classes is based upon the same rates from Cincinnati to Atlanta as from Baltimore to Atlanta. This is not true of all classes, but it is true of a number of classes. Q. State whether there is any such competition at Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta as exists at Atlanta, Georgia. A. There is not the same competition. There is competition existing up to Chattanooga,—strong competition; and the rates fixed by that competition are used in making rates to these local stations. As I have before testified, to these competitive rates up to Chattanooga are added the rates which are the same for the same distance as the rates of the Georgia commission."

While the testimony varies somewhat, the above is in line with the testimony of all the witnesses for the defendants who testified on the subject. The present case was heard and decided by the interstate commerce commission in 1892. At that time there had been no authoritative determination of the question as to whether or not competition at a longer distance point would render the carriage of freight to such point under substantially dissimilar circumstances and conditions from those existing at a shorter distance point within the meaning of the fourth section of the act to regulate commerce. Since that time several cases have been before the supreme court, and the question thoroughly discussed. It appears to be now finally settled by the decision of the supreme court in the case of *Interstate Commerce Commission v. Alabama M. Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. 45. In that case the substance of the decision by the supreme court may be gathered from a headnote as follows:

"Competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of congress in the passage of the act to regulate commerce. This is no longer an open question in this court."

In the case of *Savannah Bureau of Freight & Transportation v. Charleston & S. Ry. Co.*, 7 Interst. Commerce Com. R. 479, the in-

terstate commerce commission, speaking of this decision in the Alabama M. Ry. Co. Case, used the following language:

"The commission has uniformly held, up to the present time, that this species of competition does not create the necessary dissimilarity of circumstances and conditions under that section, and such would have been its decision in this case upon the law as it was supposed to be when the findings of fact were prepared. Since then, however, the supreme court of the United States, by its decision in the case of Interstate Commerce Commission v. Alabama M. Ry. Co. (decided Nov. 8, 1897) 168 U. S. 144, 18 Sup. Ct. 45, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law as applied to the facts found in this case, we are of the opinion that the charging of the higher rate to the intermediate points as set forth is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply, and the carrier is not bound to regard it in the making of its tariffs. The court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate at the intermediate point, and the higher rate is not prohibited by the fourth section."

In the Eleventh Annual Report of the Interstate Commerce Commission (page 37) the commission discussed the Alabama M. Ry. Co. Case, decided by the supreme court, as follows:

"It is stated in the foregoing pages that there was pending before the supreme court of the United States a case arising under the fourth section. Since the above was written, that case has been decided adversely to the contention of the commission. It is proper, therefore, to further state the nature and bearing of that decision. The case is entitled 'Interstate Commerce Commission v. Alabama Midland Railway Company and Others,' and was decided November 8, 1897. The original complaint was brought by the Board of Trade of Troy, Ala., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections. The facts, in brief, are these: Troy, Ala., is situated upon the Alabama Midland Railway, 52 miles east of Montgomery. Rates from all points in the East and Northeast are higher to Troy than to Montgomery via the Alabama Midland, although the traffic over that line passes through Troy on its way to Montgomery. Rates on cotton from Troy to Eastern seaports, like Savannah, are higher than rates on cotton from Montgomery, although the Montgomery cotton passes through Troy upon its way to Savannah. There were other questions in the case, but these sufficiently illustrate what was decided in reference to the fourth section. Troy is reached by two railroads, the Alabama Midland and Georgia Central, and both these lines actually compete at that point for all kinds of traffic. Montgomery is the converging point for several lines of railway, which also compete for all kinds of traffic. The defendants claimed that the lower rate at Montgomery was justified and made necessary by this competition between the different lines centering there, which did not affect the rate to Troy. The fourth section provides that more shall not be charged for the short than for the long haul when the transportation is under 'substantially similar circumstances and conditions.' The defendants insisted that the fact of railway competition at Montgomery made the circumstances and conditions at Troy and at Montgomery dissimilar, and that, therefore, the inhibition of the fourth section did not apply. The commission had held in many previous cases, and held in this case, that railway competition between carriers subject to the provisions of the act should not of itself create necessary dissimilarity in circumstances and conditions. This contention is not sustained by the supreme court, which holds that such competition does

create that dissimilarity, and that the higher rate to Troy is not prohibited by the fourth section."

Then, after discussing at some length the origin of this section, the views of the commission, its purposes, etc., it states (page 43):

"This language is intelligible as to the third section, but we are at a loss to understand how it can be applied to the fourth. That section enacts that the carrier shall not charge more for the short than for the long haul under substantially similar circumstances and conditions. If the circumstances and conditions are similar, the greater charge cannot be made. If the circumstances and conditions are not similar, the section does not apply. The court holds that railway competition of controlling force makes the circumstances dissimilar. If, therefore, we find in a particular case that competition of controlling force actually exists, that ends the matter. We have no power to say whether, nor to what extent, such competition justifies the higher rate to the intermediate point. The third section is still left, and under that section we may inquire whether, under all the circumstances, the rates as adjusted give an undue preference to the competitive point, but the fourth section is by this decision eliminated from the act."

In view of the foregoing statements made by the interstate commerce commission in its report, and in the decision of the Savannah Bureau of Freight & Transportation Case, it may reasonably be assumed that the commission itself would not now, upon the record and facts, decide, in the case under consideration, that the fourth section of the act was violated.

Examining the question of the existence of such competition at Atlanta as is necessary to justify the lower rate, we find that the interstate commerce commission has expressed itself in this case. In its report and opinion in the present case the commission stated:

"The present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from competing markets, like St. Louis, Baltimore, Cincinnati, etc., and with some modifications, occurring from time to time, has been in effect for a considerable period."

If competition generally with other lines renders the circumstances and conditions of the haul dissimilar, severe competition would seem to make it beyond question. As a matter of general public knowledge, Atlanta is many times as large as either of the points on the Western & Atlantic Railroad as to which complaint is made. It is also well known, and it is disclosed by the evidence, that at Atlanta several different lines of railroad compete actively for business; and not only is competition active between carriers, but also between markets competing for the Atlanta business. Goods may be brought by water from New York, Philadelphia, Baltimore, and other Eastern points by steamer to Charleston, Brunswick, and Savannah, and thence by competing lines of railway to Atlanta. From similar points in the North and East there are also competing lines of rail. From points in middle North and the great Northwest, there is competition by rail and partly by water routes. Eight lines of railroads enter Atlanta. Its commercial and manufacturing interests are large and varied. At the local points on the Western & Atlantic Railroad mentioned there is very little, if any, competition. It must be apparent at a glance that the conditions under which transportation is effected to Atlanta and at any of the local stations are entirely different. Assuming, therefore, what is now

clearly decided, that competition may distinguish the circumstances, and should be considered in determining whether a given rate is obnoxious to the fourth section of the act to regulate commerce, it seems clear that the rates complained of in this case are not violative of that section.

In the case of *Brewer v. Railway Co.*, 84 Fed. 258, recently decided by Judge Speer, of the Southern district of Georgia, it is held that the competition existing at Macon, Ga., is such as to distinguish the circumstances and conditions of transportation to that city from those existing at Griffin; and a construction is given the fourth section of the act in accordance with what has been hereinbefore expressed. Judge Speer, in concluding his opinion, aptly says:

"Shall government undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate and increase commerce. The act to regulate interstate commerce has no such purpose, and yet this appears to be the inevitable result of the relief the complainants seek in this case, without any adequate corresponding advantage either to themselves or to the community in which they live."

It is said, however, that, even if the rates in question here are not objectionable under the fourth section of the act, the charges made to Calhoun, Kingston, Adairsville, Cartersville, Acworth, and Marietta are, in and of themselves, unjust and unreasonable, and as such come within the prohibition of the first section of the act referred to. That section provides that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for receiving, delivering, storage or handling of such property shall be reasonable and just; and every unreasonable and unjust charge for such service is prohibited and declared to be unlawful." It has been stated already that the charge originally made in this case, and the one to which evidence was directed, hearings had, and orders made, up to the present time, was the violation of the fourth section of the act, and that the charges made to the local stations on the Western & Atlantic Railroad relatively to the charge made at Atlanta were in violation of that section. But there is no evidence whatever to justify a finding that the rates charged to Calhoun, Kingston, Adairsville, Cartersville, Acworth, and Marietta are unjust and unreasonable in and of themselves. It is argued that the fact that the rate to Atlanta is said to be a reasonable and just rate by the witnesses for the defendant, that the rates to the other points, being higher, must be unreasonable. The witnesses speak of the rate to Atlanta as a part of a general system of rates, and a fair construction of their evidence is that they are spoken of as reasonable in connection with this general system of rate-making. These witnesses testify in response to questions of counsel for complainant that the rate to Atlanta pays something above the cost of the service of carriage. It is doubtful as to what this expression means, and as to what it includes,—whether it relates simply to the

cost connected immediately with the transportation of the goods, or whether it embraces all of the cost to the railroad company, including its fixed charges, etc. But, either way, the fact that the rate to Atlanta is reasonable does not show that the other rates are unreasonable.

It is said, also, that the fact that a part of the rate to Calhoun, Kingston, Adairsville, Cartersville, Acworth, and Marietta is the local rate fixed by the Georgia railroad commission for local hauls shows that it is unreasonable. The rates to these points are made up of a highly competitive rate to Chattanooga with the local rate added. The testimony is that each is reasonable of itself. In the Alabama M. Ry. Co. Case in the circuit court of appeals (21 C. C. A. 51, 74 Fed. 723), in reply to a question of this sort, raised in that case, it is said "the rates in question, when separately considered, are not unreasonable or unjust." The facts here being similar, the conclusion should be the same.

It is further urged that this bill should be sustained upon the ground that the rates complained of violate the third section of the act, in that there is an undue preference and advantage in favor of the longer distance point, and an unreasonable prejudice or disadvantage against the shorter distance point. It was said by this court in the case of Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 925, as follows:

"As to the question of undue preference, under section 8 of the act to regulate commerce, it may be stated that, unless the traffic involved here is obnoxious to the fourth clause of the act, it can hardly be said to be an undue preference in favor of Augusta, or an undue prejudice or disadvantage against Social Circle. In the party rate case (Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 12 Sup. Ct. 844) the supreme court say: 'But so far as relates to the question of undue preference, it may be presumed that congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute. * * * In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge.' So that, unless the rates complained of, as compared with each other, violate the fourth section of the act, there seems to be very little ground for claiming that they violate the undue preference provision of the third section."

There might be, of course, a case of undue preference on the one hand and undue prejudice on the other in connection with a charge of a greater rate for the shorter than for the longer haul. But the evidence here fails to show that there is any undue preference in favor of the longer distance point. The evidence shows that the rate to Atlanta is forced on the railroad officials by competition. There is no evidence whatever of any improper desire on the part of these officials to give Atlanta a lower rate or the local points a higher rate. The matter is controlled by existing competitive conditions.

Counsel for the commission, in his able brief, invites the attention of the court to the fact that "violations of the long and short haul rule of section 4 are only a species of undue preference in rates be-

tween localities, and that such violations fall within the purview of the provisions of section 3 forbidding undue preference between localities, and would have been unlawful under that section, although not specifically denounced in section 4. Congress, therefore, in making the greater charge for the shorter than the longer haul the subject of specific denunciation in a distinct section of the law, only intended to emphasize its disapprobation of that particular species of undue preference in rates between localities, and to point it out as one of the principal evils which called for remedial legislation, and which the commerce law was especially designed to remedy." But congress, by the fourth section, intended to establish a test as to the lawfulness or unlawfulness of charges in connection with the long and short haul. Where, under the terms of the section distinctly and specifically dealing with the long and short haul question, certain rates are legal, we cannot turn to another broader and more comprehensive part of the law, and determine them to be illegal. If the lesser charge to the longer distance point results from dissimilar circumstances and conditions brought about by competition, it cannot be said to be a preference which is undue or unreasonable.

Attention has been called by counsel for the commission to a recent decision by Judge Severens in the circuit court for the Eastern district of Tennessee, at Chattanooga, in the case of Interstate Commerce Commission v. East Tennessee, V. & G. R. Co., 85 Fed. 107, and special stress is laid on a part of the opinion by Judge Severens, as follows:

"Now, I do not understand that such a conclusion follows from that decision [decision of the supreme court in the Alabama Midland Case]. On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination whether the conditions are similar; and, if dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of. The language of the act ought not to be tied up by such liberal construction. If it were, then if it should be found that the dissimilarity of conditions is really in favor of the locality discriminated against, the provision would not apply,—a result contrary to the manifest intent. In other words, my opinion is that the restraint of section 4 is to be applied upon the scale of comparison between dissimilarity of conditions and the disparity of rates, and that it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

This view of the law suggested by Judge Severens, it is submitted with the utmost deference, is not the view adopted by the courts, or, indeed, by the interstate commerce commission itself. The view generally entertained is that, if the circumstances and conditions at the longer distance point are substantially dissimilar from those at the shorter distance point, then the fourth section of the act is inapplicable.

In the case of *In re Louisville & N. R. Co.*, 1 Interst. Commerce Com. R. 57, speaking through Judge Cooley, with reference to the phrase "under substantially similar circumstances and conditions," in the fourth section of the act, the commission says:

"If the circumstances and conditions of the two hauls are dissimilar, the statute is not violated."

In the Eleventh Annual Report, embraced in the language heretofore quoted, is this expression by the commission:

"If, therefore, we find in a particular case that competition of controlling force actually exists, that ends the matter. We have no power to say whether, nor to what extent, such competition justifies the higher rate to the intermediate point."

The language of the commission in the Louisville & N. R. Co. Case has been quoted with approval by Judge Ross in *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 Fed. 300, and by Judge Simonton in *Behlmer v. Railroad Co.*, 71 Fed. 839. *Alabama M. Ry. Co. Case*, *supra*.

In the opinion of the circuit court of appeals for the Fifth circuit (21 C. C. A. 59, 74 Fed. 723) in the *Alabama M. Ry. Co. Case*, by Circuit Judge McCormick, this occurs:

"Within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unreasonable or unjust, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and, generally, to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration; and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business."

In the same case in the supreme court this language of the circuit court of appeals is drawn in question, and in the opinion by Justice Shiras for the supreme court (168 U. S. 173, 18 Sup. Ct. 51) it is said:

"The last sentence in this extract is objected to by the commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty—the practical impossibility—of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers in fixing and adjusting rates in such instances is not subject to revision by the commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discrimination and preferences."

The meaning of this must be that, where the circumstances and conditions at the longer distance point are substantially dissimilar, the carrier may judge of this for itself, in the first instance, and fix the rates for the longer distance point without violating the fourth section of the act; but this does not preclude the courts or the com-

mission from inquiring as to whether the rates to the shorter distance points are unjust or unreasonable, or whether they constitute undue preference for, or unjust prejudice against, any locality.

It may be said finally that, in order to constitute dissimilarity under the fourth section of the act, the competition must be real, and not imaginary or trifling, and to this effect are all the decisions on the subject. It is conceded that the second section of the act is wholly inapplicable here, in that it deals with preferences as between shippers, and not as between localities.

The conclusions reached in this case are:

1. It is shown by the evidence and by the record that competition at Atlanta is active and effective, and controls in the making of the rates in controversy to Atlanta, and that there is little or no competition at any of the local points as to which complaint is made by the George commission. Consequently, the haul to Atlanta is not under circumstances and conditions substantially similar to those at the other localities, and therefore the fourth section of the act is not violated.

2. There is nothing whatever in the evidence or in the record from which it can be justly concluded that the rates to any of the local points named are, in and of themselves, unjust and unreasonable, in violation of the first section of the act.

3. The evidence fails to show that the rates complained of violate the third section of the act. The only complaint made, and all that the evidence shows, is that the rate to Atlanta, the longer distance point, is less than the rate to these shorter distance points; and as the rate to Atlanta is shown to have been brought about by, and to be the result of, active competition at that point, it cannot be held to be a preference which is undue or unreasonable in favor of Atlanta, or to subject the local points named to any undue or unreasonable prejudice or disadvantage.

Entertaining the foregoing opinion of the case, the court must deny the injunction prayed for to restrain the continuance of the rates in question.

BARROW S. S. CO., Limited, v. KANE.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 98.

1. CARRIERS—INJURY TO PASSENGER—INDEPENDENT CONTRACTORS.

A carrier's obligation to transport his passengers safely cannot be shifted from himself by delegation to an independent contractor, and it extends to all the agencies employed, and includes the duty of protecting the passenger from an injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation.

2. SAME.

The agents of a steamship company were charged with the duty of transferring its passengers by tugs or tenders from the port of embarkation, and putting them on board its ships. For this they received a commission, paying the expenses themselves. They employed a steam tender and two persons in charge thereof, and these persons, while plaintiff was

being transferred, assaulted him, and confined him in a room of the tender, apart from the other passengers. *Held*, that the steamship company was liable in damages for their acts.

In Error to the Circuit Court of the United States for the Southern District of New York.

Esek Cowen, for plaintiff in error.

F. K. Pendleton, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The questions presented by the defense of want of jurisdiction of the court below having been certified to the supreme court, and answered adversely to the contention of the plaintiff in error, the questions upon the merits remain to be considered. 18 Sup. Ct. 526.

Error is assigned that the trial judge instructed the jury, in substance, that the defendant was responsible for the acts of Hamilton and Sweeney, one or both. The evidence upon the trial authorized the jury to find that the plaintiff, while being transported from Londonderry to New York as a passenger, pursuant to a contract made by him with the defendant, a common carrier of passengers, was assaulted and maltreated by Hamilton and Sweeney. These persons were in the employ of Henderson Bros., agents for the defendant; Hamilton being a manager for that firm, and Sweeney a porter. Among the duties of Henderson Bros. was that of carrying the passengers of the defendant and their baggage from the city of Londonderry, by tugs or tenders, and putting them on board the defendant's steamships at the mouth of the river. For this purpose they employed the steam tender Osprey. They received a commission, and paid the expenses of the service themselves, and they employed and paid Hamilton and Sweeney. According to the evidence for the plaintiff, while he was on the Osprey, being carried to the defendant's steamship Devonia, he was, without cause, forcibly removed from the part of the vessel occupied by the other passengers, assaulted, dragged into a room, and kept there by Hamilton and Sweeney until the tender reached the Devonia. It was insisted upon the trial that Henderson Bros. were independent contractors for performing that part of the transportation which consisted in transferring passengers from the city to the steamship, and that, because Hamilton and Sweeney were the employes of Henderson Bros., the relation of master and servant did not exist between the defendant and those by whose misconduct the plaintiff was injured.

The rule respondeat superior rests on the power which the responsible party has a right to exercise over the acts of his subordinates, and which, for the prevention of injuries to third persons, he is bound to exercise, and applies only to cases in which such power exists. In those undertakings in which this power, in whole or in part, may properly be devolved upon others, and has been so devolved by a contract which substitutes another in the place of the original principal, and delegates to him exclusively the control of the subordinate agents whom he may find it expedient to employ, the subordinate

agents are his servants, and not the servants of the original principal; and the latter is not responsible for their negligent or wrongful acts. But the undertaking of a common carrier to a passenger is not of that character. His obligation to transport the passenger safely cannot be shifted from himself by delegation to an independent contractor; and it extends to all the agencies employed, and includes the duty of protecting the passenger from any injury caused by the act of any subordinate or third person engaged in any part of the service required by the contract of transportation.

The present case is quite analogous to those in which it has been held that a railroad company is responsible for the neglect or misconduct of the servants of a sleeping-car company, whereby a passenger sustains loss or injury while being transported under the contract with the railroad company. *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. 319; *Railroad Co. v. Walrath*, 38 Ohio St. 461; *Kinsley v. Railroad Co.*, 125 Mass. 54. In *Dwinelle v. Railroad Co.* it was held that the porter of a sleeping car was, while assisting the railroad company in carrying out its contract of transportation with the passenger, the servant of the company, although it did not own the sleeping car, or hire or pay the porter; and that, whatever might be the motive which incited him to assault a passenger during the existence of the relations between passenger and carrier, the company was liable. The evidence upon the trial indicated beyond a doubt that the acts of Hamilton and Sweeney were committed under color of the authority which they had been intrusted to exercise over the passengers of the defendant in the usual course of transportation. The defendant was responsible for their acts, notwithstanding they were servants of Henderson Bros. We find no error in the rulings complained of, and the judgment is accordingly affirmed.

CLARK et al. v. HOWARD.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1023.

NEGLIGENCE—DEFECTIVE RAILWAY PLATFORM.

One traversing a railway platform merely to deliver an article sold by him to persons on a train is entitled to no higher degree of care on the part of the railroad company with respect to keeping its platform in good condition than is due from a municipality to the public in respect to its streets, and hence it is not liable for injury resulting from mere slipperiness due to sleet and snow recently fallen.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action at law by William H. Howard against S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, to recover damages for personal injuries. In the circuit court a verdict was returned for plaintiff, and judgment entered accordingly, and the defendants sued out this writ of error.

A. L. Williams (N. H. Loomis and R. W. Blair, on brief), for plaintiffs in error.

Thomas P. Fenlon, Jr. (Thomas P. Fenlon, Sr., on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge. This case grows out of an injury which William H. Howard, the plaintiff below, the defendant in error here, sustained by slipping and falling on the platform of a railroad station at Tonganoxie, Kan., which belonged to the Union Pacific Railway Company. The sole question for consideration is whether the defendants below, who are the plaintiffs in error here, were entitled, at the close of the evidence, to a peremptory instruction directing a verdict in their favor. This question must be decided in the light of the following facts, which are practically undisputed: The station house where the accident occurred fronts about east, and was provided with a wooden platform on the east side and at the north end thereof, which was constructed in the usual manner, of planks laid crosswise, and at the time of the accident was in a good state of repair. The platform on the east side of the station house ran parallel with the railroad tracks, and was the one used by passengers when entering or leaving a train. The platform at the north end of the station ran at right angles to the railroad track, and was about 8 feet wide and altogether about 38 feet in length. The ground on the west or rear side of the station was somewhat higher than the railroad tracks, and for that reason the north platform, for a distance of about 15 feet from the point of junction with the east or front platform, was laid on an incline, the descent being not over $1\frac{1}{4}$ inches to the foot. Persons who desired to go upon the front platform from the west or rear side of the station were in the habit of walking along the platform at the north end of the station, or through the station house, by means of a door on the west side thereof, as happened to be most convenient. The injury complained of was sustained in mid-winter, on January 23, 1896. During the afternoon and evening of the preceding day rain and sleet had fallen. Later in the night it had turned cold and frozen, and some snow had also fallen, the result being that on the morning of January 23d the platform of the station, and the sidewalks and streets of the town where the station was located, were covered with a coating of ice, which was overlaid in most places with a few inches of wet snow that had fallen thereon and frozen. The plaintiff, who was a butcher by trade, was well aware of the slippery condition of the streets and sidewalks at and before the hour when the accident occurred. He testified, in substance, that in the morning of that day he had put on rubbers "because it was snowy and slippery," and that he wore them during the forenoon whenever he found it necessary to go out of his shop upon the streets. Between 12 and 1 o'clock p. m. he had occasion to go to the depot to deliver 33 pounds of meat to a theatrical troupe, who occupied a car that was standing on a side track in front of the station. His route from his shop to this car led him down the street, and along the platform

at the north end of the depot building, and thence across the main track to the side track, but he might as well have gone through the station, or obliquely across the right of way, a little to the north of the north platform. While walking down the slope on the north platform he slipped and fell, and broke his right leg, which is the injury complained of.

There was some conflict of evidence at the trial respecting the question whether any of the snow which had fallen on the north platform during the previous night had been removed before the accident happened, but, according to the view that we have felt ourselves compelled to take of the case, that issue is now immaterial. The plaintiff was well aware that ice had formed on the surface of the platform and sidewalks during the previous night, and that it had been covered with a mantle of snow, and that the sidewalks of the town were slippery, and that care must be exercised in walking over any plank or stone sidewalk, to which the ice had presumptively adhered. Moreover, the condition in which the platform at the north end of the station was in when the plaintiff attempted to walk over it was obvious to the most casual observer, and he could not have been ignorant, and confessedly was not ignorant, of its condition. It was manifest to him, as it must have been to every one who saw it, that it was covered to some extent with snow or sleet, and that, in view of the character of the weather, the presence of snow or sleet would render the platform slippery.

Inasmuch as the plaintiff went to the depot, on the occasion of the accident, not as a passenger intending to board one of the defendants' trains, nor for the purpose of transacting any business with the defendants, but for his individual benefit and advantage, he was using the north platform of the station on that occasion as an ordinary public sidewalk, and for that reason we are of opinion that the defendants owed him no higher duty with respect to keeping it in order than a municipality owes to its citizens and to the public generally with respect to the care of its sidewalks. We know of no reason why the defendants on the occasion in question should be charged with a greater obligation to the plaintiff, or be held to the exercise of a higher degree of care, than the town of Tonganoxie was required to exercise in keeping its sidewalks in a proper condition for travel. It may be conceded, for present purposes, that it was the duty of said town to exercise ordinary care in seeing that its sidewalks were maintained in an ordinarily safe condition for use by pedestrians, and that a similar obligation rested on the defendants with respect to the north platform of their depot; but wherever, by the local law, a duty such as is last mentioned is imposed on municipalities, it is generally held that mere slipperiness, occasioned by snow or ice, which is due altogether to the action of the elements, is not such a defect in a sidewalk or street as will render the municipality liable therefor. Neither is proof that on a certain occasion a sidewalk was thus made slippery by the action of the elements any evidence of negligence or of a want of ordinary care.

A different rule obtains when the surface of a street is allowed to become rough and uneven by the formation of ridges of ice or snow,

or by the formation of gullies therein, which are of such a nature as to obstruct travel or render it unsafe and dangerous. A municipality which is charged with the duty of keeping its streets in a passable condition may well be required to see to it that the risks incident to passing over a slippery street or sidewalk are not increased by such obstructions as ruts or ridges, but it cannot be expected to remove all snow and ice from its sidewalks, or to guard against mere slipperiness which is due altogether to the action of the elements. *Smyth v. Bangor*, 72 Me. 249; *Stanton v. City of Springfield*, 12 Allen, 566; *Nason v. City of Boston*, 14 Allen, 508; *Luther v. City of Worcester*, 97 Mass. 268, 271; *Gilbert v. City of Roxbury*, 100 Mass. 185; *Cook v. City of Milwaukee*, 24 Wis. 270, 274; *City of Chicago v. McGiven*, 78 Ill. 347, 352; *Todd v. City of Troy*, 61 N. Y. 507; *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43; *Blakeley v. City of Troy*, 18 Hun, 167; *Darling v. Mayor, etc.*, Id. 340; *Caswell v. Road Co.*, 28 U. C. Q. B. 247; *Shear. & R. Neg.* § 363.

In the case at bar the evidence shows no other defect in the platform where the injury was sustained than that it had been rendered slippery by sleet which had fallen and frozen only a few hours before the accident occurred. The platform does not appear to have been rough, but a coating of ice or sleet had formed quite evenly over its surface. The ice or sleet may have been covered with a few inches of loose snow, but, if such was the case, the plaintiff was well aware of the fact, and ventured upon the platform when he was incumbered with a heavy burden. If he had slipped and fallen on one of the public sidewalks of the town of Tonganoxie under such circumstances, we think that the case would not have disclosed any evidence of culpable negligence on the part of the municipality, and for like reasons we are of opinion that it fails to disclose any evidence of negligence on the part of the defendants which would warrant a recovery.

In conclusion, it should be observed that, at the plaintiff's instance and request, the trial court gave the following instruction:

"But if the plaintiff was aware of the slippery and dangerous condition of the platform, and chose to go across it instead of going around it, he took the risk on himself, and cannot recover, although the defendants were guilty of negligence in failing to properly clean it or put it in a safe condition."

Assuming this to be a correct declaration of law applicable to the facts of the case, of which the plaintiff cannot complain, we think that the trial court should have directed a verdict for the defendants, since it appears from the plaintiff's own admissions that he was aware of the slippery condition of the platform, and chose to walk across it or along it with a burden which incumbered his movements, and rendered him more liable to slip and fall, when, without any apparent inconvenience, he might have avoided the platform altogether, either by going through the station or across the right of way to the north of the platform. For error in refusing to direct a verdict for the defendants, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GREENE v. SIGUA IRON CO.¹

(Circuit Court of Appeals, Second Circuit. October 21, 1896.)

1. CORPORATION—CONTRACT TO BECOME STOCKHOLDER—TRANSFER OF STOCK.

An agreement to purchase from a syndicate a certain number of shares of stock in a corporation, which had been subscribed for by the syndicate, but had not yet been issued, "or a proportionate part in case of oversubscription," is not a contract of purchase, which renders the purchaser a stockholder in the corporation on a subsequent transfer of the stock to him without his knowledge, but is merely an executory engagement to purchase, which renders him liable for damages for its breach on his failure to perform.

2. CONTRACTS—CONSIDERATION—UNILATERAL UNDERTAKING.

A writing by which the subscribers promise to purchase from the owners certain shares of stock in a corporation, but which contains no agreement on the part of the owners to sell is not a valid contract for want of consideration, but is merely a unilateral undertaking, which may be retracted by a subscriber at any time before it has been acted upon by the owners by a transfer of the stock.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by the Sigua Iron Company against Benjamin D. Greene. Judgment for plaintiff, and defendant appeals.

Kellogg, Rose & Smith, for plaintiff in error.

Wm. B. Hornblower and Howard A. Taylor, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon a verdict of a jury. The action was brought to recover of the defendant, as a stockholder of the corporation plaintiff, the amount of certain calls for installments due and unpaid upon 400 shares of stock. The assignments of error raise the question whether there was sufficient evidence in the case to support the ruling of the trial judge refusing to direct a verdict for the defendant, and leaving it to the jury to determine as an issue of fact whether the defendant ever became a stockholder of the plaintiff. It was not alleged that the defendant was liable for the calls as a stockholder of the corporation by original subscription, but the theory of the action was that he became a purchaser of 1,000 shares, and a stockholder by the transfer of those shares to him upon the books of the corporation. It appeared in evidence that certain individuals known as the "Sigua Syndicate," the promoters of the enterprise which the corporation was organized to carry on, were, by an agreement with the corporation, entitled to 29,995 shares of its capital stock, of the par value of \$100 per share, subject to calls and assessments to the extent of

¹ This case was originally reported in 76 Fed. 947, but is now re-reported in order to supply certain sentences which were inadvertently omitted from the original copy of the opinion.

35 per cent. In May, 1890, the plaintiff and certain other persons severally signed an instrument which read as follows:

"We, the undersigned, hereby agree with the Sigma Syndicate to purchase from them, at \$35 per share, the number of shares (of the par value of \$100 each) set opposite our names, respectively, the same being 65 per cent. paid, and liable to further calls and assessments to the extent of 35 per cent.; said 35 per cent. being payable one-tenth, or ten per cent. thereof, on call, and the remainder as required, probably at the rate of one-tenth, or ten per cent., of said 35 per cent. every two months, or a proportionate part in case of over-subscription."

The defendant subscribed for 1,000 shares. The instrument was delivered to one Smith as trustee for the syndicate. July 8, 1890, the corporation duly issued a certificate to Smith, as trustee for the syndicate, for the 29,995 shares. July 9, 1890, Smith, as trustee, executed an assignment of 1,000 of these shares to the defendant, and the corporation, upon Smith's request, transferred upon its stock ledger the 1,000 shares to the defendant, and issued two certificates therefor in the name of the defendant, one for 600 and the other for 400 shares. The defendant had previously declined to take the 400 shares, insisting that the subscription was made upon the condition that he should not be required to pay for any of the shares which he might not be able to place with or sell to other persons, and that he had been unable to dispose of 400 shares. He afterwards accepted the certificate for 600 shares, but did not take the one for 400 shares, and it was not delivered to him, but thereafter always remained in the possession of the corporation. Calls for payment of installments were duly made by the board of directors from time to time, but no notice of a call was ever sent to the defendant. The amount due on unpaid installments of 400 shares at the time of the trial was \$14,000 principal and \$5,790.96 interest; in all, \$19,790.96. For this amount the jury rendered a verdict for the plaintiff. The trial judge seems to have assumed that the subscription by the defendant evidenced a purchase of the shares, and instructed the jury that it was of itself a sufficient authorization to the corporation to make the transfer upon its books to defendant.

It is entirely clear that a person cannot be constituted a shareholder in a corporation by a transfer of shares without his consent. The transfer of shares on the books to a person who refuses to accept them or recognize the act in any way does not change his position in regard to the corporation. That a purchase of shares from an existing stockholder, which is sufficient, as between the parties, to divest the title of the vendor, and vest it in the vendee, and is intended to do so, is of itself an implied delegation of authority to the vendor, consequently to the corporation, to cause the requisite transfer to be made upon the books of the corporation, we do not doubt. The vendor is entitled, as against the vendee, to be relieved from further liability as a stockholder, and the vendee is entitled, as against the vendor, to all the rights of a stockholder; and the intention of the parties cannot be fully effectuated without the transfer upon the books. The very essence of such a contract is that the seller shall

relinquish and be relieved from, and the purchaser assume, all future benefits and liabilities in respect of the shares. *Grissell v. Bristowe*, L. R. 3 C. P. 112. Because the vendor is entitled to be relieved from these liabilities, it has been held that, where he has been obliged to pay the debts of the corporation in consequence of the failure of the vendee to cause the transfer to be made upon the books, he may recover the amount so paid in an appropriate action. *Johnson v. Underhill*, 52 N. Y. 203; *Castellan v. Hobson*, L. R. 10 Eq. 47; *Walker v. Bartlett*, 18 C. B. 845; *Wynne v. Price*, 3 De Gex & S. 310. In *Webster v. Upton*, 91 U. S. 65, the court declared that it was the duty of the vendor of shares to make the transfer to the purchaser on the books of the company, and that the purchase was of itself an authority to the vendor to cause such a transfer to be made. The court said: "It is clear that the vendor may himself request the transfer to be made, and that when it is made at his request the buyer becomes responsible for subsequent calls." See, also, *Wheeler v. Millar*, 90 N. Y. 353. It was held in *Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, and 31 N. E. 344, that a broker who had purchased shares from another broker without giving the latter express authority to cause the transfer to be made upon the books of the corporation did not become a stockholder notwithstanding the selling broker had caused the transfer to be made. This doctrine would result either in compelling a vendor whose shares have been purchased to continue to be a stockholder, and subject to all the liabilities of that relation, or in relieving both vendor and vendee from the obligations of that relation to the corporation and its creditors. But it is unnecessary to consider the question upon principle, as the adjudication in *Webster v. Upton* is controlling upon this court. If by agreement between the defendant and the Sigua Syndicate the defendant had acquired the title to the 1,000 shares, the doctrine stated would be applicable. But the subscription did not vest in him any particular shares or number of shares, and was not intended to do so. When it was signed, the syndicate did not have legal title to the shares, because they had not at that time been transferred to the syndicate upon the books of the company. It was uncertain how many of the shares were eventually to be taken by the defendant. He promised to purchase a thousand shares, "or a proportionate part in case of oversubscription." It was merely an executory engagement for the purchase of shares, which, if it had been valid, would have rendered the defendant liable in damages for a breach upon his refusal to perform. But it was not a valid contract because of want of consideration. *Bish. Cont.* § 77.

The subscription was a purely unilateral undertaking, without any concurrent undertaking on the part of the syndicate. If the syndicate had refused to transfer the shares to the defendant, and he had sought redress for his damages, it would have been a complete answer to his action that there was no promise on the part of the syndicate to transfer to him any shares.

Whether a consideration is necessary to support the promise of a stockholder by subscription, and how the consideration is consid-

tuted, are questions which have been much discussed; and, as is said by a recent commentator, "the courts, in their search for the consideration of such a contract, have indulged in a variety of speculations more curious than useful." *Thomp. Corp.* § 1200. The most approved reasoning seems to be that upon the acceptance by the corporation of the subscription the subscriber is immediately invested with the privileges of a stockholder, and the rights thus acquired are a sufficient consideration for his promise. But, as is pointed out by Mr. Morawetz (*Priv. Corp.* § 134):

"This reasoning has no application in case of a contract to purchase shares, or to become a shareholder in a corporation at a future time. A contract of this description is an ordinary common-law contract, and is subject to all the technical rules governing common-law contracts. The promise to pay for shares, and the corresponding promise to deliver them, or to receive the purchaser as a shareholder, are concurrent, and each constitutes the consideration for the other. Without a consideration neither promise would be binding."

There are unilateral contracts, which are, in effect, a request or proposal to the promisee, in which it is not necessary that the consideration should exist at the time of making the promise, and where, if the promisee acts upon the promise, it becomes obligatory; but in this class of contracts the promisor may always retract before performance by the promisee, and in the intermediate time the promise is inert. That a unilateral promise to sell cannot be enforced by a party who has not agreed to buy, but subsequently notifies his acceptance of the offer to sell, was decided as long ago as the case of *Cooke v. Oxley*, 3 Term R. 653. Inasmuch as the defendant retracted his promise before the shares were transferred to him, it is unnecessary to consider whether his subscription can be regarded as belonging to the class of unilateral contracts which have been referred to. The case is one where the defendant never became a stockholder of the corporation, and because the trial judge declined to direct a verdict for the defendant upon this ground we conclude that the judgment should be reversed.

Application for Reargument.

(December 8, 1896.)

WALLACE, Circuit Judge. The application which has been made for a reargument of this cause is based largely upon the ground that the points upon which the decision of the court proceeds were not discussed in argument or upon the briefs. The fundamental proposition which it was incumbent upon the plaintiff to establish was that the defendant became a stockholder of the corporation as to the shares in controversy by reason of a transfer of those shares to him upon the books of the corporation; and it was of course essential that the plaintiff demonstrate that the transfer was duly authorized by the defendant. No authority from him was shown, or was claimed to exist, except such as could be implied from the contract with the *Sigua Syndicate*. The plaintiff insisted that this contract evidenced a purchase of the shares, and consequently imported authority to

the vendor and to the corporation to transfer the shares upon its books and treat the defendant as a stockholder. We held the contrary, being of opinion that the contract was merely an executory agreement to purchase, and not a present contract of purchase. If this point was not discussed, we can only say that it was the basic point in the case, and a decision could not have been properly reached by the court without considering it and deciding it. As we entertain no doubt of the correctness of the judgment upon this point, and as all the other grounds of the application for a reargument relate to subsidiary questions not affecting the primary one which lies at the very threshold of the controversy, we do not think a reargument would be profitable, and the application is therefore denied.

SIGUA IRON CO. v. GREENE.

(Circuit Court of Appeals, Second Circuit. June 13, 1898.)

1. TRIAL—MOTION FOR DIRECTION OF VERDICT—WAIVER OF RIGHT TO GO TO JURY.

A party, by moving for the direction of a verdict, does not thereby waive any right he may have to go to the jury on questions of fact, and where both parties at the close of the evidence moved for the direction of a verdict, and both motions were denied, but the court, over the exception of one party, submitted a single issue of fact to the jury, such party is not estopped by his motion from assigning as error the failure of the court to submit the case generally.

2. SAME—DIRECTION OF VERDICT—QUESTIONS FOR JURY.

The testimony of a party on a material issue, though uncontradicted, should be submitted to the jury if his adversary so requests.

3. CORPORATIONS—STOCKHOLDERS—CREATION OF RELATIONSHIP.

The relation between a corporation and a stockholder is a contractual one, and, although an express contract between them is not necessary to its creation, there must be an assent by both parties, either express or implied.

4. SAME—SUIT AGAINST STOCKHOLDER—PROOF OF RELATIONSHIP.

In an action by a corporation to recover an assessment, entries of defendant's name in plaintiff's books as a stockholder are not prima facie evidence that he is such stockholder.

5. SAME—ACQUIESCENCE IN ALLOTMENT OF STOCK.

A person who approves, ratifies, or acquiesces in the transfer to him of shares of stock in a corporation is liable as a stockholder, though the transfer was originally made without his knowledge or consent.

6. SAME—TRIAL—WITHDRAWAL OF QUESTION FROM JURY.

In an action to recover from defendant assessments on certain shares of stock which had stood in his name for some years on the books of the corporation, where it was a material question whether defendant knew such fact, and acquiesced in it, and he testified that he did not, but it was shown that during a portion of the time defendant, who owned other stock, was a director of the corporation, the plaintiff was entitled to have such question submitted to the jury.

7. EVIDENCE—CONTRADICTING WRITTEN CONTRACT—WHEN RULE APPLIES.

The rule that parol evidence cannot be received to contradict or vary a written contract does not apply as against either party in an action be-

tween a party to the contract and a third person, as the estoppel on which the rule rests must be mutual, and the third person is not bound by the contract.

This cause comes here on a writ of error brought by plaintiff below to review a judgment of the circuit court, Southern district of New York, in favor of defendant below, said judgment being entered upon a verdict directed by the court.

The action was brought by plaintiff, a West Virginia corporation, to recover a balance unpaid on some stock in said company, which it claimed to have been owned by defendant. The following outline of the facts and history of the case sufficiently indicates the points discussed in the opinion, *infra*: In the early part of the year 1890 a number of persons known as the "Sigua Syndicate" had obtained and held an option on certain mining property,—the legal title seems to have been in one E. D. Smith, as trustee,—and for the purpose of taking over and operating such property the plaintiff corporation was formed in April, 1890. Its authorized capital stock was \$5,000,000. Of this \$1,000,000 was treasury stock. \$1,000,000 was issued full paid, and \$3,000,000 was issued 65 per cent. paid. By an agreement known as the "Sigua Syndicate Agreement" all of the stock of this company was underwritten. The several signers agreed to transfer the option and leasehold to the company for said \$5,000,000 capital stock, to return \$1,000,000 of the full-paid stock to the company to be held as treasury stock for company purposes, and to take the number of shares set opposite their names, both of full paid and of 65 per cent. stock. All rights to any stock secured to the subscribers under this agreement were divided into 30 equal (syndicate) shares, and defendant subscribed, through E. D. Smith, his agent, duly authorized to make such subscription, for one-half share. In due course the shares of stock coming to defendant under this agreement were issued to him. All assessments thereon have been duly paid in money or services, and no claim by reason of his holding such shares has been made against him. Some of the subscribers to the Sigua Syndicate agreement, being of the opinion that they were taking more of the stock than they cared to hold, formed a pool to dispose of such surplus of 65 per cent. paid stock. Of course, no one wished to part with the full-paid stock. The object was presumably to get rid of possible liability for future calls. E. D. Smith was one of this pool. He contributed 1,250 shares, the whole number of shares in the pool being 10,000, which was one-third of the total number of 65 per cent. paid shares to be issued by the company. These 10,000 shares were put in Smith's hands by the members of the pool, to be disposed of. It turned out that considerably less than half of this pool of 10,000 shares was thus disposed of. The balance, of course, remained the property of the original subscribers, and was subsequently placed, or ought to have been placed, in their names on the books of the company. The fundamental question in dispute here is whether 400 of these 10,000 shares was disposed of to the defendant, or whether its original holder is still the owner, and liable for any unpaid balances thereon. The agreement by virtue of which it is contended that defendant engaged to take said 400 shares, and touching them, to become a stockholder in the company, is as follows:

"Agreement of purchase of Sigua Iron Company Stock. Capital stock, \$5,000,000. Par value, \$100 per share. \$1,000,000 of capital stock to be left in the treasury of the company.

"We, the undersigned, hereby agree with the Sigua Syndicate to purchase from them, at \$35 per share, the number of shares (of the par value of \$100 each), set opposite our names, respectively, the same being 65 per cent. paid, and liable to further calls and assessments to the extent of 35 per cent., said 35 per cent. being payable $\frac{1}{10}$, or 10 per cent., thereof, on call, and the remainder as required, probably at the rate of $\frac{1}{10}$, or 10 per cent. of said 35 per cent., every two months, or a proportionate part in case of over-subscription:

"Name.	Address.	Number of Shares.	Amount to be Paid.
B. D. Greene.	50 Broadway.	1,000	35,000
I. L. Pierson.	Care Adolph Bolissovain & Co., Amsterdam.	500	17,500
Robert Fleming, Per E. D. S.	Care Maitland, Phelps & Co., New York.	500	17,500
W. M. Chauvenet.	St. Louis, 709 Pine St.	100	3,500
Samuel Bell, Jr.	208 So. 4th St.	100	3,500
H. M. Sill.	Schwil Lave, Gtn.	100	3,500
W. W. McKee.	Catasauqua.	200	7,000
J. W. Fuller.	"		
Chas. H. Audon.		100	3,500
A. P. Berlin, Per E. D. S.	Slatington, Pa.	100	3,500
F. F. Vandervoort.	Phg., Pa.	100	3,500
M. E. Olmstead, Per E. D. S.	Harrisburg.	200	7,000
Paul Thompson.	206 So. 4th St.	50	1,750
E. J. Collins.	Bullitt Building.	100	3,500"

The Sigua Syndicate did not sign this agreement, nor, so far as appears, was it or any agreement to sell ever signed by any of the members of such syndicate or pool. All of these transactions occurred before any certificate of stock had been made out by the company. On July 8, 1890, three certificates were made out to E. D. Smith, trustee,—two each for 10,000 shares full paid, and one for 29,995 shares 85 per cent. paid, and were issued to him on that day. Thereupon, and on the same day, he delivered back two of these (one of the 10,000 share certificates and the 29,995 share certificate), indorsed with a statement to whom the shares should be transferred. Transfers were thereupon made upon the books of the company, and stock certificates prepared in conformity to such list. Two certificates were made out in the name of defendant, covering his half share under the original syndicate agreement, and, in addition, one for 600 and one for 400 shares.

It will be observed that defendant's name is subscribed to the agreement of purchase for 1,000 shares. He accepted 600 of these, took stock certificate therefor, and, so far as appears, has responded to any calls thereon. It is as to the balance only—400 shares—that dispute has arisen. The defendant admits his signature to this document; his contention, briefly stated, being that he signed upon an express understanding with the representative of the sellers that he was to take only such part of the 1,000 shares as he could find outside purchasers for; that he notified Smith, the representative of the seller, and also notified the president of the company, that he had been able to place only 600 shares, and would take only that quantity, and that his contention as to the number of shares of stock which should be thus allotted to him was, so far as he knew, always acquiesced in by the company. He insists that he did not know these 400 shares had ever been transferred to him on the books, and that he never authorized or acquiesced in such transfer.

Upon the first trial of the action the case went to the jury, and plaintiff recovered verdict for the full amount. Upon appeal to this court judgment was reversed. The opinion is reported, but not in full, as *Greene v. Iron Co.*, in 22 O. O. A. 636, 76 Fed. 947.¹ Upon the new trial two specific questions were put to the jury and upon their answers being received verdict was directed for defendant.

Howard A. Taylor, for plaintiff in error.

L. Lafin Kellogg, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

¹ See, for a full report of this case, 88 Fed. 203.

LACOMBE, Circuit Judge (after stating the facts). Before discussing the merits of this appeal, it will be well to dispose of a point of practice which was presented upon the argument. Plaintiff in error insists not only that upon the whole case it was entitled to a direction, but also that, if that be not so, there were disputed questions of fact which the court improperly took from the jury, and itself decided. Defendant in error insists that plaintiff in error is in no position to raise this objection. The point is thus stated in defendant's brief:

"Where, at the close of the evidence on a trial, both parties ask the court to direct a verdict in their favor, and the court directs a verdict for one side, to which the other excepts, but makes no request to go to the jury, it will be held that the parties have thus treated the case as presenting questions of law only, and, there being evidence to support the ruling, the judgment should not be assailed by showing that there were questions of fact arising on the evidence."

In support of this proposition are cited *Provost v. McEncroe*, 102 N. Y. 650, 5 N. E. 795; *Sutter v. Vanderveer*, 122 N. Y. 652, 25 N. E. 907; *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837; *Board v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433; *Robertson v. Edelhoff*, 132 U. S. 614, 10 Sup. Ct. 186. The circumstance that a party, at the close of the case, moves the court to direct a verdict in his favor, does not, of course, operate to waive any right he may have to go to the jury. Such motion may be made, and most often is made, upon the theory that some controlling proposition of law would require a decision in the party's favor, although some or all of the disputed questions of fact were decided in his adversary's favor. But, if the court be not convinced as to the soundness of his proposition of law, he is none the less entitled to have his hearing before the triers of the facts upon any disputed material issues of fact in the case, unless in some way or other he waives his right, or leads the court to suppose that he concedes there is no material fact in dispute. In the supposititious case stated above, where both sides move for a direction, and one motion is granted and the other denied, and the defeated party takes an exception only, without any suggestion that there is some material fact in dispute that should go to the jury, the court is entitled to assume that he concedes there is nothing material for the jury to pass upon. But the case at bar is a very different one from that to which the authorities are cited. The proofs being closed, both sides moved for the direction of a verdict, but the court denied both motions. Two dispositions of the case, and two only, were then possible: A juror might have been drawn, or the case given to the jury. When cases are given to juries, it is the usual practice to require them to give a general verdict upon all the evidence. Until they were in some way notified that a special verdict would be required, both sides, their motions being denied, were entitled to assume that the verdict was to be a general one on the whole case. Thereupon the court announced that it was going to leave one question only to the jury, namely, "to find whether there was an agreement between the defendant and Smith, as trustee for the syndicate, by which Greene was to become an out and out purchaser of 1,000 shares, or

whether it was, in substance, as the defendant claims, that he was only to take such shares as he could dispose of." "Then," added the court, "when that finding is in the case, I will direct a verdict either one way or the other." To this plaintiff duly excepted. When the court announced its decision to send only one question to the jury, it necessarily announced its decision to withdraw all other disputed material questions of fact from the consideration of the jury, and under the exception to such a disposition of the case plaintiff in error would be entitled to contend, as to any material question of fact, that it was improperly withdrawn from the jury. We find no force, therefore, in this preliminary objection.

Upon the first trial, the court left it to the jury to say upon all the evidence in the case whether defendant ever became a stockholder of plaintiff, directing their attention particularly to later transactions between defendant and the officers of the company subsequent to July 1, 1890. As to the agreement of purchase,—the second agreement, *supra*,—however, it gave the jury distinctly to understand that under its terms Greene succeeded to the rights and obligations of those from whom the 1,000 shares were to come, and that to relieve himself therefrom he would have to show in some way that he had been released and discharged. The jury were told that among the "undisputed facts in the case" were "Greene's purchase of one thousand shares," and "his liability to pay therefor unless he was somehow released." This court, upon appeal, reached a different conclusion as to this second agreement. We held that when it was signed "the syndicate did not have legal title to the shares, because they had not at the time been transferred to the syndicate upon the books of the company." We might have added—certainly upon the evidence now before us it stands uncontradicted—that the opening declaration of the agreement is a misstatement. "The undersigned" did not by that paper, nor by any other paper, nor orally, nor in any way, "agree with the Sigua Syndicate to purchase from them" the shares referred to. It is true that E. D. Smith, who was the trustee of the Sigua Syndicate, solicited subscriptions to the paper; but he himself says—and he was plaintiff's witness—that the shares he was trying to dispose of were the shares, not of the syndicate, but of individual members, who had formed a pool to get rid of their stock. Why the paper was so phrased as to delude the unwary subscriber into the belief that he was dealing with the Sigua Syndicate, and not with the individuals who were seeking to unload before a call, does not appear, but may be surmised. This court further held that it was merely an executory engagement for the purchase of shares, which, if it had been valid, would have rendered defendant liable in damages upon his failure to perform; but not a present contract of purchase. Moreover, we held that it was not a valid contract for want of consideration; that, if the syndicate had refused to transfer the shares to defendant, and he had sought redress for his damages, it would have been a complete answer to his action that there was no promise on the part of the syndicate to transfer to him any shares. A like answer might have been made even by the individual members of the pool; while, as appears by the record now before

the court, the Sigua Syndicate might truthfully defend upon the sufficient ground that it never had anything to do with the record agreement in any way, shape, or manner, its name being used merely as a figurehead by a man who showed no authority to act. Finally, we suggested that the agreement might perhaps be construed as a "unilateral contract * * *", in effect a request or proposal to the promisee, in which it is not necessary that the consideration should exist at the time of making the promise, and when, if the promisee acts upon the promise, it becomes obligatory; but in this class of contracts the promisor may always retract before performance by the promisee, and in the intermediate time the promise is inert." Whether the agreement in this case was to be thus construed we did not consider, "inasmuch as the defendant retracted his promise before the shares were transferred to him." For these reasons we reversed the former judgment, stating that it was error for the trial judge not to direct a verdict for the defendant. The views heretofore expressed in this court as to the nature and effect of the agreement called for reversal, but we were probably in error in holding that the trial judge should have directed a verdict for defendant. The evidence that "defendant retracted his promise before the shares were transferred to him" was that of Greene himself, and the testimony of a party on a material issue should always be submitted to the jury, even though uncontradicted, if his adversary so request.

In some important respects the case made upon the second trial is different from that under the evidence as admitted upon the first trial, and examined on the first appeal. Plaintiff's own evidence shows that the written document, known as the "agreement of purchase," and whose construction occupied the attention of the court on the former appeal, incorrectly expresses the result of the negotiations which it undertakes to record; that the Sigua Syndicate was not a party to such agreement, nor to any of the negotiations that led up to it; that it never agreed to sell its shares to the subscribers to such agreement, and never agreed with them that they should purchase, but that under the guise of the Sigua Syndicate a few of its members did undertake to relieve themselves from liability by selling some of their shares; and that signatures to such agreement were obtained to accomplish this object. Defendant put in stronger evidence, which induced the jury to answer the questions put to them, *supra*, the first in the negative, the second in the affirmative. The questions, therefore, presented on this writ of error differ materially from those considered when the first trial was under review. Before discussing them, it may be well to restate the fundamental proposition set forth in our former opinion that "a person cannot be constituted a shareholder in a corporation by a transfer of shares without his consent." The same proposition was enunciated by this court in *Carey v. Williams*, 25 C. C. A. 227, 79 Fed. 906, in these terms: "The relation of corporation and stockholder is a contractual one, and can only be created with the consent, express or implied, of both parties." This statement by no means necessarily implies that the relationship can be created only by express contract between the corporation and the stockholder. Plaintiff in error is quite correct in the suggestion

that this occurs but rarely; substantially the only instance being in the case of an issue of treasury stock. In the case of a transfer of stock there is either a contract between transferor and transferee, whereby the latter acquires the rights of the former, or there is a gift, defined by some authorities as an executed contract, which is founded on mutual consent, for the minds of the parties must meet alike in the case of a gift and of a contract founded on consideration. When the purchaser, donee, or transferee has thus, by his own act, succeeded to the rights of the former holder of the shares, he has voluntarily assumed a relationship to the corporation which makes it the duty of the corporation to accept him as a stockholder, and to perfect his title by a transfer on the books, and makes it his duty to accept such transfer on the books and become a stockholder of record whenever the corporation or the former holder so requires. It seems hardly necessary to discuss whether this shall be defined as an implied contract or a quasi contract. The important fact is that assent by the newcomer is an essential prerequisite. We do not understand that there is any contention here that a man may be made a stockholder by the mere unauthorized entry of his name upon the books without his knowledge or consent, or that he may, without such knowledge or consent, be made a stockholder, even by act of the legislature. It is contended, however, that when a person's name appears on the books as a stockholder, no matter how it got there, such entry is *prima facie* proof that he is a stockholder, and the burden is on him to disprove it. This proposition was discussed and decided contrary to the contention of the plaintiff in error by this court in *Carey v. Williams*, 25 C. C. A. 227, 79 Fed. 906. The correctness of such ruling is, of course, questioned in the case at bar, and it is suggested in the brief that "the courts of the different states in this country are handing down decisions every few months directly to the contrary of *Carey v. Williams*." We find, however, on referring to the three authorities cited to this proposition, that in none of them is *Carey v. Williams* referred to, and that two of them were decided before the opinion in that case was itself handed down. Whatever may be held elsewhere, this court abides by its decision in *Carey v. Williams*, being unwilling to substitute a rule as to the probative force of such entries in the books, which, in some of the cases approving it, is called "a rule of convenience," when we are entirely satisfied that it would in many cases prove to be a "rule of injustice,"—unless constrained to do so by controlling authority. In *Carey v. Williams* it was fully explained why this court did not find such controlling authority in *Turnbull v. Payson*, 95 U. S. 418. Plaintiff in error refers to a later decision of the supreme court,—*Finn v. Brown*, 142 U. S. 56, 12 Sup. Ct. 136. In that case the language of Mr. Justice Clifford in *Turnbull v. Payson* is cited with approval, but no such proposition was necessary to the decision. A verdict had been directed against defendant as a stockholder. He contended that he had a right to go to the jury upon his own evidence that he knew nothing of the transfer to himself, and had not authorized it. The uncontroverted facts showed that 50 shares in a national bank were transferred to his name on October 29th, and a certificate made

out. He had not theretofore owned any stock in the bank. On October 30th he was appointed a director and vice president. Section 5146, Rev. St. U. S., provides that every director must own in his own right, during his whole term of service, at least 10 shares of stock; and that, if he does not own such 10 shares, he cannot become or continue a director. Section 5147 requires each director, when appointed or elected, to take an oath declaring, inter alia, that he is the owner in good faith and in his own right of the requisite number of shares. In the absence of proof to the contrary, the supreme court held that it must be presumed defendant took such oath before he acted as director. On November 21st, at a directors' meeting at which defendant was present and voting, the resignation of the cashier was accepted, and defendant, as vice president, was authorized to act as cashier until a new cashier should be regularly appointed. Thereafter, and until the bank's failure in January ensuing, he acted under such authorization as cashier. Section 5210 provides that "the president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders * * * and the number of shares held by each." In view of these facts, it is not surprising that the supreme court held that defendant "must be presumed conclusively" to have had knowledge of what the books showed as to his holding of stock, and to have assented thereto.

The next question for consideration is whether, as the case is presented here, taking the contract between Smith and Greene as the jury found it, there was any authority for the transfer of the 400 shares to him on the books of the company. The entries in the books were made under Smith's direction. To what extent was that direction authorized? As to 166 $\frac{2}{3}$ shares of full paid and 500 shares of 65 per cent. paid stock (being a one-half share in the syndicate), he had Greene's express written agreement to accept the same from the Sigua Iron Company. As to the 1,000 shares, he had the express written agreement of one or more of the other members of the Sigua Syndicate to accept the same from the Sigua Iron Company, and, in the absence of anything more, he should have directed transfer to them. As to a part of those 1,000 shares, however, he had, as agent for the persons who had originally agreed to take them, effected a sale to Greene, and such of them as were so sold he might properly have transferred to Greene's name, because by buying them Greene assented to such transfer. But as to any shares not so sold, Smith had no authority to make such transfer, and the only shares included in the sale were those which Greene might be able to dispose of to others. The evidence warrants the finding that 600 shares were thus disposed of, but upon the theory of defendant in regard to the second contract, which the jury found to be correct, we do not find in the record, as to the 400 shares, any contract of the defendant whereby he assented to their transfer to him, or any authorization by him to Smith of a transfer to him. We must conclude, therefore, that the mere entry of his name in the books and on the certificate for these 400 shares did not make him a shareholder as to them. It does not follow, however, as matter of law, that he was not a

shareholder when this action was commenced. Although the mere transfer of stock on the books of the corporation to the name of an individual without his knowledge or consent imposes no liability, nevertheless, "if, after the transfer, he in any way approved, ratified, or acquiesced in such transfer," he will be held "liable to be treated as a shareholder." *Keyser v. Hitz*, 133 U. S. 149, 10 Sup. Ct. 290. Whether Greene knew that these 400 shares had been transferred to him, and stood in his name on the books, and whether, knowing that to be so, he took any steps to have them retransferred to the persons to whom, under the original syndicate agreement, they properly belonged, or "approved," "ratified," or "acquiesced in" the transfer to himself, were all questions of fact, and, if there was conflicting evidence thereon, it was for the jury to determine them. On the one side, defendant testified that he never saw the certificate for the 400 shares, or knew about its being in his name on the books. It appeared otherwise than by his testimony that on July 8th he wrote to the treasurer, inclosing check for an assessment on 600 shares (additional to his original 666), and stating that the other 400 shares subscribed by him had been taken by friends whom he might not see before going away (he left for Europe in July, and returned in August), but that as soon as he returned he would see them, and send in their names; that upon his return he informed the president of the company that these friends would not take the 400 shares, and that he could not place it; that thereafter he was never called on for any assessment (and there were several of them) on these 400 shares; that in subsequent treasurer's reports and at directors' meetings they were listed as "unplaced stock"; and that, when a request for payment was ordered by the directors to be made on "delinquent subscribers," his name was not included on the list, and no such request was made as to these 400 shares. On the other hand, it appears that from the date of organization (May 20, 1890) until April 11, 1892, he was himself a director. We do not hold that, as matter of law, it is therefore to be conclusively presumed that he knew his name stood in the stock certificate book as the holder of the 400 shares named in the unissued certificate. The case at bar differs materially from *Finn v. Brown*, *supra*. But it certainly was a circumstance proper to be considered by the jury when weighing his own testimony as to his ignorance of the fact. It also appeared that at the very directors' meeting at which the 400 shares were reported as part of the 2,120 "unplaced stock" it was identified as "B. D. Greene, 400 shares." Without expressing any opinion as to the weight of the evidence pro and con touching knowledge and acquiescence, we are satisfied that there was sufficient conflict upon the question to call for its submission to the jury; and in withdrawing it from their consideration, by submitting to them the single question as to the making of the contract over plaintiff's exception, we are of the opinion that there was error requiring a reversal and a new trial. A similar question was submitted to the jury on the first trial, but under instructions that the evidence showed that defendant had actually purchased the 400 shares, and was to be held liable thereon unless he showed that he had been

released. Why this was error has been already pointed out. On the facts as they stand on this record, with the answer of the jury to the questions put to them, the burden would not be upon defendant to show that he had been released, but on plaintiff to show that defendant knew he was entered as a shareholder, and acquiesced therein by permitting the entry to stand with no effort to alter it.

Plaintiff in error insists that there is no distinction between the case at bar and *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, where a verdict was directed in favor of the trustee of the corporation against the stockholder. In the case at bar, however, there is no pretense that defendant was an original subscriber as to the shares in controversy. He obtained them, if at all, from a prior owner; and only to the extent to which he contracted to take such shares did he give his assignor authority to have them transferred to him. In *Hawkins v. Glenn*, however, the defendant contracted directly with the company. He was an original subscriber in his own name for 250 shares. It was undisputed that he knew the shares stood in his name, for the certificates, made out in his name only, were sent to and received by him, and never returned.

It is desirable that the other assignments of error which have been argued here should be disposed of, so as to eliminate as many questions as possible from the next trial of the action. It is contended that there was error in admitting evidence to vary the terms of the written instrument referred to above as the "agreement of purchase." Some question is raised as to whether plaintiff's counsel had not waived the right to object by himself introducing evidence thereon. It is not by any means clear on the record that he did so. The evidence he produced was put in at the close of the examination of a witness who was about to leave town, and counsel expressly stated that it was out of order, and in rebuttal, should defendant himself give evidence tending to vary the terms of the written instrument. Moreover, the evidence thus offered by plaintiff did not tend to vary the terms of the written instrument, but the reverse. However, it is not necessary to pass upon this point. Assuming, for the sake of the argument, that the plaintiff's exception was timely, and that it had not been waived by his previous conduct of the case, it was, in our opinion, unsound. The true rule is aptly expressed by the court of appeals of this state in *Lee v. Adsit*, 37 N. Y. 78, as follows:

"The rule that parol extrinsic evidence shall not be received to contradict or vary a contract which is in writing applies only in controversies between the parties, promisor and promisee in such contract. * * * The writing is not conclusive as between one of the contracting parties and a third person. This doctrine is asserted in a multitude of authorities, but in many instances it is accompanied by remarks from which it might be contended that the privilege of explaining the written document was not accorded to him, who was a party to it, but only to his adversary. 1 Greenl. Ev. § 279; *New Berlin v. Norwich*, 10 Johns. 230; *Evans v. Wells*, 22 Wend. 345. But it is not so confined. According to Co. Litt. 352a, 'every estoppel ought to be reciprocal that is to bind both parties, and this is the reason that regularly a stranger shall neither take advantage of or be bound by an estoppel.' To this effect, see *Jewell v. Harrington*, 19 Wend. 472; *Sparrow v. Kingman*, 1 N. Y. 246. * * * In *Reynolds v. Magness*, 24 N. C. 30, after stating the general rule, and that it applies only as between the parties, and not to strangers, Judge

Gaston says: "They [the strangers] are at liberty to show that the written instrument does not disclose the full or true character of the transaction. And, if they be thus at liberty, when contending with a party to the transaction, he must be equally free when contending with them. Both must be bound by this [conventional law] or neither."

And the same court has since reiterated the same rule.

"Third persons are not precluded from proving the truth, however contradictory to the written statements of others. Strangers to the instrument, not having come into this agreement, are not bound by it, and may show that it does not disclose the very truth of the matter. And as, in a contention between a party to an instrument and a stranger to it, the stranger may give testimony by parol differing from the contents of the instrument, so the party to it is not to be at a disadvantage with his opponent, and he, too, in such case, may give the same kind of testimony." *McMaster v. Insurance Co.*, 55 N. Y. 222. And to the same effect, *Dempsey v. Kipp*, 61 N. Y. 462; *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591.

Exception was reserved as to evidence tending to show notification to the company subsequent to July 9th that defendant had not placed the shares, and would not take them. If the case stood as it did on the first trial, the agreement, being an executory one,—an offer to purchase 1,000 shares,—which would have become binding upon the promisor if the promisee acted before the offer was retracted, this date would be of much importance, since it was on July 9th that the promisee transferred the stock. Subsequent retraction by the defendant would have availed nothing, and evidence thereof would have been immaterial and irrelevant. But in the shape the case took upon the second trial the evidence was admissible upon the question whether or not defendant knew that he was entered on the books as a stockholder, and acquiesced in such entry. And on the same theory the reports of the treasurer and the minutes of directors' meetings were competent evidence. The judgment of the circuit court is reversed, and cause remanded for a new trial.

MCDOUGALL v. HAZELTON TRIPOD-BOILER CO. et al.

HAZELTON TRIPOD-BOILER CO. et al. v. MCDOUGALL.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1896.)

Nos. 537, 538.

1. CORPORATIONS—AUTHORITY OF PRESIDENT—ESTOPPEL.

A corporation, which by resolution has empowered its president to pledge a contract, under which money is due it, as collateral security for money borrowed, cannot claim that the terms of the pledge made by the president are in excess of the authority conferred on him, when at the time of the pledge it was cognizant of all the particulars thereof, and received the money borrowed, and gave no sign of repudiating the transaction.

2. SAME.

A pledgor cannot object that a sale of the thing pledged by one acting as agent of the pledgee was unauthorized by the latter, when it appears that such agent acted upon an assumption of authority, and that the pledgee was aware of the sale, and never made any objection to it.

3. PLEDGE—SALE BY PLEDGEE—NOTICE.

A pledgee, authorized by the terms of the pledge to sell the securities without notice to the pledgor, is not bound to notify the pledgor of the grounds on which he exercises the power of sale.

4. **BILLS AND NOTES—MATURITY—DEMAND.**

When a note is made payable five days after demand, an express demand in explicit terms is not in all cases and for all purposes necessary. If the payee signifies to the maker his desire for payment in such manner as to be the equivalent of a request, this is sufficient.

5. **SAME—EFFECT OF SALE.**

A sale of collateral by the pledgee pursuant to the terms of the pledge conveys the entire interest, so that the pledgor is not entitled, as against the purchaser, to a surplus realized by him beyond the amount for which the pledge was made.

6. **SAME—EXPENSES OF REALIZING ON PLEDGED SECURITY.**

A corporation, claiming money under a contract, after instituting suit thereon, pledged the contract with a third person as collateral, but continued to prosecute the suit in its own name, with a view of realizing for itself a surplus above the amount of the debt secured by the pledge. After it obtained decree, one who had purchased the contract from the pledgee under his power of sale intervened, and claimed the proceeds of the decree. *Held*, that the pledgor was not entitled to be repaid out of the fund the expenses incurred in prosecuting the suit.

7. **ATTORNEY AND CLIENT—LIEN FOR SERVICES.**

The rule giving attorneys and solicitors a lien upon the recovery for compensation for their services extends also to expenses incurred in rendering the services.

Appeals from the Circuit Court of the United States for the Northern Division of the Western District of Tennessee.

The original bill in this cause was filed on January 21, 1892, by the Hazelton Tripod-Boiler Company against the Citizens' Street-Railroad Company for the purpose of obtaining a decree, and enforcing a mechanic's lien upon a lot in Memphis on which were the steam power and machinery by which the railroad company operated its railway system. The amount for which a decree and the enforcement of the lien were prayed was the sum of \$17,000, and some interest; the principal sum being the purchase price for three steam boilers furnished by the boiler company, a corporation located at Chicago, to the railroad company, a corporation doing business at Memphis, for the purpose of supplying the latter with power. The contract between the companies, under which the boilers were supplied, had been made in April, 1891, and the boilers were set up during that year; but the purchase price, though in terms due some time previous to the filing of the bill, had not been paid,—the railroad company having refused payment upon the ground that the boilers were defective, and not in conformity with the contract. Upon the filing of the bill the railroad company appeared and answered; setting up the faulty execution of the contract on the part of the boiler company in defense, and further alleging that the contract itself, in respect to the purchase, was modified by a further stipulation that it should not exceed the cost of construction. On June 6, 1892,—a few months after filing the bill,—the boiler company, being in need of funds, borrowed \$10,000 from George Linyard, of New York, and gave him its promissory note therefor, with interest; therein also pledging the boiler company's interest in the contract with the railroad company above set forth. This instrument was in the language following:

"\$10,000.

Chicago, Illinois, June 6th, 1892.

"Five days after demand, for value received, we promise to pay to the order of ourselves the sum of ten thousand dollars, at our office, 1410 Manhattan Building, with interest at the rate of six per cent. per annum after date; having deposited with said legal holder of same, as collateral security, our contract with Citizens' Street-Railroad Company of Shelby County, Tennessee, Memphis, Tennessee, dated April 15, 1891, and accepted May 2, 1891, which we hereby give the said legal holder of said note, his agent or assignee, authority to sell, or any part thereof, on the maturity of this note, or at any time thereafter, or before, in the event of said securities depreciating in value in the opinion of said legal holder of said note, at public or private sale, at the

discretion of said legal holder of said note, his assignee, without advertising the same or demanding payment, or giving us any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said collateral, including attorney's fees; and in case the proceeds of the sale of the said collateral shall not cover the principal, interest, and expenses, we promise to pay the deficiency forthwith, after such sale.

Hazelton Tripod-Boiler Co.,

"By C. B. Holmes, President."

In October, 1892, as Linyard alleges, he sent this instrument to L. H. Bisbee, one of the solicitors for the boiler company in the then pending suit, with instructions to collect it, and, after paying Linyard what was due him, to pay the balance to the boiler company. In December following, the boiler company, having become insolvent, made an assignment for the benefit of its creditors to G. W. Griffin, as trustee; and he subsequently became a party to the suit, as co-complainant. The taking of proof, and other preliminary matters, prolonged the suit for several years. In November, 1894, Linyard tendered, and by leave of the court filed, a supplemental bill, so called, alleging his acquisition of the note and pledge above mentioned, that he had sent the instrument to Bisbee, as above stated; that Bisbee had not collected the note, and had refused to return it to Linyard on the latter's request; that he had therefore revoked Bisbee's authority; and he prayed that the proceeds of the suit should first be applied in satisfaction of the note. To this bill the boiler company and Griffin, assignee, were made defendants, and they answered, admitting the substantial allegations of the bill. During the progress of the suit, and after considerable proof had been taken, the case was brought on for hearing; and the court, apparently being in doubt whether the contract for the boilers was modified to the extent that the price should not exceed their actual cost, ordered a reference to the master to ascertain and report what that cost was. This duty was performed by the master, but, as it was finally held by the court that the decree should be for the contract price, further reference to that report is unnecessary.

On January 6, 1896, Linyard, after having made, as he claims, repeated but ineffectual efforts to realize his debt by demand upon the assignee, and endeavor to sell his collateral, finally sold the contract to William McDougall for the sum of \$11,000. On the 17th of the same month, Judge Hammond, who had heard the case, filed an opinion ordering a decree in favor of the boiler company for the amount specified by the contract, with interest. 72 Fed. 317. A few days thereafter, McDougall made application to the court for leave to file a supplemental bill setting up the transfer to him of the subject-matter of the suit, and praying that the decree might be entered in his favor. Leave to file this bill was postponed until after the decree should be entered. On January 31st the final decree in the primary controversy for \$18,473.37 was entered in favor of the boiler company against the railroad company, and, this being done, McDougall's bill was permitted to be filed. Id. 325. The railroad company paid the amount decreed against it into court, and this was turned into the registry to await the determination of the claims upon it set up by various parties. The boiler company, upon grounds stated in the opinion, claimed that the pledge of the collateral in the note was unauthorized, and, further, that the sale by Linyard to McDougall was inoperative to convey more than so much of the interest in the contract as would suffice to pay the \$10,000 borrowed from Linyard, with interest, and therefore it was entitled to the whole of the decree, or at all events to the surplus of the decree after that debt was satisfied. Bisbee and Metcalf & Walker, the counsel who had conducted the suit for the complainant, asserted a lien upon the fund for their services, the value of which, upon reference, was fixed at \$3,000; and \$131.70 were allowed them for personal expenses which they also claimed. Griffin made claim for his personal expenses incurred in the progress of the litigation, which by like reference were found to amount to \$548.62. All these claims were denied by McDougall, who insisted that the whole amount of the decree should be paid to him. Upon final hearing, Judge Clark, who heard the case upon these controversies, held that the claim

of the boiler company to the whole decree or to the surplus was not maintainable; that Bisbee and Metcalf & Walker were entitled to the lien claimed by them for counsel fees and expenses, in the amounts above stated; and that Griffin was not entitled to be reimbursed for his personal expenses incurred in the suit. A decree for distribution of the fund was entered accordingly. Some minor details of fact are noted in the opinion following. The boiler company and Griffin appeal from so much of the decree as denies their respective claims, and McDougall appeals from the allowance of the claims of Bisbee and Metcalf & Walker for counsel fees and expenses.

J. H. Watkins, for McDougall.

S. P. Walker, for Hazelton Tripod-Boiler Co.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The boiler company, upon its appeal, contests the right of McDougall to take the whole of the decree against the railroad company, subject to the lien of counsel, on various grounds:

1. It is urged that the pledge of the collateral to the note was void because in excess of the authority conferred upon Holmes, the president of the company, who transacted the business, by the board of directors. The resolution authorizing him in terms empowered him to assign the contract to the holder of the note, as security therefor, and to authorize such holder to collect the amount due on the contract, to satisfy himself for the sum due on the note, with interest, together with all expenses of collection, and thereupon to require him to account to the boiler company for the surplus. The note was negotiable, and it is manifest that it was anticipated that the note, with the collateral, might pass into other hands by transfer from the original holder. The collateral was an incident, and would pass by the transfer of the debt to the new holder, and he would be authorized to take all appropriate measures for the collection of the money due on the contract pledged. Construing the resolution of the board strictly, it might be doubted whether, if Linyard had known its terms, he could have enforced the payment of the note by a sale of the contract pledged. Possibly it might still have been competent for him to have urged that under the resolution itself he was entitled to the ordinary rights of a pledgee, which would have included the power of sale, as well as the right to enforce collection of it by suit. But it is not necessary to determine this question. We are satisfied that the boiler company knew of the particulars of the transaction as it occurred. Moreover, it received the money borrowed, and gave no sign of repudiating the means by which it had been obtained. It knew, and Griffin, the assignee, knew, that Linyard was for a considerable period endeavoring to sell the pledge, and no objection to his want of authority to make such sale was interposed. In these circumstances, it is evident that it cannot now be heard to disavow the terms of the contract by which it borrowed the money. *Wilson v. Pauly*, 18 C. C. A. 475, 72 Fed. 129, and 37 U. S. App. 642. It is further argued in support of this denial of authority that the power to sell without notice, if such power was given, did not include the power

to sell without demand; but as we reach the conclusion, stated in discussing another branch of the case, that a sufficient demand was made, in the circumstances, we need not follow the subject further in this connection.

2. It is insisted by the boiler company that Woodbridge, who made the sale to McDougall for Linyard, is not proved to have had authority from Linyard to make it. But, while it is true that there is no direct proof of his appointment as agent, it appears that he had for some time previous to the sale been acting professedly for Linyard in trying to realize the debt from the sale of the collateral, and further that, in making the disposition of it to McDougall, he acted upon an assumption of authority from Linyard, in whose name he made the sale. The latter came into the suit in 1894, and has continued to be a party since, although only nominally such since the sale to McDougall in 1896. The circumstances are such that it must be assumed that he was aware of the sale of the boiler company's contract to McDougall, and from his acquiescence in it, and his failure to raise any objection to the decree of the court disposing of the proceeds to McDougall, either before or after the decree was entered,—undoubtedly with his full knowledge,—we think it may be fairly inferred that he recognized the sale as one made for him, and that he must be regarded as having ratified it. Clearly, he would be bound by the orders and decree of the court in the suit to which he has been a party; and one of those orders was that permitting McDougall to file the supplemental bill, which was based upon the acquisition of Linyard's rights. We therefore think there was no error in holding the transfer to have been duly made, so far as the question of the authority to make it is concerned.

3. The next ground taken by the boiler company is that the sale of the pledge by Linyard was prematurely made. It is contended that it nowhere appears that the sale was made before demand for payment upon the ground that the pledgee regarded the security as depreciating in value. We know of no rule requiring the pledgee to make a formal announcement of the reason on which he exercises his power, if notice thereof has not been stipulated for in the contract by which the pledge is made. In this case notice of the sale was expressly waived by the pledgor, and it would not be unreasonable to hold that such a waiver was broad enough to include notice of the reason for making it. There is abundance of evidence to show that the pledgee might reasonably have regarded his security as depreciating. It was the subject of a litigation which had already been protracted for several years. It was being persistently defended, and costs and fees were accumulating. He had for some time been trying, without success, to dispose of his collateral, and had offered it for considerably less than the amount due him on his note, and the boiler company had become insolvent. We are disposed to believe that Linyard, in these circumstances, regarded his security as depreciating, and we think he would have been justified in selling the pledge on that ground. But we are also of opinion that sufficient had transpired to effect the maturity of the note.

It is insisted for the boiler company that no formal demand for

payment of the note is shown, and that, as it was made payable five days after demand, it had not matured. It is no doubt quite elementary that the general rule applicable to an instrument thus drawn is, as contended, that demand of payment must be made, in order to fix its maturity. But an express demand, in explicit terms, is not in all cases necessary. If the payee signifies to the maker, and clearly makes known to him, his desire for payment, in such manner as to be the equivalent of a request, that is sufficient. A note in this form is held to be overdue after the lapse of a short period, varying, as held by the reported cases, from one to a few months, the presumption being that demand has been made, and payment refused; and upon this presumption the instrument is treated as dishonored. Here the note had been outstanding for more than three years. The boiler company had nothing with which to make payment, all its property having been assigned to Griffin; and Woodbridge, who had charge of the claim for Linyard, was for several months in communication with Griffin, seeking to make collection. He offered to take \$11,000 for the collateral. Griffin entertained the proposition, and tried to raise the money. In 1894 Linyard had intervened in the suit, to which both the boiler company and Griffin were already parties; alleging nonpayment of the note, and praying to have the proceeds of the suit on the collateral applied in satisfaction of his claim. The boiler company and Griffin answered, admitting the substance of Linyard's bill, and stating that when the sum due from the railroad company was realized the claim of Linyard should be paid. The note itself had been sent to the boiler company as early as October, 1892, for the purpose of getting payment out of the contract pledged, and that company put the papers in the hands of Bisbee for the collection of the amount due Linyard. A formal demand upon the boiler company would have been wholly futile. We cannot doubt that there was in all these circumstances the equivalent of a demand, and that the note must be regarded as having been long past due when Linyard sold his pledge in 1896.

4. Another contention made for the boiler company is founded upon these facts: There is evidence tending to prove that McDougall's purchase was in the interest of one Billings, who was at the time of the purchase the owner of the large majority of the stock of the railroad company, and had also had a controlling interest in that company from its formation,—covering, of course, the date of the contract with the boiler company; that Billings had promised the railroad company to provide sufficient funds to meet its liabilities, among which was that of the boiler contract; that instead of doing this he caused to be set up what is alleged to have been a fictitious defense to the boiler company's suit; that by being kept out of the money due on the contract the boiler company became embarrassed, and, being unable to pay its debts, was obliged to make an assignment for the benefit of its creditors; and that this was the reason why it could not pay its debt to Linyard, and occasioned the sale of the collateral to McDougall as agent for himself. It is upon this proof alleged that Billings by false and fraudulent practices brought about the conditions which compelled the sale, and having

effected it, and taken the benefit to himself, he became a trustee *ex maleficio*. But it is hardly conceivable that Billings could have been inspired by any such motive at the time when the contract for the boilers was made. There were no circumstances then which indicated that any such scheme was possible. The defense which the railroad company interposed was one which, if well founded, it was proper and competent for that company to make; and it appears that, upon full proof of the facts, the court was so much in doubt that a reference was ordered to lay the foundation for a decree that the contract was in fact such as the railroad company alleged it to have been. And, on looking into the evidence in the record, we are unable to say that it is at all clear that there was no fair ground for the defense, and that it was falsely interposed. Certainly there is no such preponderance of evidence leading to that conclusion as is required of one who charges another with a fraudulent motive. The charge in this instance seems mainly to rest upon the fact that the defense was not sustained by the court, for we find not much else to support it. Further, there is no proof that Billings made any promise to the boiler company that he would pay for the boilers. Indeed, it is clear from the record that the only promise, if it was such, which Billings made of the kind alleged, was a promise made to the railroad company. Confirmation of this is found in the fact that the boiler company has never attempted to hold Billings upon any obligation directly to itself. If, therefore, Billings failed to fulfill such an obligation, as the evidence possibly indicates, it was a matter in which the railroad company alone was concerned. And besides it is not proved that the defense was undertaken because of a lack of funds to pay the railroad company's debt. Up to about the date of McDougall's purchase there is nothing of consequence to show that Billings had conceived the purpose of making it. Our opinion of the probability is that Billings, being quite sure that there would, in any event, be a decree for a larger amount than Linyard's debt, thought it a good speculation for him to buy the collateral, and planned to do so. And we can find no reason for saying that he had not the same privilege to buy it as any other person had. He was in no trust relation to the boiler company, and a sale to him would not put that company in any worse position than a sale to any other person. It may be (though it is a question which we are not required to decide) that the railroad company, by virtue of his relation to it, could claim that the purchase should be held to have been made in its interest, and thereupon hold him as trustee. But that is another matter. It is clear that he stood in no such relation to the boiler company. In the case of *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, which is much relied upon by the appellant, two very essential facts existed, which, as has been shown, did not exist here. The first and most important one is that in that case there was an unlawful conspiracy between an intervening stranger and the managing officials of the debtor company to defeat the plaintiff's contract; and, in the second place, it involved the abstraction of all the debtor's assets out of which his claim could be collected. Stripped of these features, the case has little resemblance to this. For

these reasons we think the boiler company's claim must fail. The sale by Linyard conveyed the whole of the company's interest in the contract. *Trust Co. v. Young*, 4 C. C. A. 561, 54 Fed. 759, and 6 U. S. App. 469; *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 86 Fed. 975, 982; *Wade v. Railroad Co.*, 149 U. S. 327, 13 Sup. Ct. 892. Its insolvency was the cause of its loss of the pledge, and there is nothing shown in the conduct of the other parties which is sufficiently proximate to its misfortune to make them responsible for it upon any recognized doctrine of law or equity.

The appeal in respect to the claim of Griffin stands upon these facts: Griffin was the assignee of the boiler company. In the progress of the suit in which he intervened after the assignment, he incurred certain traveling and other expenses in giving his attention thereto. For the amount of these he makes claim upon the fund. He has already been reimbursed from the assets of the boiler company. The circuit court held that he was not entitled to maintain this claim, and we are of opinion that this conclusion was right. Under the general rule of law, the expenses incurred in enforcing the pledge must be borne by the pledgor (*Gregory v. Pike*, 15 C. C. A. 33, 67 Fed. 837); and, if the pledgee is compelled to pay them in the first instance, he has his remedy over against the pledgor. But here the pledgor had already instituted the suit in its own behalf at the time of the pledge, and it thereafter continued to prosecute it by its own counsel. After the assignment to Griffin he came in, and the suit was prosecuted by them jointly. It was thus prosecuted in their own interest; the purpose being to reduce the claim to judgment, and thereupon to obtain the proceeds after paying the sum for which it was pledged. They retained the control of the suit, and the only object of Linyard's intervention in 1894 was to obtain standing ground in the court, upon which he could be recognized when the fund should be brought in. This was the whole consequence of his intervention. It was an episode which formed no part of the main proceeding in the case. We can discover no ground upon which Linyard's pledge could be burdened with the expenses of the boiler company, or later of the assignee, in reducing the claim to judgment by a suit brought and controlled by itself for its own purposes. If such a claim could be supported, it is obvious that the costs might absorb the pledge, and leave to the pledgor the surplus intact.

McDougall appeals from that provision of the decree which allowed to Bisbee and Metcalf & Walker their claim for professional services in the case, fixed at \$3,000, and their expenses in rendering such services, amounting to \$131.70. The allowance of this claim is resisted on two grounds: First, because, as is urged, the lien of the solicitors had not become fixed on the 6th day of January, when the sale to McDougall took place; and, second, because they have denied and resisted the demand of the true owner of the claim. In respect to the first ground, it appears that the solicitors above named filed the original bill in behalf of the boiler company. When Griffin, the assignee, joined, they continued to represent the parties complainant; and this was their position in the case at the time of, and subsequent

to, the filing of the intervening petition of Linyard. He took no step to displace them, but in effect allowed them to continue the prosecution of the suit; his intervention being, as already indicated, simply to obtain a foothold in the case, and be in position to demand the recognition of his rights when the proceeds of the decree should be paid in. At the date of the entry of the decree they were still the solicitors for the complainants. McDougall's purchase was made on the 6th of January. The opinion of the court, announcing the final determination of the merits of the case, was handed down on the 17th. McDougall filed his application for leave to intervene on the 25th. The court denied the application for the time being, and on the 31st of the same month entered the final decree, in accordance with its opinion filed on the 17th, in favor of the original parties complainant, and against the railroad company. McDougall was thereupon allowed to intervene. Whether the court was influenced in some measure in delaying the allowance of McDougall's intervention by the purpose to preserve the lien of the solicitors upon the fund, does not appear. But, if it was, we think it was not improper. These solicitors had carried on the contest from the beginning, and had brought it to an altogether successful result. The professional labor in the case was substantially ended, and the fruits of their service were already in sight. The litigation was ended, and nothing remained but the formal entry of the conclusion already declared by the court. If there were anything in the circumstance that the decree had not been entered when McDougall presented his supplemental bill, and applied for leave to intervene in the suit, even if the court had then allowed it to be done,—a point we do not decide,—it was a bare technicality; and McDougall has no equity to complain that the court did not allow him at the nick of time to stand in and prevent the formal act which would fix the lien. By the law of Tennessee, attorneys and solicitors have a lien upon the recovery, whether by judgment or decree, for their services in the case. *Hunt v. McClanahan*, 1 Heisk. 503; *Perkins v. Perkins*, 9 Heisk. 95; *Damron v. Robertson*, 12 Lea, 372; *Roberts v. Mitchell*, 94 Tenn. 277, 29 S. W. 5; *Brown v. Bigley*, 3 Tenn. Ch. 618. The assignee of a judgment takes it subject to the lien. *Cunningham v. McGrady*, 2 Baxt. 141. And although it does not appear that the question has ever been considered by the supreme court of that state whether the same rule would apply to the expenses incurred in rendering such services, we can see no reason for a distinction. The labor and the money expended are equally the property of the lawyer, and alike necessary to the prosecution of the suit. In substance, they are intrinsically connected,—the service, and the expenses incurred in rendering it. The other reason assigned for the rejection of this claim is that the solicitors have denied, and continue to deny, the right of the true owner of the decree. The basis of this allegation consists in the fact that as solicitors for the complainants they have adhered to their clients, and have presented and urged the claims of those clients to the decree, or some part of it. There was no departure from duty in this. It was hardly to be expected that upon such an issue they would go over to the opposite party. The

rule relied upon, that the lien is lost by hostile action towards the owner, rests upon the assumption of a repudiation of his duty by the attorney, and has no application to the present case. The solicitors did not have their lien by virtue of any relation to Linyard or McDougall, but upon the ground that they had prosecuted the suit for the recovery of this fund to a final decree for parties entitled to maintain it. There was no error in sustaining this claim.

None of the assignments of error being sustained, the decree appealed from is affirmed. McDougall will recover his costs on this appeal and in the court below against the boiler company and Griffin, as between those parties, and Bisbee and Metcalf & Walker will recover their costs against McDougall in this court and in the court below.

CITY OF DENVER et al. v. SHERRET.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,061.

1. CITIZENSHIP—CHANGE OF DOMICILE.

Plaintiff, who had always resided in Kansas, as a member of her father's family, went to Denver, Colo., where she took an examination for the position of teacher in the schools, intending, if successful, to remain there, but, if not, to return to Kansas. Before the result of her examination was known, she was seriously injured, and, when sufficiently recovered, returned to her father's home, in Kansas, where she remained. *Held*, that she did not cease to be a citizen of Kansas.

2. MUNICIPAL CORPORATIONS—ELECTRIC LIGHT POLES IN STREETS—LIABILITY FOR DEFECTS.

A city, by authorizing the erection by an electric light company of poles and wires in the streets, does not become chargeable with the duty of inspecting such structures, and maintaining them in a safe condition for the protection of persons using the streets for travel, to the same extent as though it had itself erected them; but its duty extends only to a general supervision over the light company, and it is liable for injuries caused by defects only when it has been negligent, after actual or constructive notice of such defects. Thayer, Circuit Judge, dissenting.

3. PARTIES—JOINDER OF DEFENDANTS—MOTION TO REQUIRE ELECTION.

Where an action was brought against a city and an electric light company as jointly liable for an injury to plaintiff, and no objection to the joinder was taken by motion or demurrer, but defendants both answered, a motion made when the cause came on for trial to require plaintiff to elect which defendant she would proceed against was, in effect, a motion for separate trials; and, being addressed to the discretion of the court, its ruling thereon is not reviewable.

4. ELECTRIC LIGHT COMPANY—LIABILITY FOR DEFECTIVE POLE—INSTRUCTIONS.

An instruction that it is the duty of an electric light company having poles in the streets to make such inspection of them, "from time to time, as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use," is misleading, where the defect shown by the evidence was not visible from the outside, as apparently requiring that the inspection must be effectual and going beyond the ordinary requirement of reasonable and ordinary care.

5. SAME—NOTICE OF DEFECT—KNOWLEDGE OF EMPLOYEE.

The discovery of a defect in an electric light pole by an employé of the company while in the line of his employment, and whose duty it is to report it to his superiors, is notice of such defect to the company.

6. SAME—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

The fact that plaintiff was walking diagonally across the street when struck by a falling electric light pole and wires does not tend to establish contributory negligence, in the absence of any facts which would charge her with notice that there was greater danger in so crossing.

7. DAMAGES FOR PERSONAL INJURIES—FUTURE EARNINGS.

An instruction that, if the jury found that plaintiff's injuries would impair her ability to carry on her occupation as school teacher in the future, she was entitled to recover as damages therefor the amount of salary she would have earned during the time she would be so disabled from pursuing her occupation, is erroneous; the true rule being that, upon all the evidence, the jury should award such fair sum as would, in their judgment, compensate for the lessened or destroyed ability to earn money, making due allowance for the contingencies and uncertainties that inhere in such matters. Thayer, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

T. J. O'Donnell (Milton Smith, on brief), for plaintiffs in error.

D. V. Burns, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. This action was brought in the circuit court for the district of Colorado by the defendant in error against the city of Denver and the Denver Consolidated Electric Company to recover damages for personal injuries caused her by the falling of an electric light pole to which were attached the wires which supported the lamp used in lighting the city streets. In her petition, the plaintiff, as ground of jurisdiction, averred that she was a citizen of the state of Kansas, and that the defendants were corporations created under the laws of the state of Colorado. In the answers filed, the defendants took issue on the averment of the citizenship of the plaintiff, claiming that she had become a citizen of the state of Colorado. The issue thus made was heard and determined before entering upon the merits of the case, and, upon the conclusion of the evidence adduced on that issue, the court instructed the jury to find thereon in favor of the plaintiff, and this ruling is now assigned as error. The point at issue was: Of what state was the plaintiff a citizen when this action was brought, on the 29th day of October, 1897? The evidence showed without dispute that the plaintiff had been born in Hiawatha, Kan., and had lived there all her life, as a member of her father's family, being engaged as a teacher in the public schools of that place, until, in May, 1897, she went to the city of Denver, for the purpose of endeavoring to secure a position in the schools of that city; and she and her father both testified that, if she failed in securing such position, it was her intent to return to Kansas, and continue her occupation as a teacher in Hiawatha. On the 21st and 22d days of June, she underwent the requisite examination before the school board of Denver; but, before the result was known, she was injured as stated, and, when sufficiently recovered, she returned to her father's house, in Hiawatha; and since that time she had continued to live at Hiawatha as an inmate of his family. The

utmost that could be fairly claimed under the evidence in this case is that it was the purpose of plaintiff to change her place of residence from Hiawatha to Denver in case she was successful in obtaining a position as teacher in the schools of the latter city; but this position was not obtained, and the plaintiff still continues to be a member of her father's family, at Hiawatha. Clearly, therefore, there was not any evidence in the case which would have sustained a finding that on the 29th day of October, 1897, the plaintiff was a citizen of the state of Colorado, and had ceased to be a citizen of Kansas; and, this being true, the court did not err in directing a verdict on this issue in favor of plaintiff, thus sustaining the jurisdiction of the court.

Upon the merits of the case, it appeared from the evidence that the Denver Consolidated Electric Company, under an ordinance of the city of Denver, had obtained the authority to place in the city streets the poles and wires necessary to enable it to furnish electricity for lighting purposes; that, in pursuance of this authority, it had maintained at the intersection of Seventeenth and Stout streets a pole and wires, and also a lamp attached to wires, for the purpose of lighting the street; that on the 22d day of June, 1897, this pole fell down, carrying with it the wires attached thereto, which struck the plaintiff, who was then crossing the street, and severely injured her. The plaintiff further introduced evidence tending to show that the pole had been erected for a number of years; that it had become rotten in the part subjected to the dampness of the earth, which condition could have been readily discovered by proper examination of the pole; and it was claimed on behalf of plaintiff that both defendants had been guilty of negligence in thus allowing the pole to remain in the street after it had become rotten. Both the city and the electric company are joined as defendants to the action, but it will probably aid in a clear understanding of the questions involved if the case is viewed—First, as an action against the city alone, and, second, as one against the electric company.

In defining the legal duty imposed upon the city, the court charged the jury that:

"The city of Denver, as a municipal corporation, is charged with the duty of keeping the streets in a safe condition. If it does anything directly to render them unsafe, it is liable in damages for the act. If it permits another to do anything which renders the streets unsafe, it is liable, and the person doing it will be liable in the same degree. If the city had erected this pole which fell, and the falling of which, it is alleged, caused the injury, and had allowed it to get into a condition which caused it to fall, it would be liable for any injury resulting from such fall; and permitting another, the Consolidated Electric Company, to maintain the pole, in no manner changes the position of the city in the matter."

Exceptions were duly taken to the cited portions of the charge of the court, and we have thus presented the question whether the charge correctly states the duty imposed by the law upon the city with respect to the poles placed in the streets of the city by the electric company. The court instructed the jury that, as the city was charged with the duty of keeping the streets in a safe condition, it was charged with the duty of inspecting the poles from time to time,

in order to ascertain their condition; and, in effect, the court laid down the rule that the city was bound to do all that would have been required of it had the city itself been the owner of the electric plant, including the poles used in connection therewith. If this liability exists with respect to the poles erected in the streets, it must also exist with respect to the wires and lamps attached thereto, for it will be remembered that it is not claimed that the mere erection of the pole which fell created an unlawful obstruction of the streets; but the theory of the trial court was that, as the city permitted the electric company to erect the pole as part of its lighting system, the city was charged with the duty of inspection, by reason of the duty of the city to keep the streets in a safe condition, and therefore, as the city permitted the electric company to string its wires along the streets, and hang its lamps over the same, the same duty of inspection must exist with respect to the wires and lamps as exists with respect to the poles. It is well known that, in the development of urban life, city streets are now used, under legislative sanction, for many purposes other than for the passage of persons, animals, and vehicles along the same. Underneath the streets may be placed conduits for the conveyance of water and gas, while above ground are found telegraph and telephone wires, electric light and power wires, and electric street-car wires, all suspended along and over the streets, and experience has demonstrated that the presence of these wires creates a new danger in the use of the public highways. If what is called "a live wire" becomes broken and falls into the street, it may cause the death of all persons or animals coming into contact therewith. So, also, it has been demonstrated that, in the running of cable cars through the streets of a city, a danger is created to the public, in that occasionally the machinery forming the grip does not properly act, and the car cannot be stopped, but may be dashed into other vehicles, causing injury to persons and property, or the cable itself may become defective, and thus cause an obstruction to the free use of the street. If the ruling of the trial court in this case is sustained, to the effect that, because the city permitted the electric company to erect the pole in the street as part of its electric system, the city became charged with the duty of inspecting the pole, the same as though it was owned and operated by the city, then it must follow that, because a city permits the use of its streets for telegraph, telephone, electric light, and power systems, as well as for the use of cable and electric street-car systems, the city is charged with the duty of inspecting all the poles, wires, lamps, cables, and cars used in connection with these systems in the public streets, in order to prevent obstructions being caused to the safe use of the street, through defects in the appliances used for these several purposes.

The trial court charged the jury that, if the city was liable in this case, it was by reason of its omission in the matter of inspection. But it is apparent that inspection is merely a means to an end, and, if the city was under obligation to inspect, it is because the city was under obligation to maintain the pole in a safe condition; and that this was the meaning of the court in its charge is clear from the statement that:

"If the city had erected this pole which fell, and the falling of which, it is alleged, caused the injury, and had allowed it to get into a condition which caused it to fall, it would be liable for any injury resulting from such fall; and permitting another, the Consolidated Electric Company, to maintain the pole, in no manner changes the position of the city in the matter."

Thus, the jury were instructed that they must view the case just as they would be required to do if it appeared that the city had itself erected the pole as part of a lighting system erected, owned, and operated by the city. Any corporation, municipal or otherwise, or any person that may be the owner of an electric light and power plant, is under obligation to use ordinary care in the maintenance and operation thereof, in order to prevent injury to third parties; but it cannot be true that, simply because a municipal corporation permits another to erect and operate such a plant in the city streets, it becomes charged with the duty of maintaining the poles, wires, and lamps connected therewith in a safe condition. The charge given to the jury was to the effect that the obligation resting upon the city was just the same as though the city had erected and owned the pole; that, therefore, it was under obligation to inspect the pole from time to time, to the end that it should be kept in a safe condition; and that if, through the failure to properly inspect the same, it was allowed to become rotten and fall, the city would be liable for the results thereof. If this is a correct statement of the law, it follows that with respect to all the appliances in the shape of poles, wires, lamps, cables, and the like placed in the city streets, by telegraph, telephone, electric light, electric power, electric and cable street-car companies, there rests a primary duty and obligation upon the city to keep them in safe condition, and to make the inspections necessary to detect defects in order that the same may be promptly repaired. If this duty rests upon the city, then it will be compelled to keep in its employ men who possess the knowledge and skill needed to detect defects, and, when detected, to repair and keep in proper condition the electric wires and the cables and other appliances used in the streets; and it is apparent that this would, of necessity, lead to a conflict, in many instances, between the city and the companies owning and operating the electric and cable plants. In support of the charge of the court upon this point, counsel for the defendants in error cite a number of cases decided by the supreme court of the United States and the supreme court of Colorado, in which the duty of inspecting the streets is recognized; but they are all cases based upon defects in bridges, sidewalks, or carriageways, wherein the primary duty of erecting and maintaining the same, as part of the highway, was upon the city, and wherein the duty of inspection exists, because the duty of keeping in repair rests primarily upon the city; but none of these cases involved the point now under consideration. In this case, the trial court held, and the contrary is not contended for by counsel for defendant in error, that the original erection of the pole was lawful, and did not constitute an obstruction in the street; and therefore the question is narrowed down to the point whether the city is bound to inspect from time to time all poles, wires, lamps, and cables that may be lawfully placed in

the streets, for defects therein, and to repair such defects in order to prevent them becoming an obstruction to the safe use of the streets, or whether the rights of the public are not sufficiently protected by imposing the duty of keeping watch over these appliances upon the corporation or person owning and operating the same, and holding the city liable only in cases wherein, after actual or constructive notice of the existence of danger to the public in the use of the street, growing out of or caused by some defect in the poles, wires, or other appliances, the city does not use diligence in obviating the danger thus created. Believing this to be the extent of liability incurred by the city under such circumstances, it follows that the trial court erred in holding that the same rule must obtain as would be applicable if the city had itself erected the pole for its own purposes.

Coming now to a consideration of the errors relied on as grounds for reversing the judgment against the electric company, the first one presented is that the trial court erred in overruling the motion made by the defendants when the case was called for trial, that the plaintiff be required to elect whether she would proceed against the city of Denver alone, or against the electric company alone, on the ground that the defendants were not joint tort feors, and were not jointly liable to plaintiff. In form, the complaint charges the defendants with a joint liability. The defendants did not, by motion or demurrer, present the question whether they were properly joined in the action, and in the answers filed no issue or question of this nature was presented. The case coming on for trial, the defendants then moved that plaintiff be required to elect whether she would proceed against the city or the electric company, which was, in effect, asking the court to order separate trials. As the record then was, this was but an appeal to the court to exercise its discretion in determining whether there should be separate trials of the issues presented by the answers. If the motion had been granted, and plaintiff had elected to proceed against the city, the case would still be left pending against the electric company, as the motion did not ask a dismissal of the case as against either defendant. Motions of this character, being but appeals to the discretion of the trial court in regulating the order of trial, do not usually present questions upon which an appeal lies, and this case is not an exception to the general rule.

The principal grounds relied on for a reversal of the judgment against the electric company are found in the charge of the court, touching the duty of the company with respect to the pole erected by it, it being claimed on behalf of plaintiff in error that the court, in effect, made it the duty of the company to exercise such a supervision of the poles forming part of its system that it would certainly detect defects therein rendering the poles unsafe. It will be remembered that negligence against the company was charged in two particulars: First, that the company failed to properly inspect the pole from time to time, and thus it was allowed to become rotten and unsafe; and, second, that, some days before the pole fell, actual notice of the unsafe condition of the pole was brought home to the

company, and, with this notice, the company neglected to make it safe. The portions of the charge to which exceptions were taken are as follows:

"The pole in question was unquestionably a good one when it was erected. It was large enough, and apparently strong enough. If it had broken down immediately, no negligence could be imputed either to the city or to the company on account of the fact. If it had been overthrown by a great storm, as sometimes happens, immediately after its erection, there would be no act of negligence imputable either to the city or the electric light company in respect to it. But it was charged and alleged in the complaint that it was allowed to stand for such time that it became decayed and weak, and that it fell in consequence of such weakness. If this is a fact, and no measures were taken either by the city or the electric light company, to ascertain its condition, or if the measures were not effectual, if they were not such as should have been taken to ascertain the condition of the pole, then the liability exists in the same manner. * * * The defect which existed in it, if there was such defect, being rotten at the surface of the ground or below the ground, was one which was not open to ordinary observation. If there was a shell which was not decayed, it would be necessary to penetrate the shell in order to ascertain the condition of the heart of the pole. Whether any one on behalf of the city or on behalf of the company made any such examination, within a reasonable time, as was needful to ascertain its condition, is a question for your consideration. In putting up the poles in the street, it was undoubtedly a duty resting upon the city, and upon the company which erected them, to examine them from time to time, as often as may be necessary, to ascertain their condition. Decay in timber is natural. We all know what it is. We know it from the ordinary experience of our lives, and it is a circumstance of which all parties concerned in these matters are bound to take notice. They are required to know that timber will decay, and are required to make such examination and inspection from time to time as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use. If you are of opinion that the examinations, either of the electric company or by the city, were of a kind and character such as ought to have been made to ascertain the condition of the pole, and were, in fact, made by them, and that the defect in the pole, if any there was, was not discovered by such examination, then the city cannot be liable in this action. The only liability of the city with respect to the poles erected in this manner, when it was apparently safe on the outside when it was first put up, was to inspect from time to time to ascertain whether it had fallen into a condition which rendered it unsafe."

In the latter part of the charge the jury was instructed that, unless there was negligence on part of the company, it would not be liable; that negligence would consist in a failure to inspect and examine the pole with sufficient care and diligence. And in the first part of the charge it was declared to be the duty of the company to take effectual measures to ascertain the condition of the pole; that the company was required to know that timber will decay, and was required to make such examination and inspection, from time to time, "as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use." It may be true, as is claimed on behalf of the defendant in error, that the court did not intend to impose upon the company a duty beyond that of exercising ordinary care in the maintenance of the poles forming part of its electric light plant; but the question is whether the jury would not naturally construe these instructions to mean that the company was bound to make such an examination and inspection from time to time as would determine and ascertain whether decay had in fact

taken place. Giving the language used its natural import, it certainly does impose upon the company the duty of making such examination, from time to time, as will ascertain and determine whether the poles have become decayed; and it is then declared that a failure to make such an examination constitutes negligence on part of the company. The evidence in this case showed that the decay which affected the strength of the pole was not upon the surface, and therefore was not open to ordinary observation, and, applying the instructions given to the facts proven, the jury could only understand from the instructions given that the company was bound to make such an examination of the poles as would be effectual to discover decay existing underneath the surface.

In defining the liability of the city, the court charged the jury that if "the examination, either of the electric company or by the city, were of a kind and character such as ought to have been made to ascertain the condition of the pole, and were in fact made by them, and that the defect in the pole, if any there was, was not discovered by such examination, then the city cannot be liable in this action." No such instruction was given with reference to the electric company, and there seems no escape from the conclusion that the charge was faulty and misleading, in that it failed to properly define the duty resting upon the company with respect to the maintenance of the poles by it lawfully placed in the city streets, in that it was so phrased that the jury must have understood that the company was bound to make such an examination that all defects would certainly be discovered, instead of being bound to use reasonable and ordinary care in the supervision and inspection of the poles placed in the street. By this ruling it is not meant to relieve the company from a faithful performance of its obligations to the public. In all cases wherein telegraph, telephone, electric light and power and electric car companies obtain and exercise the privilege of erecting and maintaining poles, wires, lamps, and other appliances in the public streets, they are bound to know that the maintenance of such appliances in and about the highway may create dangers to persons exercising the primary and paramount right of passage along or across the same. The companies are not insurers of the safety of the public against all dangers arising from the lawful placing in the street of the appliances pertaining to the business carried on by the companies; but they are bound to know the dangers which may naturally be caused by such use of the streets, and to guard against the same by the exercise of all the foresight and caution which can be reasonably expected of prudent men under such circumstances. If the court, in its instructions, had not overstepped this line in defining the obligation resting upon the electric company, we would not feel compelled to hold that error had been committed; but, as we view it, the court used language which the jury might well construe to mean that practically the company was bound to make such an examination of its appliances as would certainly secure a discovery of all hidden defects therein, which extends the duty resting upon the company beyond the limit which the law imposes upon the company.

It is also assigned as error that the court charged the jury that if Blake, who was an employé of the company, made an examination of the pole, and discovered its rotten and unsafe condition, this would be notice to the company, whether he communicated this knowledge to any officer of the company or not. Blake was called as a witness for the defendant in error, and he testified that he was in the employ of the electric company as a lamp trimmer, it being his duty to trim the lamps, report the "outs," put in carbons, and to report anything that looked bad,—to report any trouble. He further testified that, some 10 or 15 days before the pole fell which injured Miss Sherret, he examined the pole with a screwdriver, and found "that the screwdriver went in pretty easy, and showed that it [the pole] was pretty rotten," and that he was led to make this examination from seeing the pole "wriggling." He further testified that he notified Mr. Sheridan, a storekeeper of the company, of the fact he had discovered. Mr. Sheridan, being called as a witness, denied receiving such report or notice from Blake. Mr. McSparrin, the line foreman of the electric company, and Mr. Barker, the superintendent, both testified that it was Blake's duty to report any defects he discovered either to the foreman or the superintendent, and both witnesses denied receiving any report of the defect in the pole from him. The court instructed the jury that, if they found from the evidence that Blake did in fact examine the pole and discover the unsafe condition thereof at the time he stated in his testimony, this would be notice to the company, regardless of the question whether he made a report thereof to any other employé or officer of the company, and this ruling is assigned as error.

In Thompson on the Law of Corporations (volume 4, § 5195) the rule is stated to be to the effect that, in order to bind the principal, the notice must be communicated to one whose duty it is "to act for the principal upon the subject of the notice, or whose duty it is to communicate the information either to the principal or to the agent whose duty it was to act for him with regard to it." Counsel for the electric company, in the brief submitted, state their view of the rule in the following terms: "The general rule with reference to the question of notice is that notice to the agent is notice to the principal, if the agent comes to a knowledge of the facts while he is acting for the principal; but this rule is limited by the further rules that notice to the agent, to bind the principal, must be within the scope of the employment,"—and cite in support thereof the cases of *The Distilled Spirits*, 11 Wall. 356, and *Rogers v. Palmer*, 102 U. S. 263. In the former case it was said that "the general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty"; and in the latter case it was held that knowledge obtained by an attorney when conducting a case for a client was imputable to the latter.

As already stated, Blake testified that it was his duty to report anything wrong or any trouble he discovered about the poles or wires of the company; and none of the witnesses for the electric

company deny this fact, but, on the contrary, McSparrin and Barker, the line foreman and superintendent, both testify that it was Blake's duty to report to them any defects he might discover; and thus it was made plain that it was Blake's duty to take notice of defects in the plant coming under his observation, and to report the same when discovered; and therefore, within the doctrine of the authorities cited, the court was justified in instructing the jury that knowledge acquired by Blake of the defective condition of the pole, when he was going his rounds as an employé of the company, would be imputable to the company, because it was proven beyond dispute that it was his duty to take notice of defects, and, noticing them, to make report thereof.

A number of errors are assigned upon the action of the court in permitting testimony to be given with respect to the mental and physical condition of the defendant in error prior to the accident, and her condition after the injury; but we find no error therein, and it is not necessary to discuss them at length.

Exception is also taken to the ruling of the court upon the defense interposed of contributory negligence, which was to the effect that there was no evidence sustaining the defense. The charge of negligence on part of defendant in error was based upon the fact that, when she attempted to cross the street at the time of the accident, she did so diagonally, thus leaving the crossing usually followed by pedestrians; it being claimed that, had she been upon the crossing proper, she would not have been struck by the falling pole and wires. To maintain the defense of contributory negligence under these circumstances, it would be necessary to hold that the defendant in error had no legal right to cross the street diagonally, and that she was a trespasser in thus going upon it. In support of this contention, counsel for plaintiff in error cite a number of cases wherein it was held that it was a question for the jury to determine whether the party injured was negligent in the use made of the street or highway; but these are cases wherein the charge of negligence against the defendant corporation was a failure to keep the sidewalk in proper condition, in that some defect existed in the pathway itself, but it appeared that the usually traveled part of the street was in proper condition, and the injury had been occasioned by the traveler going outside of this part of the street. In this class of cases there is usually a choice given to the traveler to use the usually traveled and safe part of the highway, or to go upon the part which may be less safe; and then it is for the jury to say whether it was negligence to use the latter. In this case, as the trial court stated to the jury, when defendant in error started to cross the street, there was nothing in the surroundings which would charge her with notice that she incurred greater danger in crossing diagonally, and therefore there was nothing on which to base the charge of contributory negligence other than the fact that she crossed diagonally; and certainly this would not sustain the charge of contributory negligence, unless it be true that pedestrians have no right to cross a public street except at right angles and at places ordinarily used as a crossing. The use of the public streets between crossings is not limited solely to

animals and vehicles, but may be used by footmen, due caution being exercised. Elliott, Roads & S. 622; *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. 415.

The only other error assigned which needs consideration is based upon that part of the charge upon the rule of damages which was given in the following words:

"If she is under further disability, if these injuries are permanent in their character, so that she will not be able hereafter to resume her occupation, or, resuming it, cannot perform the service as efficiently as before, she is entitled to compensation in the degree in which she loses the power to earn money. So that, if you think that her powers are permanently impaired, that she will not hereafter be able to carry on her occupation as a school teacher, for the length of time for which she is withdrawn from her occupation she is entitled to such money as she could earn during that time, whether it be one year or more."

In effect, the jury were instructed that defendant in error was entitled to compensation for the past loss of time, resulting from the injury,—that is, to the compensation she would have earned as a school teacher; and, further, that, if the jury found that the injuries received would impair her ability to carry on her occupation as a school teacher in the future, she would be entitled to the salary she would have earned for the year or years she was disabled from pursuing her occupation. In cases wherein the evidence shows that the injury received will affect the ability of the party in the future to earn money, compensation must be made therefor; but the rule is not that the jury must determine the number of years that the disability will continue to exist, and then multiply this number by the yearly compensation the party has earned in the past. Damages for future losses in cases of this kind are not susceptible of computation by a strictly mathematical calculation. Evidence may be given of the age of the party injured, the probable duration of life, the effect the injury has had upon the ability of the person to earn money, of the probability that the injurious effect on the ability to earn money will continue in the future, either during life or for a lesser period, and of the business or occupation in which the person was engaged, and the compensation, whether by wages, fees, by a fixed salary or profits that resulted therefrom; and, from the facts thus proven in evidence, it is for the jury to award such fair sum as will, in their judgment, compensate the party for the decreased or destroyed ability to earn money in the future, due allowance being made for the contingencies and uncertainties that inhere in such matters. *Railroad Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1; *Railway Co. v. Needham*, 10 U. S. App. 339, 351, 3 C. C. A. 129, 148, and 52 Fed. 371, 378. We are of the opinion that the charge of the court on this subject is open to the criticism that the jury would naturally infer therefrom that they must compensate the defendant in error for this future loss by allowing her the yearly compensation she had earned as a teacher for the length of time they deemed the disability would continue, thus assuming that, if this accident had not happened, the defendant in error would certainly have continued to teach at that rate of salary for her lifetime, or for the length of time the jury determined the injury would continue to affect her

ability to earn money; and, as already said, this is not a correct statement of the rule to be observed by the jury in estimating damages of this nature.

For these reasons, the judgments rendered must be reversed, and the case be remanded for a new trial as to both the city of Denver and the electric company.

THAYER, Circuit Judge (dissenting). I am not able to concur in all the propositions considered and decided in the foregoing opinion. If a city authorizes a telegraph, telephone, or electric light company to erect a tall wooden pole, burdened with wires, on one of its public thoroughfares, it is affected with knowledge, from the very nature of the structure, that, in course of time, it will decay, and become dangerous to those who have occasion to use its streets. I am of opinion, therefore, that a municipality which authorizes such poles to be erected on its streets is under an obligation to the public to see that they are examined in a proper manner and at reasonable intervals, either by its own agents or by the persons or corporations whom it has authorized to erect them, and that the duty of inspection does not rest exclusively upon the latter, as the opinion of the majority seems to hold. Moreover, I do not understand that the charge of the trial judge, when considered altogether, imposed upon the electric light company the duty of exercising more than ordinary care in the matter of inspecting its poles. From the fact that the jury were instructed very pointedly that there could be no recovery against either of the defendants unless negligence on their part was proven, it is apparent, I think, that the trial judge did not entertain the view, or intend to convey the idea to the jury that the electric light company was bound at all hazards to see that its poles were in a safe condition. Considered as an entirety, the charge on this branch of the case meant, I think, that the electric light company was required to adopt a proper method of examining its poles,—one which would be liable to develop any interior rottenness,—and to examine them at reasonable intervals. This direction, in my judgment, was substantially correct.

WILLIAMS et al. v. LYMAN.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1896.)

No. 1,034.

1. PRINCIPAL AND SURETY—OFFICIAL BONDS—NEGLIGENCE OF OBLIGEE.

Neither the negligence nor failure of an obligee in an official bond, in the discharge of some duty to a third party, nor his negligence or laches in enforcing a compliance with its condition, will release the sureties. Nothing less than the breach of a covenant which the obligee has made, or connivance at the principal's breach of the bond, or knowledge of such breach, and a continuance of his employment without communicating the fact to his sureties, or such a willful shutting of the eyes to the evidences of the breach as warrants the inference of connivance, will have that effect.

2. SAME.

Mere neglect of an internal revenue collector to comply with the laws and regulations requiring him to frequently examine and verify the accounts of his deputy, and see that he faithfully discharges his duty, will not release the sureties on the deputy's official bond from liability for defalcations, which a strict performance of these duties might have prevented.

In Error to the Circuit Court of the United States for the District of Utah.

This was an action at law by Ambrose W. Lyman against P. L. Williams, George Cullins, and Sidney W. Darke, as sureties on the official bond of Richard H. Cabell, as a deputy internal revenue collector. There was a verdict for plaintiff in the court below, and judgment was entered thereon, to review which the defendants sued out this writ of error.

E. B. Critchlow and George Sutherland, for plaintiffs in error.

Franklin S. Richards, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This case presents but a single question, and it is this: Is negligence or laches by an obligee in the discharge of his duties to a third person, or in the enforcement of his claims against the principal in a bond, a release of the obligation of the sureties thereon? This question arises in this way: On January 24, 1894, Ambrose W. Lyman, the defendant in error, was the United States internal revenue collector for the district of Montana. He appointed one Richard H. Cabell one of his deputies, and on that day Cabell as principal, and the plaintiffs in error as sureties, executed a bond to the defendant in error conditioned for the faithful discharge of his duties by Cabell. Between the date of that bond and February 23, 1897, Cabell misappropriated moneys of the United States which came into his hands as deputy collector to the amount of about \$8,000. Lyman, the obligee in the bond, brought this action to recover his loss on account of this defalcation. The plaintiffs in error answered, and the case was tried by a jury, which returned a verdict in favor of the defendant in error.

The only error of which complaint is made is that the court below struck out the sixth paragraph of the answer, with leave to the plaintiffs in error to amend it by adding allegations of fraud and connivance. This paragraph pleaded two defenses. The first was that, under the laws of the United States and the rules made by the secretary of the treasury and the commissioner of internal revenue thereunder, it was the duty of the defendant in error to frequently and personally examine and verify the accounts of Cabell, to diligently and carefully supervise his discharge of the duties of his office, and to see that he faithfully performed them; that the defendant in error entirely neglected to do these things; and that the misappropriation and defalcation of Cabell would not have occurred if Lyman had faithfully and diligently discharged his duties. The second defense was that the defendant in error knew of the misappropriations of Cabell

while they were in progress, but failed to notify the sureties thereof, and was guilty of neglect so gross and inexcusable that it operated as a fraud upon them. The latter defense is not before us for consideration, because the plaintiffs in error so amended their answer after the sixth paragraph was stricken out that they were permitted to introduce evidence upon the trial in support of this defense, and the court charged the jury that, if the defendant in error had any notice or knowledge of the defalcation of Cabell, it was his duty to immediately discharge him, or to communicate the fact to his sureties as soon as he heard it, and that, if he failed to do so, he could not recover on the bond, although mere inattention or negligence on his part, without knowledge, would not defeat the action. The only question, therefore, for our consideration, is whether or not the negligence of Lyman released the sureties.

It is earnestly contended that since the laws and regulations under which the commissioner and his deputy were acting required the former to diligently supervise and inspect the accounts and acts of the latter, and since such a supervision and inspection would have brought the latter's defalcations to light and might have prevented the larger part of them, the sureties on his bond had a right to rely upon the faithful discharge of these duties by this collector, and that they ought not to be compelled to pay for losses that probably would not have been sustained if the obligee in their bond had been diligent and faithful. It may be conceded that if this collector, in consideration of the execution of the bond, had covenanted with these sureties that he would diligently supervise and inspect the acts and accounts, and compel the faithful discharge of the duties imposed upon his deputy, and had then made a breach of his agreement, the sureties would have been released from their obligation. This proposition rests upon the rule that a breach of a contract by one of the parties to it releases the other from further performance. It may be conceded, also, that sureties for a deputy or a servant are released from liability for subsequent delinquencies if the employer connives at his defalcations, or if he becomes aware of them, and permits his deputy or servant to continue in his employment, without communicating his knowledge to the sureties. The reason is that the duty to act in good faith towards those in contract relations with them rests upon all men, and a concealment of such defalcations, a failure to notify the sureties of them as soon as discovered, or to immediately discharge the defaulter, or a connivance at them, is both a violation of that duty and a fraud upon the sureties. *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Burgess v. Eve*, L. R. 13 Eq. 450, 458; *Gradle v. Hoffman*, 105 Ill. 147, 155. Perhaps a willful shutting of the eyes to evidences of fraud, dishonesty, or embezzlement on the part of the servant—a negligence so gross as to warrant the inference of connivance—might have the same effect, because such willful ignorance would work a like fraud on the sureties. But there must be some violation of a covenant with, or some breach of a duty to, the sureties to work a release of their obligation. Was there anything of this character in the failure of the collector to supervise and inspect the acts and accounts and to diligently enforce the discharge of the duties of his

deputy, as required by the acts of congress and the regulations of the treasury department? He made no agreement with these sureties that he would comply with these laws and regulations. The laws were not enacted nor were the regulations adopted in the interest, or for the benefit, of these sureties. The acts of congress were passed, and the rules of the treasury department were established, for the benefit and protection of the United States, and for their benefit and protection alone. The plaintiffs in error cannot, therefore, base any cause of action or defense upon these laws and regulations alone, because Lyman owed the duty of obedience to them to the United States only, and they alone could recover damages for the breach of that duty. The failure to discharge a duty to the complaining party, and resulting injury to him, are indispensable elements of an action or defense on the ground of negligence. *Reynolds v. Railway Co.*, 32 U. S. App. 577, 586, 16 C. C. A. 435, 440, and 69 Fed. 808.

Lyman, then, owed no duty to the sureties by virtue of the laws and regulations. Did the execution of the bond impose any duty upon him to comply with these laws and regulations for the benefit of the plaintiffs in error? They were in force when the bond was executed. They required regular, prompt, and correct accounts and vouchers, the careful preservation and prompt payment of the moneys of the government to the collector, and the faithful discharge of all his duties from the deputy, Cabell, as much as they called for supervision, inspection, and diligence by the collector, Lyman. If Cabell had complied with the laws and regulations, no negligence of Lyman—no failure on his part to discharge his duties—could have entailed any loss upon the sureties. When this bond was made, these sureties came to Lyman, and said, in effect, "If you will appoint Cabell your deputy, we will guaranty that he will comply with the laws and regulations which govern that office, and that he will faithfully discharge its duties." Lyman appointed him, and in consideration of that appointment these sureties gave the guaranty,—they executed this bond. Cabell failed to fulfill the guaranty; he broke the condition of the bond. The contract which his sureties made with the collector was that they would see that his deputy, Cabell, faithfully discharged his duties. They failed to do this. Is it any defense to an action on this contract that the collector or any other party failed to do the very thing which these sureties had agreed to do for them? Is it any defense to such an action that the collector was negligent in the discharge of a duty which he owed to the government, and that, if he had faithfully and carefully discharged that duty, the failure of these sureties to perform their contract—their failure to see that this deputy discharged his duties—would have caused them less loss? These questions must be answered in the negative. The contract was not that these sureties would guaranty the faithful discharge of the duties of this deputy if the collector supervised, inspected, and enforced his performance of them, or if he faithfully discharged his duties to the government or to any other third party. The bond contained no such conditions. Its purpose and effect were rather to relieve the collector of care concerning Cabell's actions and to cast that burden upon his sureties. The con-

tract of suretyship is not that the obligee will see that the principal performs its condition, but it is that the surety will see that he performs it. *Nelson v. Bank*, 32 U. S. App. 554, 571, 16 C. C. A. 425, 435, and 69 Fed. 798. If the principal fails, and loss ensues, the laches or negligence of the obligee constitutes no defense for the surety, because by his contract he takes upon himself the primary duty of watchfulness and care. If the deputy in this case was late in the presentation of his accounts, and lax in the discharge of his duties, and if care and diligence would have discovered the beginning of his misappropriations and would have prevented his subsequent delinquencies, the burden was on those who guaranteed his acts to exercise that care, to discover those defalcations, and to demand his removal. If they failed to be careful, if they failed to discover the misappropriations, and to demand the removal of their principal until after loss had resulted from his defalcations, their contract was that they would pay that loss. Neither the negligence nor failure of an obligee in a bond in the discharge of some duty to a third party, nor his negligence or laches in enforcing a compliance with its condition, will release the sureties from their obligation. Nothing less than the breach of a covenant which the obligee has made, or connivance at the principal's breach of the condition of the bond, or knowledge of such breach, and a continuance of his employment without communicating the fact to his sureties, or such a willful shutting of the eyes to the evidences of the breach as warrants the inference of connivance, will have that effect. *Mactaggart v. Watson*, 3 Clark & F. 533; *U. S. v. Kirkpatrick*, 9 Wheat. 720, 735; *Tapley v. Martin*, 116 Mass. 275; *Board v. Otis*, 62 N. Y. 88, 92; *U. S. v. Witten*, 143 U. S. 76, 79, 12 Sup. Ct. 372; *Water Co. v. Parker* (Cal.) 35 Pac. 1048, 1051; *Bostwick v. Van Voorhis*, 91 N. Y. 353, 361; *Pacific Fire Ins. Co. of New York v. Pacific Surety Co. of California* (Cal.) 28 Pac. 842; *Bank v. Brownell*, 9 R. L. 168. The judgment below is affirmed.

BERGER et al. v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.

(Circuit Court, W. D. Missouri, W. D. June 13, 1898.)

ACCIDENT INSURANCE—SHOOTING BY INSANE PERSON.

An exception in an accident policy of "intentional injuries inflicted by the insured or any other person" does not include death from being shot by an insane person without capacity to form an intention to inflict such injuries, or to understand the nature and quality of his act.

This was an action at law by Emma Berger and others against the Pacific Mutual Life Insurance Company of California to recover on a policy of accident insurance.

New & Palmer and Karnes, Holmes & Kranthoff, for plaintiffs.
Trimble & Braley, for defendant.

PHILIPS, District Judge. The defendant has demurred to the petition herein, raising the principal question as to whether or not the defendant is liable on the policy of insurance sued upon for the

death of Lyman A. Berger, caused by a gun or pistol shot fired by one John Schlegel, alleged to have been at the time of firing "a person of insane mind, and then and there without sufficient capacity to form and have an intention to inflict such injuries, or to understand the nature and quality of his act," by which act a violent and accidental injury was inflicted upon said Lyman A. Berger, occasioning his death. The policy in question is what is known as an "accident policy." Among its provisions is the following, in substance: This insurance does not cover, and the company will not be liable for, injury or death caused by, resulting from, or attributable, partially or wholly, to "intentional injuries inflicted by the insured or any other person." The federal authorities are quite agreed that if the death is caused by the voluntary act of the assured, when his reasoning faculties were so far impaired that he was not able to understand the moral character, or the general nature, consequences, and effect, of the act he was about to commit, such death is not "intentional," within the meaning of that term as employed in the policy, and the insurer is liable. This, for the very obvious reason that the term "intentional" implies the exercise of the reasoning faculty, consciousness, and volition; and, when the injury is thus inflicted by such a person, it is accidental, resulting from external, violent cause, within the meaning of an accident policy. *Insurance Co. v. Terry*, 15 Wall. 591; *Insurance Co. v. Rodel*, 95 U. S. 232; *Insurance Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99; *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685. If this be so as to a self-inflicted injury by the insured, I am not able to perceive any escape from the proposition that the same rule should be applied to the injury inflicted by "other person." The word "intentional" qualifies as much the act of the other person as it does the injury inflicted by the insured; and on the rule of construction, a sociis nocitur, the same meaning and construction must be given to the word "intentional" when applied to the act of the other person as when applied to the self-inflicted injury by the insured. If an injury inflicted on one's self while insane is not intentionally done, because of the mental incapacity of the party to perform an intentional act, it would seem that it must follow logically that an injury inflicted by another party, when such other party was insane, was not intentionally done. Where the term "intentional" is employed in the same clause and connection, it qualifies the act both of the insured and the act of "any other person."

It does seem to me that an argument may be drawn in favor of this conclusion by reference to the immediately preceding part of this same paragraph in the policy. It exempts the insurance company from all responsibility resulting from suicide, whether committed by the insured when sane or insane. Technically speaking, it is a legal solecism to speak of suicide committed by an insane person, as the term "suicide" implies the willful and voluntary act of a person who understands the physical nature of the act, and intends by it to accomplish the result of self-destruction. It is a deliberate termination of one's existence, while in the possession and enjoyment of his mental faculties, and therefore the books say that self-killing

by an insane person is not suicide. *Breasted v. Trust Co.*, 4 Hill, 73; *Id.*, 8 N. Y. 299; *Nimick v. Insurance Co.*, Fed. Cas. No. 10,266. But doubtless the courts would say in respect of a policy of insurance which in express terms exempts the insurer from liability resulting from suicide, sane or insane, that the clear purpose was to include death by the act or hand of the insured, whether he was sane or insane at the time. The inference, however, to be drawn from this provision is that, when the insurance company intended to exempt itself from liability for an injury or death resulting from an act committed by the party when insane, it is expressly so declared; and therefore when, in the same connection, it only exempted itself from liability for death resulting from an intentional injury inflicted either by the insured or any other person, without the qualification of "sane or insane," the conclusion follows that such exception was not in the mind of the insurer; and on the well-established rule of construction, applied by the courts to contracts of insurance companies, that the terms be construed in favor of the insured rather than in favor of the insurer, it results that the demurrer should be overruled, which is accordingly done.

FRED J. KIESEL & CO. v. SUN INS. OFFICE OF LONDON.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1,027.

1. FIRE INSURANCE—CONSTRUCTION OF POLICY.

A policy on goods in a warehouse contained a clause which declared that "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The building fell, and the goods were destroyed by fire; but whether the fall was caused by the fire, or by a gale of wind, was the matter in issue. Plaintiff requested a charge that, if the building or goods were on fire before the building fell, the company was liable, even though it would not have fallen but for the wind. *Held*, that the court properly rejected this request, and correctly charged that, if the fall was caused by the fire, the company was liable, but, if it resulted from some other cause, it was not.

2. SAME.

While a policy which is ambiguous or of doubtful meaning should be construed most strongly against the insurer, yet, if its terms are clear and unambiguous, they are to be taken in their plain, ordinary sense, and no construction is necessary.

3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.

A question which was not called to the attention of the court below by any objection or request for instructions will not be considered on appeal or writ of error.

4. OPINION EVIDENCE—WHEN ADMISSIBLE.

There is a recognized exception to the general rule requiring a witness to state facts, and not conclusions, which permits him to state his inference or opinion from facts he sees or knows, when he draws it from so many minor details that it is impossible to state them so that a jury could deduce a just inference from his narrative. But on an issue as to whether a building containing insured goods fell as the result of fire, or was blown down by a high wind, *held*, that the court committed no error in refusing to permit witnesses, who testified that they saw the roof

on fire, and had seen other buildings on fire before, to give their opinions as to whether it was still standing when they saw it burning.

5. **SAME.**

The general rule that witnesses should state facts, and not conclusions, should be strictly followed; and, whenever it is doubtful whether a case falls under the rule or one of its exceptions, the wise course is to place it under the rule.

In Error to the Circuit Court of the United States for the District of Utah.

A. R. Heywood (Hugh A. Tait, on the brief), for plaintiff in error.

T. C. Van Ness, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a judgment for the defendant in error, the Sun Insurance Office of London, an insurance corporation, in an action brought against it by the plaintiff in error, Fred J. Kiesel & Co., a corporation, on a policy of fire insurance upon merchandise that was situated in a warehouse at Ogden, in the state of Utah. One of the clauses of this policy reads: "If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." The complaint of the plaintiff contained the usual allegations of the issue of the policy, the destruction by fire of the merchandise insured, the proof of the loss; and a demand for its payment. In its answer the defendant denied that the goods were destroyed by fire, and that proper proof of loss was made, and then averred that the building in which the merchandise was contained fell, not as a result of fire, but as a result of wind, before either the building or the goods within it were destroyed or injured by fire. When the case came to trial, the defendant stipulated that, if it was liable at all, it was liable for the full amount of the policy, and that the proof of loss was sufficient in that event, but "did not admit that it was liable, but, upon the contrary, alleged and claimed and stood upon the proposition that in truth the building was blown down by a gale of wind on the night of the 18th of September, and that, after the building had been blown down, a fire started in the debris, and destroyed to some extent, the contents; that the only real issue to be tried was whether or not the loss occurred from fire,—that is, whether the building first caught fire, which resulted in the destruction of the building and its contents, or whether it fell before the fire began." This issue was tried by a jury for five days. Evidence was introduced, on the one hand, tending to show that the warehouse was on fire, and that the flames were breaking through its roof while every part of it was still standing; and, on the other hand, that material portions and substantially all of the warehouse had fallen from a cause other than fire, and unconnected with fire, to wit, from a gale of wind, prior to the occurrence of fire on the goods insured or on the building. The principal complaint in the case is: That at the close of the trial the court below refused to give to the jury the following instruction, which

was requested by counsel for the plaintiff: "If you believe from the evidence that the fire had originated, and that the building or any portion of the insured goods therein contained was on fire and burning, before the building or any part thereof fell, your verdict should be for the plaintiff, notwithstanding you may find from the evidence that subsequently the building or some substantial part thereof fell, and that the same would not have fallen but for the wind which was blowing at the time." That it charged them on this subject in these words: "If this building, or any substantial part thereof, fell before the fire, or before any portion of the merchandise insured (and this policy is on the merchandise within the building, and not on the building itself), before any portion of that merchandise was injured by fire, and it so fell, not as the result of the fire, but as the result of something else, your verdict should be for the defendant in this case, and not for the plaintiff." And that when counsel for the insurance company, at the close of the charge, excepted to this portion of it, and said, "As I understand the charge of the court, no matter to what extent the building was burning, if the goods were not on fire, no liability would attach," the court turned to the jury, and further charged them in this way: "Perhaps, gentlemen, I did not explain fully what I meant on that subject. If that building fell, even after the fire had originated, but fell from a cause distinct from the fire,—in other words, if the fall was not caused by the fire,—and if at the time it fell the goods had not caught fire, and had not been damaged by fire, the defendant would not be liable in this case. If, on the other hand, the goods—and the goods and merchandise only were insured—in the building, if those goods had been damaged by fire or had caught fire prior to the falling of the building, you will find for the plaintiff."

It is plain from the request of the plaintiff's counsel, which we have quoted, and from the instructions given by the court, that the only question of law at issue between court and counsel was whether or not the defendant was liable under its policy in case the building, or a substantial part thereof, fell from some other cause than fire after fire had attacked it, and before any of the goods insured were burned. No words occur to us more apt, terse, and expressive than those contained in the policy with which to answer this question: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." If the building falls before the goods insured are damaged by fire, and if the fall is not caused by fire, from that instant the insurance ceases. The purpose of parties to an insurance policy in making their contract is to indemnify the insured against all destruction or damage caused by fire, but to give no indemnity against any destruction which resulted from other causes. Naturally, the dominant thought throughout the entire agreement, and hence the key to its interpretation and the measure of the liability of the company under it, is the cause of the destruction or damage. Generally speaking, if that cause is fire, there is liability. If fire is not the cause, there is no liability. In the particular clause in issue in this case, the same purpose controls, the same key interpreta, the

same test determines the liability. If the fall of the building was caused by fire, then the defendant was liable, whether the goods insured were burned before or after the fall; but if the fall occurred before the fire attacked the goods, and if that fall was caused by an earthquake, by a waterspout, by a cyclone, or by any other cause than fire, the express agreement was that, when the fall occurred, the insurance ceased, and there was no liability. If the building was on fire, and if it would not have fallen without the fire, its fall might well be said to have been the result of the fire; but if it was on fire, and if it would have fallen by the force of the wind if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable. Herein was the fatal defect in the instruction asked by plaintiff's counsel. They failed to appreciate the fact that the cause of the fall was the test of the liability. They requested the court to charge the jury that if the building was on fire, and would not have fallen but for the wind, the defendant was liable, when, by the express terms of the contract, it was not liable unless the warehouse fell as the result of the fire; and inasmuch as it might have been on fire, and yet might have fallen from the wind if there had been no fire, this instruction was erroneous. If they had asked a charge that the defendant was liable if the building would not have fallen but for the fire, that instruction would have been in accord with the terms of the contract, and would undoubtedly have been given. But when they asked that the defendant be held although the fall resulted from the wind, regardless of the question whether it resulted either directly or indirectly from the fire, they attempted to evade and escape from the plain reading of the agreement. The court below perceived this mistake, and correctly charged that, if the fall was caused by the fire, the insurance company was liable, but that if it resulted from some other cause it was not.

In reaching this conclusion, we have not overlooked the customary appeal of counsel in insurance cases to the rule that, where the terms of a policy are ambiguous or of doubtful meaning, its words should be construed most strongly against the company. *Guarantee Co. v. Mechanics' Savings Bank & Trust Co.*, 47 U. S. App. 91, 101, 26 C. C. A. 146, 152, and 80 Fed. 766, 772. But it is equally well settled that "contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken in their plain, ordinary, and proper sense." *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 463, 14 Sup. Ct. 379, 381. We are unable to discover anything ambiguous, doubtful, or obscure in the language of the clause over which this controversy rages. It was competent for these parties to fix the terms of their agreement. It is admitted that the contract was one for indemnity against loss caused by fire, and not against loss from other causes. It was for indemnity against such loss while the goods remained in the same state of hazard in which they were when the contract was made; and the policy contained various provisions limiting its duration and effect if a change in the situation of the goods took place which might enhance the

danger of loss by fire, such as that the policy should be void if the insured obtained other insurance without notice to the company, or if the goods became incumbered by a chattel mortgage, or if the policy was assigned before loss, or if dynamite or certain other explosives exceeding in quantity 25 pounds were kept on the premises, or if a loss was caused by riot, theft, or by the neglect of the insured after a fire, or if the building containing the goods fell except as the result of fire. There was nothing unjust, unreasonable, or unfair in any of these stipulations. In making them, the parties merely exercised their rights of contract. They simply guarded more carefully and expressed more clearly their fixed intent to make a contract to indemnify the insured against loss caused by fire, and by fire only. Both parties well understood that this fire insurance company did not undertake to indemnify the plaintiff against loss caused by tornadoes, cyclones, waterspouts, earthquakes, or winds. Observation had taught, and experience had proved, that the débris of a fallen building is far more likely than the standing building to take fire and burn; and the clause here in issue, which exempts the company from liability from the contents of such a building from the instant of its fall, when that fall is not caused by fire, is consistent with the main purpose of the contract, is rational and fair in itself, and is expressed in words so apt, terse, and plain that attempts to elucidate their meaning are vain. Where the terms of a contract are so clear that exposition serves only to obscure, interpretation is futile and rules of construction have no application.

Several objections to this charge have been presented, which do not challenge the soundness of the main proposition of law which we have been considering, and they will now be briefly noticed.

It is claimed that the charge was erroneous because the defendant did not claim in its answer that it was free from liability if the building caught fire before it fell, and because at the opening of the trial it admitted "that the only real issue to be tried was whether or not the loss occurred from fire,—that is, whether the building first caught fire, which resulted in the destruction of the building and its contents, or whether it fell before the fire began." No objection of this kind, however, was made, and no exception to the charge on this ground was taken. No request was preferred to instruct the jury that the defendant, by its answer and stipulation, had admitted that it was liable if the building caught fire before it fell, and that question was never presented to the court below. It is therefore not here for our consideration. This is a court for the correction of the errors of the trial court only. *Insurance Co. v. Miller*, 19 U. S. App. 588-592, 8 C. C. A. 612, 614, and 60 Fed. 254, 257; *City of Lincoln v. Sun Vapor Street-Light Co.*, 19 U. S. App. 431, 439, 8 C. C. A. 253, 258, and 59 Fed. 756, 761. Since this question was not presented to that court, and that court never considered or decided it, it certainly never committed any error regarding it, and there is nothing in this objection for us to consider or correct. Moreover, the stipulation at the opening of the trial was not made for the purpose of presenting an accurate statement of the single issue for trial, but for the mere purpose of naming that issue and separating it from others raised by the plead-

ings. The policy was introduced in evidence at the trial, and on its face it raised the question which the court considered. The case was tried five days, and at the close of that trial the court gave the law relative to this issue, and submitted it to the jury without any suggestion or warning from any one that it had been eliminated from the case either by answer or admission. Under these circumstances, the issue was not eliminated. It was pending, and a refusal to consider and submit it would have been erroneous.

It is said that the last sentence of the supplementary charge, which was, "If, on the other hand, the goods,—and the goods and merchandise only were insured in the building,—if those goods had been damaged by fire, or had caught fire prior to the falling of the building, you will find for the plaintiff," was, in effect, a charge that the jury could not find for the plaintiff unless the goods took fire before the building fell, and that this was an erroneous statement of the law. But no exception was taken to this sentence of the charge, and no request was made for its modification or extension; so that this question is not before us, and, if it was, it is plain, when the entire charge is considered, that there is no just ground for this criticism. No jury of ordinary intelligence could have listened to the instructions of the court in this case without perceiving that the question for them to determine was not whether or not the goods were burning before the building fell, but was whether the fall of the building was the result of fire or of some other cause.

It is assigned as error that witnesses who had testified that they saw the roof of the building on fire, and that they had seen other buildings on fire before, were not permitted to testify whether or not in their opinion the roof was standing when they saw it burning. It is conceded that this was not a proper subject for expert testimony, and that the general rule of evidence is that a witness must state the facts, and may not testify to his opinions. But it is claimed that the proposed testimony falls under the recognized exception to this rule that any witness may state his conclusion, inference, or opinion from facts he sees or knows when he draws it from so many minor details that it is impossible for him to state them so that the jury would have a fair opportunity to deduce a just inference, or to form a correct opinion from the narration or description he could give. *Railroad Co. v. Rambo*, 16 U. S. App. 277, 280, 281, 8 C. C. A. 6, 8, and 59 Fed. 75, 77; *Yahn v. City of Ottumwa (Iowa)* 15 N. W. 257. It is not difficult to state this exception, or to illustrate it with striking examples; but it is not always easy to correctly apply it in doubtful cases. Many instances readily occur to the mind which, from their very nature, fall clearly within the exception. A witness may give his opinion as to the identity of a person, as to his physical or mental condition, may testify that he was sick or intoxicated, or that he was pleased or angry or insane, because it is clearly impossible for him to describe to the jury the many, sometimes slight, yet sure, manifestations of the identity or state which he saw, so that they can have any fair opportunity to draw from them a correct conclusion. In cases of this kind a refusal to allow a witness to state his opinion would constitute a palpable error. But there are many cases so near the

line between the rule and its exception that an appellate court should not be swift to reverse the rulings of the court below unless it is reasonably clear that a plain error of law has been committed. There is a wide difference in the ability of witnesses to describe what they have seen, and to narrate what they have heard. One witness may be able to make so graphic a word picture of a scene he has witnessed that those who hear it are in as good a situation to deduce a correct conclusion as he is; while another, who has observed the same incidents, may be utterly incapable of describing them, and can do nothing but state the impression or conclusion he drew from them. The trial court sees and hears each witness, and in doubtful cases is far better qualified than the court of appeals to determine whether a witness should be confined to the facts, or should be allowed to state his conclusions. In the case in hand, it does not appear to have been impossible—indeed, it does not seem to have been very difficult—for the witnesses to have so described the appearance of the burning roof that the jury could have drawn a correct conclusion from their description with reference to the question whether or not it was standing when they saw it burning. One of these witnesses testified that he saw the upper portion of the east wall from one end to the other standing; that he saw one-third of the easterly slope of the roof in place; and that the north two-thirds of this easterly slope was covered with fire and flames, so that he could not see the material of which it was composed. This witness could certainly have stated, as the facts were, either that the base of these flames was on the plane of the roof, or that on a portion of the roof their base was on this plane, and on another portion it was below it, and that the flames came through it as from the mouth of a crater; and from such a description the jury could easily have drawn the proper conclusion. The general rule that facts, and not conclusions, should be stated, is a wise and salutary one, and cannot be too strictly followed. It tends to prevent fraud and perjury, and is one of the strongest safeguards of personal liberty and private rights. Whenever it is doubtful whether a case falls under the rule, or under one of its exceptions, the wise course is to place it under the rule; and, in our opinion, the court below made no mistake in following this course in the case before us. The judgment below is affirmed.

UNITED STATES v. SAUER.

(District Court, W. D. Michigan, S. D. June 18, 1898.)

1. ILLEGAL USE OF MAILS—SCHEMES TO DEFRAUD—LOTTERY SCHEMES.

Rev. St. § 5480, is general in character, and makes it a criminal offense to use the mails for promoting schemes to defraud in general; and the amendment of March 2, 1889, only alters its scope by adding a certain class of cases particularly described therein. Section 3894, notwithstanding some general language therein, is specific, and designed to punish the use of the mails for promoting lottery schemes; and the amendment of September 19, 1890, merely makes further and specific provisions and amendments, without changing its scope. An indictment, therefore, for using the mails to defraud, not by any lottery scheme, is referable to sec-

tion 5480, and is to be determined under that section, without reference to the terms of section 3894.

2. SAME—VENUE OF OFFENSE.

A prosecution under Rev. St. § 5480, prohibiting the use of the post office for promoting a scheme to defraud, can only be instituted in the district in which the fraudulent matter was placed in the post office.

This matter arose upon an application for an order of removal founded on an indictment and bench warrant from the district court for the Eastern district of Pennsylvania.

George G. Covell, U. S. Atty., and Dwight Goss, Asst. U. S. Atty., for plaintiff.

Bondeman & Adams, for defendant.

SEVERENS, District Judge. The only question with which I shall have to deal is whether, upon reading the indictment and warrant shown as the ground of removal, it appears that the offense charged is triable in the Eastern district of Pennsylvania. If the court there has no jurisdiction of the offense because it was not committed in that district, the order for removal cannot properly be made. There are found in the Revised Statutes of the United States two provisions relating to the general subject of the use of the postal facilities of the United States for the purpose of promoting fraudulent schemes. One of these provisions is found in section 5480, which is framed for the purpose of constituting as a criminal offense the placing or causing to be placed in the post office material which might be otherwise mailable, for the purpose of promoting a scheme previously concocted to defraud some person or persons. That was a statute of a general character. There was at the same time another (section 3894), which in substance was a provision against the use of the mails of the United States for the purpose of promoting "lottery schemes," generally so termed. A fundamental rule of construction requires us to give such an interpretation to each of these several provisions as shall give place for the other to have effect. As I said, section 5480 is a general statute. Section 3894 is a statute designed for the specific purpose of prohibiting the use of the mails for promoting lottery schemes. It is true that in section 3894 there is some general language, such as this: "Or concerning schemes devised for the purpose of obtaining money or property under false pretences." Now, that language is general in its form; but, upon the application of two maxims, it is to be restricted in its application so as to apply to schemes of the character designated in that section (3894), because, if it were construed broadly and according to the wide import of its terms, without restriction, it would cover the subject-matter of section 5480. This would be to violate the rule which I have adverted to; of so construing each part of the statutes as that every other bearing upon a kindred subject may have its due effect. And it would also be in disregard of another maxim of construction, which is that, where general words are used in connection with particular words, the general words are to be restricted in their signification so as to include only others of the same class or character as those which are specifically design-

nated in the section and particular language in which the general language is found. Now, taking these propositions for our starting place,—i. e. that section 5480, as found in the Revised Statutes, was designed to apply to cases of the general character therein described, and that section 3894 was designed to apply to schemes in the nature of lottery enterprises,—we will follow up those two sections of the statutes and the amendments to them respectively.

Section 5480 was amended March 2, 1889, by including within the general terms of the section, as it had before stood, certain other, particular descriptions of fraud. If the whole of this language as it now stands had been then originally enacted, there might have been room for the application of one of the maxims above mentioned, viz. that general language should be restricted to a similar meaning to that of the specific and particular language or provisions in the section. But there are other considerations. This section, which is amended, was a section which had been enacted prior to the date of this act, and this amendment professes upon its face to be an amendment of the old section; and the rule is that an amendment is not to be regarded as annulling the provisions of the section to be amended any further than is necessary to give the amendment due scope and effect. The conclusion to be reached in the construction of section 5480 is that it was no further amended or altered in its scope than to add a certain class of cases which are particularly described in the amending matter. Turning to the act of September 19, 1890, upon which the district attorney has placed some reliance, it is found that that also is simply an amendment of section 3894, being the section theretofore contained in the Revised Statutes leveled at the use of the mails for lottery schemes; and it goes on to make some further and specific provisions and amendments to the statute as it formerly stood. That statute is very different as it stands amended from the statute section 5480 as amended, and the two sections or provisions stand on entirely independent grounds. Now, this indictment seems to have been framed upon the supposition that the case which is attempted to be stated under it was a case which would fall under section 3894 as amended; but, for the reasons which I have given, I am very clearly of opinion that this is not the section which is applicable to the class of cases in which the case attempted to be described in this indictment is included. So, it will not be permissible to refer to the general language of section 3894 as amended, above quoted, this not being a matter relating to any lottery scheme, or having any similitude to a lottery scheme, and very clearly falling under the provisions of section 5480, as amended by the act of March 2, 1889.

Now, it seems to me that—starting from the root of the matter, as we have done, and considering, as we must, that congress, when it made up this revision of the statutes, could not possibly have intended to make two distinct provisions in reference to the same subject-matter, but must be supposed to have intended these several provisions to relate to the distinct classes within which the cases might be included, and taking up the amendments, and show-

ing, as I think is clearly done, that each of the amendments is an amendment, and an amendment only, of the particular statute which in its caption and title it professes to be an amendment of—neither of these two branches becomes merged in the other, but that each one moves off separately, and has continued down to this time separate from the other.

Now, if this is so, and this case is not of a class or character included within the statute leveled at lottery schemes, the only remaining question is to inquire and determine whether or not the case can be tried in the district to which the letter, packet, or writing is addressed, and where it is delivered. In order to settle that matter, we must have regard to the language of section 5480 as amended. That statute, after having referred to the formation of the scheme to defraud, then goes on to enact the gist of the offense in these words: "Shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet or advertisement in any post-office, branch post office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment. * * *" I think that the words "to be sent or delivered by the said post-office establishment" refer to the purpose with which the supposed letter or packet is to be placed in the post office, and denote that it is not sufficient that a letter is simply placed in the post office, but that it must be done for the purpose of being transmitted; the words "to be sent or delivered by the said post-office establishment" being employed for the purpose of denoting the intent or general purpose for which the letter is placed in the post office. I think the conclusion is inevitable that the offense is committed by the placing of the letter in the post office, and that it is completed at the time when it is placed there for the purpose of being transmitted. The lottery statute contains a provision making it a penal offense not only to place the prohibited matter in the post office to be sent, but also makes it a penal offense to send the matter,—that is, cause it to be transmitted,—and also makes it a penal offense to deliver such matter, or cause it to be delivered, at the end of its transit. Well, now, it seems to me obvious that if the prohibition against putting the letter or packet relating to the lottery scheme into the post office did ipso facto include not only that, but the sending and the delivering of the letter at the end of the line, the second and third provisions of the lottery statute would be useless. In short, it appears to me that it is not consistent with the rules of construction which relate to the interpretation of statutes creating criminal offenses to enlarge and extend these words in section 5480 beyond their ordinary plain, natural import; and especially is this course to be required of the court when, turning to a kindred statute, we see that in the cases there provided for, for reasons best known to the legislative department which enacted them, there is also a provision, in addition to the placing of the letter in the post office, making subsequent action in the course of the transmission and delivery of such letters penal. For these reasons, my opinion is that the offense which is attempted to be set out in this indictment is one which could only be prosecuted, under the

constitutional provision in that regard, in the proper district in the state of Illinois from which this fraudulent matter was transmitted,—where it was placed in the post office.

It might not be out of place to say that this indictment, in charging the gist of the offense, says: "So devising and intending in and for executing such scheme and artifice to defraud, and for the obtaining of money under false pretenses, and attempting so to do, cause to be conveyed and delivered by mail, in the district aforesaid." Now, I think, there is grave room for doubt as to whether that language is sufficient to charge as a penal offense the placing of the mail in the post office. It would seem to me language more appropriately fitted to charge the second and third of the offenses contained in the lottery act; i. e. the sending, which is the second, and delivering, which is the third. But it is not necessary, as I think, for me to express a definite opinion upon that. It is hardly necessary to point out the distinction between the character of cases that we are dealing with and the case of an extradition by the governor of one state upon the requisition of the governor of another state in which the offense is committed. No doubt, where goods are obtained by fraudulent pretenses which are initiated in another state, and they produce their effect in the state in question, the matter might fall under the general doctrine that where an offense is committed in part in one state, and in part in another, the case may be prosecuted in either jurisdiction. But what we have to deal with is simply a federal statute, and not one relating to common-law offenses, or the practice growing out of state prosecutions, and the reclamation of fugitives from justice upon the demand of the governor of one state upon the governor of another.

For these reasons, I think, the order of removal must be denied, and the respondent discharged.

STATON V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1,035.

1. **DEFAUDING UNITED STATES—FORGED AFFIDAVIT.**

One presenting accounts to the government cannot be convicted under Rev. St. §§ 5418, 5479, for forging the name of a justice of the peace to the affidavit attached thereto, unless it be done to defraud the United States.

2. **SAME—INDICTMENT.**

An indictment charging that defendant forged the name of a justice of the peace to accounts presented by him to the government accounting officers, "with intent to defraud the United States," must be regarded as based on Rev. St. §§ 5418, 5479, and not on section 5421, which denounces the making, altering, forging, etc., of papers, for the purpose of "obtaining or receiving * * * from the United States or any of their officers or agents any sum of money."

In Error to the District Court of the United States for the Eastern District of Arkansas.

G. W. Murphy, for plaintiff in error.
Edward O. Stringer, U. S. Atty.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge. Ben B. Staton, the plaintiff in error, was indicted under an indictment containing two counts, in the district court of the United States for the Eastern district of Arkansas. The indictment on its face purported to have been framed on the provisions of sections 5418, 5421, and 5479 of the Revised Statutes of the United States. The first count of the indictment charged that said Staton, on July 3, 1894, in the Western division of the Eastern district of Arkansas, "did then and there willfully, unlawfully, willingly, falsely, and feloniously make and forge a certain affidavit and writing to his quarterly postal account and return for the quarter ending June 30, 1894, to the auditor for the post-office department, which said affidavit and writing is in words and figures as follows, to wit." The alleged forged affidavit was then set out in *hæc verba*, the same being an affidavit which purported to have been sworn to before "M. H. Stokes, J. P.," and was in form and substance the usual affidavit which postmasters are required to affix or attach to their quarterly reports. The second count of the indictment charged the accused with the commission of a similar offense on October 2, 1894, in that he had attached to his quarterly return for the quarter ending September 30, 1894, a forged affidavit made before "M. H. Stokes, J. P." The second count, however, differed from the first count in that it further alleged that M. H. Stokes, justice of the peace, did not sign his name to said affidavit; that the name of the justice had been signed thereto by said Staton; and that the act was committed by the accused "with intent to defraud the United States, contrary to the form of the statute in such case made and provided." The first count of the indictment contained no allegations similar to those last aforesaid charging that the accused had signed the name of Stokes with an intent to defraud. On the trial of the indictment, the accused testified in his own favor, in substance, as follows: That while he did sign the name of "M. H. Stokes, J. P.," to each of the quarterly reports of date June 30 and September 30, 1894, yet that the name of the justice was so signed by direction of said justice because the latter was busy at the time, and did not wish to take the trouble to affix his official signature to the reports; that the returns were in all respects true and correct; and that the defendant had no purpose or intent to defraud the United States or to obtain money or credit to which he was not entitled.

The defendant requested the trial court to charge the jury in his behalf as follows: "If the items embraced in the returns or accounts were correct, and contained no false entry or claim, and there was no intent on the part of the defendant to obtain from the government something that he was not entitled to in the way of money or credit, he is entitled to an acquittal." But the court declined to do so, and thereupon charged the jury to the contrary of such request, and in substance as follows: That, even if the accused did have authority from Stokes to sign the latter's name to the jurats which were attached to the affidavits to his quarterly reports, yet, as a person can-

not administer an oath to himself, the fact that the accused signed the name of the justice of the peace to the returns, and presented the same to the government, when he had not in fact sworn to them before the justice, constituted the crime of forgery, and that the jury should so find. No attempt is made by counsel for the government to support the action of the trial court in the respects last stated, under the provisions of sections 5418 and 5479 of the Revised Statutes, the same being two of the sections referred to on the face of the indictment, under which it purports to have been drawn. These sections in express terms provide that the making, altering, forging, or counterfeiting of the various instruments and writings to which those sections refer shall be an offense when done "for the purpose of defrauding the United States"; and inasmuch as the trial court in its charge altogether ignored the intent with which the acts complained of had been committed, and instructed the jury that the accused was guilty of the crime of forgery if he signed the name of the justice to his reports, even with that officer's consent, and subsequently presented the reports to the government, it is manifest that there was error in the charge if we regard the indictment as founded on the two sections of the statute last above mentioned.

It is contended, however,—and this seems to be the sole reason urged in support of the charge,—that the indictment was drawn under section 5421 of the Revised Statutes, and that inasmuch as the defendant admitted that he had intentionally signed the name of the justice of the peace to his reports, and subsequently presented the reports to the auditor of the post-office department, the question of intent was eliminated from the case, and no finding thereon by the jury was requisite. It is a sufficient answer to this contention to say that the indictment was not based on section 5421 of the statute, or, if it was the intention of the pleader to found it thereon, that it was insufficient. Section 5421 provides that "every person who falsely makes, alters, forges or counterfeits * * * any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving * * * from the United States or any of their officers or agents any sum of money, * * * shall be imprisoned," etc.; and neither count of the indictment in question charged, as it should have done if drawn under that section, that the act complained of was done for the purpose of obtaining from the United States a sum of money. Moreover, the second count of the indictment expressly charged that the act complained of was done "with intent to defraud the United States."

We think it clear, therefore, that the indictment must be regarded as based on sections 5418 and 5479 of the Revised Statutes, rather than on section 5421; that the element of intent was involved in the issue; and that the accused was entitled to have the jury determine, it being one of the necessary ingredients of the offense charged in the bill, whether he had been actuated with an intent to defraud the United States.

It results from these views that the judgment of the district court must be reversed, and the cause remanded for a new trial. It will be so ordered.

BURROUGHS v. ERHARDT.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 104.

CUSTOMS DUTIES—MONEY DEPOSITED WITH COLLECTOR—RECOVERY BACK.

Money deposited with the collector as security (additional to that of the importer's bonds) for payment of duties assessed, and actually applied to the payment of duties, cannot be recovered back, in the absence of a protest, even if the duties were wrongfully assessed.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error sued out by the administratrix of plaintiff below to review a judgment of the circuit court, Southern district of New York, in favor of defendant below, the collector of the port of New York, upon a verdict directed in his favor by the circuit judge.

C. B. Barker, for plaintiff in error.

Arthur M. King, Asst. U. S. Atty., for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. It is practically not disputed that if the \$6,000 in controversy was deposited with the collector to secure the payment of duties assessed upon plaintiff's merchandise, even though such duties may have been wrongly so assessed, it cannot be recovered back, since no protest was filed. The difficulty with the case is that, even upon the plaintiff's own evidence, this is precisely the purpose for which the deposit was made. Plaintiff testifies that it was deposited because the government officers "did not consider [his] bonds were sufficient to protect the government; they wanted additional security." The amended complaint avers that the deposit was made "as a guaranty of good faith in making entries for warehouse," and "as security to the United States against any loss in case the warehouse bonds were not sufficient to cover all the lumber." But the only object of the warehouse bond is to protect the government against failure to pay duties; the only possible loss consequent upon insufficient bonds would be a loss of duties. The bond is security placed in the hands of the government, from which, in the event of the importer's failure to pay duties assessed upon his goods, such payment may be obtained. The \$6,000 in gold was manifestly deposited for a like purpose. We are unable to conceive of any theory upon which, assuming plaintiff's statements to be entirely accurate, a single dollar of it was to be paid for anything except duties. It was used up (except for the small balance returned) in making payments of duties assessed against plaintiff's goods, and, in the absence of any protest against the exaction of such duties, cannot be recovered back.

In re E. W. RATHBUN & CO.

(Circuit Court, N. D. New York. July 6, 1898.)

CUSTOMS DUTIES—CLASSIFICATION—LUMBER.

White pine lumber in sticks measuring 6 by 12 inches is dutiable as "sawed lumber, not specially provided for," at two dollars per 1,000 feet, under paragraph 195 of the act of July 24, 1897, and not as timber "hewn, sided or squared (not less than eight inches square)," under paragraph 194. The parenthetical clause refers to the shape of the timber, and not to the number of square inches it contains, and excludes timber measuring less than 8 inches one way.

This is an application by the collector of customs at Oswego, N. Y., for a review of the decision of the board of general appraisers reversing the decision of the collector as to the rate of duty on certain pine lumber imported by E. W. Rathbun & Co. in November, 1897.

The collector imposed a duty of two dollars per 1,000 feet, board measure, under paragraph 195 of the act of July 24, 1897, which provides as follows:

"Sawed boards, planks, deals, and other lumber of whitewood, sycamore, and basswood, one dollar per thousand feet board measure; sawed lumber, not specially provided for in this act, two dollars per thousand feet board measure."

The importers protested, insisting that their merchandise should have been classified under paragraph 194 of the act, which is as follows:

"Timber hewn, sided, or squared (not less than eight inches square), and round timber used for spars or in building wharves, one cent per cubic foot."

The issue thus presented came on for hearing before the board of general appraisers which sustained the protest. The prevailing opinion is as follows:

"The merchandise consists of 1,452 feet white pine lumber contained in nine pieces 25 to 30 feet in length and measuring six by twelve inches. It was assessed for duty at \$2 per 1,000 feet B. M., under paragraph 195, Act July 24, 1897, and is claimed to be dutiable as timber at one cent per cubic foot under paragraph 194. Paragraph 194 reads: 'Timber hewn, sided, or squared (not less than eight inches square), * * * one cent per cubic foot.' The collector reports that as this timber measures less than eight inches one way, the assessment of duty is made for the purpose of obtaining a decision from the board. Paragraph 194 says 'not less than eight inches square.' Eight inches square is 64 inches. The timber in question is 72 inches square and is not, therefore, excluded by the limitation. The protest is sustained accordingly."

One member of the board dissented. His opinion is as follows:

"I dissent from the conclusions of my colleagues in this case. In my opinion, the words 'not less than eight inches square' in the paragraph under which duty was assessed, have reference to squared timber, neither of the sides of which shall measure less than eight inches. Such, according to my understanding, is the meaning of these words in common speech and as used in the tariff act. They are as if reading: 'neither side of which shall be less than eight inches in width.' The distinction made in the tariff act between the phrases, 'inches square' and 'square inches' is clear and easily understood. Where the former is used (as in paragraph 194), it always refers to the dimensions and shape, but where the area or square measure is intended,

without regard to the shape, the latter is always used. For example, paragraph 104 of the tariff act provides for 'cast polished plate glass * * * not exceeding 16x24 inches square.' This provision has been in several tariff acts, but has never been construed to mean 384 square inches of glass of any dimensions or sizes. Paragraph 105 contains the same expression, and, in immediate juxtaposition with it, a provision for 'cast polished plate glass * * * exceeding 144 square inches,' which does mean of any shape. In paragraph 112, provision is made for 'mirrors, not exceeding in size 144 square inches.' Paragraph 88 also provides for 'tiles * * * exceeding two square inches in size.' In the one case, the rate of duty has express reference to the dimensions and shape of the article, and in the other, to the area or square inch measurement, without regard to shape. If it is held that the phrase 'eight inches square' is the equivalent of 'sixty-four square inches,' it could be held with equal propriety that 'one hundred and forty-four square inches' means 'twelve inches square' and excludes an article 9x16 inches square. I think the protest should be overruled, and the assessment of duty affirmed."

Emory P. Close, U. S. Atty., for Collector.

COXE, District Judge. The language of paragraph 195, under which the collector acted, sufficiently describes the importations as "sawed lumber." His action must stand unless it appears that the lumber is specially provided for in paragraph 194 as "timber hewn, sided or squared (not less than eight inches square)." In other words, if lumber, which is 12 inches wide, 6 inches thick and 20 feet long, is less than 8 inches square, the importers cannot succeed. I am of the opinion that it is less than 8 inches square. The board reached a contrary conclusion upon the theory that the words "eight inches square" are equivalent in meaning to 64 square inches, and, as the pieces in question have 72 square inches, they are more than 8 inches square. This, in my judgment, is not a correct reading of the paragraph which has reference to the shape of the lumber and not to the square inches it contains. A plank which is but two inches thick cannot be eight inches square even though it be three feet wide.

The question has been fully presented in the two opinions filed by the appraisers and nothing can be added to the discussion. It is thought that the view taken in the dissenting opinion is the correct one. The decision of the board is reversed.

WESTINGHOUSE AIR-BRAKE CO. v. GREAT NORTHERN RY. CO. et al

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 117.

1. FEDERAL COURTS—JURISDICTION IN PATENT CASES—WHERE SUITS MAY BE BROUGHT.

The provision in the judiciary act of 1887-88 that no civil suit, of which federal courts have jurisdiction concurrently with the courts of the several states, shall be brought against any person in any other district than that whereof he is an inhabitant, does not apply to patent suits, exclusive jurisdiction over which is conferred by Rev. St. § 629, cl. 9. And hence, prior to the act of March 3, 1897, defining the jurisdiction of the federal courts in patent suits, a suit for infringement by a citizen of a state of the Union could be brought in any district where valid service could be made upon the defendant.

2. SAME—AMENDMENT AND REPEAL OF STATUTES.

The act of March 3, 1897, defining the jurisdiction of the federal courts in patent suits, and authorizing the bringing of such suits in the district of which defendant is an inhabitant, or in which he "shall have committed the acts of infringement, and have a regular established place of business," did not repeal prior statutes, so as to oust the courts of jurisdiction in pending cases not falling within the jurisdictional limits prescribed in the new act.

3. PATENTS—ANTICIPATION—"SUGGESTIONS" IN PRIOR PATENTS.

Prophetical suggestions in a foreign patent of what can be done, when no one has ever tested, by actual and hard experience and under the stress of competition, the truth of the suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, are not to be accepted as showing that a subsequent patent, which has already been sustained by the courts as a meritorious one, is without actual invention.

4. SAME—AIR BRAKES.

The Westinghouse patent, No. 376,837, for improvements in fluid pressure brake mechanism, *held* valid and infringed as to claims 1, 2, and 3.

5. SAME—PRELIMINARY INJUNCTION.

A railroad company continuing to use infringing air brakes on large numbers of its cars for 3½ years after notice of an adjudication by a circuit court of appeals sustaining the patent, and declaring infringement, cannot complain, on the ground of hardship, of a preliminary injunction, which provides for a gradual removal of the infringing brakes.

This appeal is by the Great Northern Railway Company from an order of the circuit court for the Southern district of New York, which granted a preliminary injunction against the infringement by that corporation of claims 1, 2, and 3 of letters patent No. 376,837, applied for October 1, 1887, and issued to George Westinghouse, Jr., on January 24, 1888, for improvements in fluid pressure brake mechanism.

The bill of complaint was filed October 8, 1896, and the defendant filed pleas to the jurisdiction, which were overruled December 27, 1897. The order for an injunction pendente lite was granted April 1, 1898. The questions of the validity of claims 1, 2, and 3 of this patent, and of their infringement by the quick action triple valve which is used by the defendant, were before this court, and were decided on October 15, 1894. *Westinghouse Air-Brake Co. v. New York Air-Brake Co.*, 11 C. C. A. 528, 63 Fed. 902, and 26 U. S. App. 248.

Simon Sterne and Wm. H. Kenyon, for appellant.

Frederic H. Betts and George H. Christy (J. Snowden Bell, of counsel), for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The first question which arises upon this appeal is that of the jurisdiction of the circuit court for the Southern district of New York over the cause, so far forth as it relates to the appellant. The Great Northern Railway Company is a corporation organized under the laws of the state of Minnesota, and is a citizen of that state, and operates a line of railway from Duluth and St. Paul to the Pacific coast. It has an office in the city of New York, where its transfer books are kept and transfers of stock are made; and this part of its corporate business is attended to at said office by Edward T. Nichols, its secretary and assistant treasurer, who resides at Morristown, N. J. Service was made upon him in New York City, as secretary of the corporation. The complainant is a citizen of the state of Pennsylvania.

The appellant insists that, when the bill was filed, the only existing statute which prescribed and designated the proper district within which suits arising under the patent laws could be brought against a citizen of the United States was the first section of the act of March 3, 1887, as amended by the act of August 13, 1888 (25 Stat. 434), the last clause of which is as follows:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

The question whether the circuit courts of the United States could take jurisdiction without the consent of the defendant, of suits of which the federal courts have exclusive jurisdiction, in any other district than the one of which the defendant was an inhabitant when the suit was brought, has been much discussed since the date of the act of March 3, 1887, but, for the present, must be considered as substantially settled by the dicta contained in the opinions of the supreme court in *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, decided December 18, 1893, and in *Re Keasby & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, decided December 16, 1895.

If the clause of the section which has been quoted was an independent paragraph, and had no relation to the previous clauses of the same section, the contention of the appellant would have great force; but in the *Hohorst Case* it is regarded as so related to the preceding clauses that it must be considered as referring only to the jurisdiction of the circuit courts, which is concurrent with that of the several states. The earlier part of the section is as follows:

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states."

The bill in equity in this case does not aver the sum or value of the matter in dispute, and the jurisdiction of the circuit court depends entirely upon the subject-matter. In regard to causes of that class, the supreme court says in the *Hohorst Case*, which was a suit by a citizen of New York against an alien corporation, for the infringement of letters patent of the United States:

"By statute in force at the time of the passage of the acts of 1887 and 1888, the courts of the nation had original jurisdiction, 'exclusive of the courts of the several states,' 'of all cases arising under the patent right or copyright laws of the United States,' without regard to the amount or value in dispute. Rev. St. § 629, cl. 9; *Id.* § 711, cl. 5. The section now in question, at the outset, speaks only of so much of the civil jurisdiction of the circuit courts of the United States as is 'concurrent with the courts of the several states,' and as concerns cases in which the matter in dispute exceeds two thousand dollars in amount or value. The grant to the circuit courts of the United States, in this section, of jurisdiction over a class of cases described generally as 'arising under the constitution and laws of the United States,' does not affect

the jurisdiction granted by earlier statutes to any court of the United States over specified cases of that class. If the clause of the section defining the district in which suit shall be brought is applicable to patent cases, the clause limiting the jurisdiction to matters of a certain amount or value must be held to be equally applicable, with the result that no court of the country, national or state, would have jurisdiction of patent suits involving a less amount or value. It is impossible to adopt a construction which necessarily leads to such a result."

The *Keasby & Mattison Case* was a suit in equity between citizens of different states for the infringement of a trade-mark under the statute of March 3, 1881; and the bill alleged that the matter in dispute, exclusive of interest and costs, exceeded the sum or value of \$2,000. The court held that a suit for infringement of a trade-mark under the trade-mark act of 1881 was "one of which the courts of the United States have jurisdiction concurrently with the courts of the several states," and that it came within the provisions of section 1 of the act of August 13, 1888, and repeat the two grounds which governed the decision in the *Hohorst Case*, the second of which has been stated, and say emphatically that it is distinguishable from a trade-mark case in the essential particulars that "it was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the circuit courts of the United States by clause 9 of section 629, and clause 5 of section 711, of the Revised Statutes, re-enacting earlier acts of congress, and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States, concurrent with that of the several states." This construction of the provisions of section 1 of the act of 1888 was very deliberately stated by the supreme court, had been apparently carefully considered, and, until it has been revised and altered by that court, is controlling upon us.

It follows that, inasmuch as jurisdiction of this class of cases does not depend upon inhabitancy, the defendant corporation "may be sued by a citizen of a state of the Union in any district in which valid service may be made upon the defendant." In *re Hohorst*, *supra*. Service was made upon the secretary of the company, who was in permanent charge of an office of the corporation in the city of New York, in which an important part of its corporate business was transacted; was made in accordance with section 432 of the New York Code of Civil Procedure (*Tuchband v. Railroad Co.*, 115 N. Y. 437, 22 N. E. 360); and was a sufficient service upon the corporation (*St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354; *Société Foncière et Agricole des Etats Unis v. Milliken*, 135 U. S. 304, 10 Sup. Ct. 823).

The appellants next assert that the act of March 3, 1897 (29 Stat. 695), devested the circuit court of any jurisdiction which it might have had when the suit was commenced. The statute is as follows:

"Chapter 395.

"An act defining the jurisdiction of the United States circuit courts in case brought for the infringement of letters patent.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an

inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

The act was passed about 15 months after the Keasby decision, and was obviously intended to add to the general statutes upon the subject of jurisdiction in patent cases a definition of the particular requisites for jurisdiction of such causes by the various circuit courts, and of the proper method of service of process upon a defendant in the district of which he was not an inhabitant. The object was to determine with precision the boundaries of jurisdiction, and to create a future method of service of process in patent causes against non-resident defendants, which had not theretofore been stated in a federal statute.

The appellant, however, says that the statute covered the subject of jurisdiction in patent cases, prescribed a new set of rules in regard thereto, and must be held to repeal former statutes. The circumstances of the cases and the statutes to which the appellant refers bear no similarity to those now in question. The statutes which, in the view of the supreme court, alone gave jurisdiction to circuit courts in patent cases, were very general. The new provisions were prospective, in accordance with the ordinary rule of construction when the language does not necessarily indicate that they are retroactive. *Harvey v. Tyler*, 2 Wall. 328. It is said, however, that the statute repealed former statutes, and that, therefore, the courts were ousted of jurisdiction in cases which were undetermined at the date of its approval, and in which the jurisdiction differed from the limits described in the new statute. Of course, it did not repeal the statute which gave the circuit courts exclusive jurisdiction of all cases arising under the patent laws. *Bank v. Harrison*, 8 Fed. 721. It did not repeal pre-existing remedies, and "is to be considered rather as a continuance and modification of old laws than as an abrogation of the old and the re-enactment of new ones." *Treat v. Staples*, 1 Holmes, 1, 5, Fed. Cas. No. 14,162; *Wright v. Oakley*, 5 Metc. (Mass.) 406.

The question of infringement depends upon the correctness of the construction which was given to the patent in the *New York Air-Brake Case*, supra. The former opinion of this court was based upon the position that the improvement shown in patent No. 376,837 was a marked and successful advance upon the invention described in No. 360,070, and that the later patent was entitled to a broad construction. The appellant introduces British letters patent to George Westinghouse, Jr., No. 4,676, applied for March 29, 1887, accepted April 29, 1887, which describes the invention of letters patent of the United States No. 360,070, and which says:

"It is obvious that it [the stem of the emergency valve] might be worked as described by a separate piston in a cylindrical cavity communicating on the one side of the piston with the auxiliary reservoir, and on the other side with the train pipe."

It is said that this describes the appellant's valve, shows that the change from 360,070 (which was applied for November 19, 1886) to 376,837 was an obvious one, and, therefore, that the former conception of the inventive character of the improvements must be modified. The successful character of the invention described in the later patent has been universally recognized in the litigations upon it, by the witnesses on both sides, including Mr. Massey, the inventor of the valve which is the subject of this suit, and by the courts in the Boyden Brake Cases, 66 Fed. 997, 25 U. S. App. 475, 17 C. C. A. 430, and 70 Fed. 816; and its importance at the date of the invention, in view of the practical failure of the brake mechanism of the previous patent, in the tests upon long freight trains, cannot be doubted. The prophetic suggestions in English patents of what can be done, when no one has ever tested by actual and hard experience and under the stress of competition the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements. The nature and character of the invention of 376,837 were, in the record heretofore before this court, put to rigorous tests by examination and cross-examination in court; and the result which was then reached is not shaken by merely a single sentence in the English patent.

The defendant has about 16,000 cars in the equipment of its system of railway, which covers a very large extent of territory, of which number about 3,200 are equipped with the infringing valves. The order provided that these valves should be removed during successive periods of 60 and 30 days, occupying 9 months in all. In October, 1894, the attention of the defendant was called by a general circular to the decision of the circuit court of appeals; and in May, 1895, its attention was particularly called to the infringement by a written proposition from the complainant for a purchase of its valves, and an indemnity against claims for infringement. It has paid no attention to the subject for about 3½ years, and it now thinks that it is a hardship to be prohibited from further infringement. The subject of the propriety generally of a preliminary injunction against the user of infringing mechanism has been fully considered by this court in *Allington v. Booth*, 24 C. C. A. 378, 78 Fed. 878; and the appellant discloses no peculiar equities which ought to induce a withholding of the injunction. It has been a deliberate user of a large number of valves, and has preferred to run the risk of an injunction than to displace its present equipment. The order of the circuit court is affirmed, with costs of this court.

WICKELMAN v. A. B. DICK CO.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 98.

1. PATENTS—NOVELTY—ACCIDENTAL PRIOR PRODUCTION.

Novelty is not negated by a prior accidental production of the same thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of their employment, is derived from it by any one.

2. SAME—STENCIL SHEETS.

The Broderick patent, No. 377,706, for a coated paper sheet for stencils, *held* to cover a novel and meritorious invention, and also *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by the A. B. Dick Company against Frederick A. Wickelman for alleged infringement of a patent for stencil sheets. In the circuit court a decree was rendered for an account of profits and damages (74 Fed. 799), and afterwards the cause was heard on exceptions to the master's report, and such exceptions were overruled. 80 Fed. 519. From the final decree thereafter rendered the defendant has appealed.

F. A. Wickelman, pro se.

Richard N. Dyer, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Error is assigned upon this appeal of a decree adjudging the validity of letters patent No. 377,706, granted February 7, 1888, to John Broderick, for coated paper sheet for stencil, and the infringement thereof by the defendant. The appellant insists that the court below should have held the patent void for want of novelty. The patent covers a meritorious invention. The subject is a transmitting printing sheet to be used as a stencil for duplicating upon other sheets the words or designs impressed upon it, but differing from a stencil in that the letters or figures are not cut out. In the ordinary stencil, loop letters such as O, D, Q, etc., cannot be perfectly formed, for, if completely cut out, the center is lost. The invention is especially valuable because it is adapted for use with a typewriting machine, and enabled for the first time a commercially useful, type-impressible stencil to be made, and thereby the duplication of a greater number of copies than can be transmitted by carbon sheets. The work done upon it is practically the equivalent of ribbon work, and resembles it so closely that it is difficult to detect whether the prints made from it are not actually typewriter work, and the thousandth copy is as perfect, substantially, as the earlier copies.

In the prior art, stencil sheets for duplicating handwritings were made from waxed or gummed paper cut or perforated through the wax and the fibers of the paper. In some instances these sheets of paper, covered with wax, were placed upon a roughened plate, and when the letters were traced upon it the plate would abrade the

sheet, causing minute perforations through which the ink could be transmitted. In others, ink of a peculiar acid was used to eat through the paper. And in others the writing was done by a notched or roughened wheel, which forced its way through the sheet. The wax coating commonly used was hard, and measurably brittle.

The patentee conceived the idea of employing a porous basic material for the sheet, which would not require to be cut or perforated, and coating it with a gummy or waxy substance, impervious to ink, of such a consistency that it could be displaced at the lines of impression so as to leave the inherent interstices in the paper exposed for the transmission of the ink. In his experiments with different kinds of basic materials he found the Japanese paper known as "yoshino" to be admirably adapted for the purpose in view, having sufficient porosity, thinness, and toughness to meet all the necessary conditions. This kind of paper had never previously been employed for stencil sheets. Among the coating substances which he tried he found that paraffine of about 120° Fahrenheit, fusion point, was suitable. In describing the way of practicing his invention he states that such paper and such a coating material are preferentially to be used in preparing the sheet. The patent, however, is not limited to the use of these constituents in preparing the sheet. The specification points out that any sheet of the requisite porosity, thinness, and toughness may be used, and may be coated with any gummy or waxy substance of a consistency that will yield upon pressure so as to expose the interstices of the basic material at the lines of impression without abrasion. The claims are as follows:

"(1) A transmitting printing sheet consisting of a thin, porous sheet through which ink is readily transmitted, such as Japanese dental paper or yoshino, filled or coated with a substance impervious to ink, as paraffine, substantially as described.

"(2) A transmitting printing sheet consisting of a thin porous sheet through which ink is readily transmitted, such as Japanese dental paper or yoshino, filled or coated with a substance impervious to ink, as paraffine, and having this filling or coating removed at the points or lines of printing, substantially as described, for the purpose specified.

"(3) A prepared sheet for stencils, consisting of a sheet of Japanese dental paper or yoshino, coated with a substance impervious to ink, substantially as described."

We entertain no doubt that, if the patentee was the first to make a transmitting sheet which, by reason of the peculiar characteristics of the basic material, and of the coating, was new and useful, what he did involved invention, and entitled him to a patent. Inventive thought was involved in the conception that materials could be employed that would dispense with cutting or puncturing instrumentalities altogether. Even if what he did was merely to employ a basic material differing in the degree of porosity and toughness, and a coating differing in the degree of softness, from that which had been previously used, he accomplished thereby a new result. Each of these modifications was necessary to successfully introduce the new principle, which differentiated his production from the stencil sheets of the prior art.

The only evidence in the record which tends to negative the novelty of the invention is the testimony relating to the waxed paper made

and sold by the defendant prior to May 20, 1886, the date of Broderick's application for the patent. Since 1871 the defendant had been engaged in the manufacture and sale of waxed paper for use as waterproof wrappers upon candy, meat, and other articles. In that business he used many different kinds of paper, and waxed them with coatings of different consistencies, including paraffine at different degrees of fusion. He testifies that he coated with wax, including paraffine ranging from 110° to 140°, every kind of paper he could find in the market, from the lightest tissue to packing paper; and that in 1878, and subsequently he used considerable Japanese paper, some of which was yoshino. Until after the date of the application for the patent in suit, he had never attempted to make any wax paper for stencil sheets, and the idea of its adaptability for that use had never occurred to him. Early in 1887 the complainant, whose officers were experimenting in the production of sheets for manifolding typewriting, employed him to make stencil sheets. After he had tried crepe lisse, nainsook, mull, and tarletan, and different kinds of paper, with coatings of various consistencies, Mr. Dick instructed him to try a soft wax, and he then made coatings of a greater degree of softness. During these experiments, at his suggestion, a West India tissue paper was tried. No suitable paper was found, however, until some time in the summer of 1887, when, at the suggestion of Mr. Dick, yoshino was tried, and was successfully coated. This evidence indicates quite persuasively that the defendant was not conversant with yoshino paper. Assuming, however, that he had used it, and had coated it with soft paraffine, it is obvious that he had done so in ignorance of the characteristics of the paper and of the necessary consistency of the coating, and that the product, if capable at all of use for a stencil sheet, was an accidental product, which contributed nothing to the prior art of making such sheets.

In disposing of the defense in the court below, Judge Wheeler, speaking of the evidence for the defendant, said:

"It falls short of showing satisfactorily, and beyond fair doubt, that he had actually ever waxed this kind of paper; and far short of so showing that he had ever made such blanks as these for stencils, or had, by waxing and shaping, made this kind of paper in the form suitable for such stencils."

In these observations we entirely agree.

The case is one for the application of the doctrine, well settled in the law of patents, that novelty is not negated by a prior accidental production of the same thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of its employment, is derived from it by any one. *Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.*, 55 Fed. 307; *Chase v. Fillebrown*, 58 Fed. 377; *Topliff v. Topliff*, 145 U. S. 161, 12 Sup. Ct. 825; *Tilghman v. Proctor*, 102 U. S. 707, 711.

"The chance operation of a principle, unrecognized by any one at the time, and from which no information of its existence, and no knowledge of a method of its employment, is derived by any one, if proved to have occurred, will not be sufficient to defeat the claim

of him who first discovers the principle, and, by putting it to practical and intelligent use, first makes it available to man." Andrews v. Carman, 13 Blatchf. 308, Fed. Cas. No. 371.

The assignments of error present no other question than that of the validity of the patent. They are not well founded, and the decree is accordingly affirmed, with costs.

EDISON ELECTRIC LIGHT CO. v. E. G. BERNARD CO. et al.

(Circuit Court, N. D. New York. May 5, 1898.)

1. PATENTS—INTERPRETATION.

The courts are not permitted to construe a patent by reconstructing it to conform to what it may think was in the mind of the patentee at the time.

2. SAME—MECHANICAL EQUIVALENTS.

On the preponderance of the evidence, *held*, that an electroplating bath is a "translating device"; that the articles placed therein to be plated are "connected in multiple-arc"; and that this arrangement is the equivalent of a multiple-arc lamp circuit.

3. SAME—ELECTRIC DYNAMOS.

Translating devices which require constant potential should be harnessed to a dynamo which produces constant potential; but it does not follow, because they are shown to be thus connected in the drawings of a patent, that the dynamo so described will secure constant potential, or tell others how to secure it.

4. SAME.

The character of the translating devices does not change the character of the dynamo, and an electrician does not become an inventor by merely attaching a series of lamps to a dynamo which had previously been used in connection with a series of articles to be plated by an electroplating circuit.

5. SAME.

The Edison patent, No. 264,668, for an improvement in regulating the generative capacity of dynamo-electric machines, is void, because of anticipation by the Brush patent, No. 217,677, for an improvement in dynamo-electric machines.

This was a suit in equity by the Edison Electric Light Company against the E. G. Bernard Company and others for alleged infringement of a patent for improvements in regulating the generative capacity of dynamo-electric machines.

This is an equity action, founded upon letters patent, No. 264,668, granted to Thomas A. Edison, September 19, 1882, for an improvement in regulating the generative capacity of dynamo-electric machines.

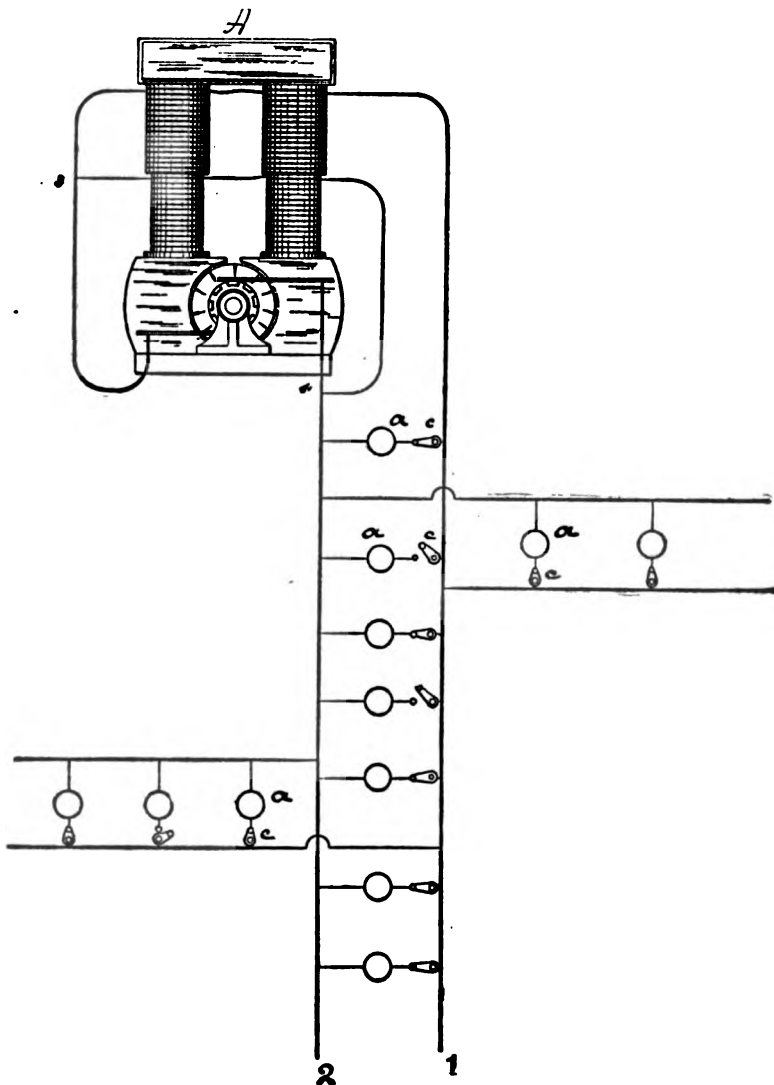
The specification says:

"The object of this invention is to produce means by which the addition or removal of translating devices in the multiple-arc circuits of a system of electrical distribution shall cause immediately a proper regulation of the current energizing the field-magnet of the dynamo-electric machine supplying such system, and this without the use of adjustable resistances, or of any mechanism whatever, except the ordinary circuit controllers of the lamps."

Of the drawing the specification says:

"A is a dynamo-electric machine, from which lead the main conductors 1 2, in multiple-arc circuits from which are placed lamps or other translating devices, a, each provided with a circuit controller, c. The lower portion of the field magnet of the generator A is wound with wire, forming part of a multiple-arc circuit, 3 4, from the main conductors 1 2. This circuit is of high

resistance, so that only a small amount of current sufficient to primarily energize the field-magnet will pass through it. It may, if desired, be a circuit supplied from an external source instead of from the conductors 1 2. The main conductor 1 is brought up on one side and wound around the magnet, afterwards extending out parallel with the conductor 2. When translating devices are first put in circuit the magnet is sufficiently energized by means of the circuit 3 4; but as their number is increased the resistance of the main circuit is lowered, so that more current flows through the conductor 1 and the magnet becomes more and more energized. As devices are thrown out and the resistance of the main circuit increases, the energy of the magnet is lessened by the decrease of current in the conductor 1.



"It will thus be seen that the regulation of the machine is accomplished instantly and automatically by the throwing in and out of circuit of single translating devices, the addition or removal of each device having an immediate effect on the current passing through the field-magnet."

The claims are:

"(1) The combination, with a dynamo-electric machine and translating devices arranged in multiple-arc, of a field-circuit of constant resistance for primarily energizing the field-magnet, and another field-circuit whose resistance is varied by the addition and removal of translating devices, substantially as set forth.

"(2) The combination, with a dynamo-electric machine, of one of its main conductors forming a portion of the coils of its field-magnet, a circuit for primarily energizing such field-magnet, and translating devices arranged in multiple-arc or derived circuits, whereby the addition of each individual translating device causes a corresponding increase in the energy of the field-magnet, substantially as set forth.

"(3) The combination of a multiple-arc circuit containing a portion of the coils of the field-magnet of a dynamo-electric machine, a multiple-arc circuit containing the armature of said machine, and multiple-arc circuits containing lamps or other translating devices, all such multiple-arc circuits being derived from the same main conductors, and another field-circuit whose resistance is varied by the addition and removal of translating devices, whereby the addition or removal of any translating device causes an instant and corresponding regulation of the current energizing the field-magnet of the machine, substantially as set forth."

The earliest date assigned for the conception of the Edison invention is August 19, 1879. The machines made at the time of the patent and prior thereto did not operate in a satisfactory manner. They never were a commercial success. They have disappeared.

On the 22d of July, 1879, letters patent, No. 217,677, were granted to Charles F. Brush for an improvement in dynamo-electric machines. The application for this patent was filed March 11, 1878.

Brush says in the specification:

"My invention relates to dynamo-electric machines, and has for its object the maintenance in such machines of a 'magnetic field' while the machine is running, whether the external circuit is closed or open. In dynamo-electric machines as ordinarily constructed, no magnetic field is maintained when the external circuit is open, except that due to residual magnetism; hence the electro-motive force developed by the machine in this condition is very feeble. It is only when the external circuit is closed through a resistance not too large that powerful currents are developed, owing to the strong magnetic field produced by the circulation of the currents themselves around the field-magnets. Such machines are not well adapted to certain kinds of work, notably that of electroplating. For this purpose a machine arranged to do a large quantity of work at one operation may fall entirely to do a small quantity, because of the comparatively high external resistance involved in the latter case and the low electro-motive force of the machine at the start. Again, it is well known that during the process of electroplating, a very considerable electro-motive force is developed in the plating bath in a direction opposed to the current from the dynamo-electric machine. If, now, the current from the machine is momentarily weakened, by accident or otherwise, its magnetic field, and consequently its electro-motive force, are correspondingly reduced. If the latter falls below the opposing electro-motive force of the bath, it will be overcome by it, and the machine will have the direction of its current reversed. This accident often happens with plating machines, and is a source of much annoyance. It will now be obvious that if even a moderately strong magnetic field be constantly maintained within the machine, both of the above-described difficulties will be eliminated. Other useful applications of a 'permanent-field' machine will readily suggest themselves. I attain my object by diverting from external work a portion of the current of the machine, and using it, either alone or in connection with the rest of the current, for working the field-magnets. I prefer the latter plan of the two just above mentioned, especially for electroplating machines. If, now, the external circuit

be broken entirely, the magnetic field will in the former plan just mentioned remain unimpaired, and in the latter plan will remain sufficiently strong to effect the desired end.

"In applying my invention to dynamo-electric machines, I wind the cores of the field-magnets with a suitable quantity of comparatively fine wire having a high resistance in comparison with that of the external circuit and the rest of the wire on the machine. The ends of this wire are so connected with other parts of the machine that when the latter is running a current of electricity constantly circulates in said wire, whether the external circuit be closed or not. The high resistance of this wire prevents the passage through it of more than a small proportion of the whole current capable of being evolved by the machine; therefore the available external current is not materially lessened. When this device, which I have called a 'teaser,' is used in connection with field-magnets, also wound with coarse wire, as shown in Figure 1 of the drawings, for the purpose of still further increasing the magnetic field by employing the main current for this pur-

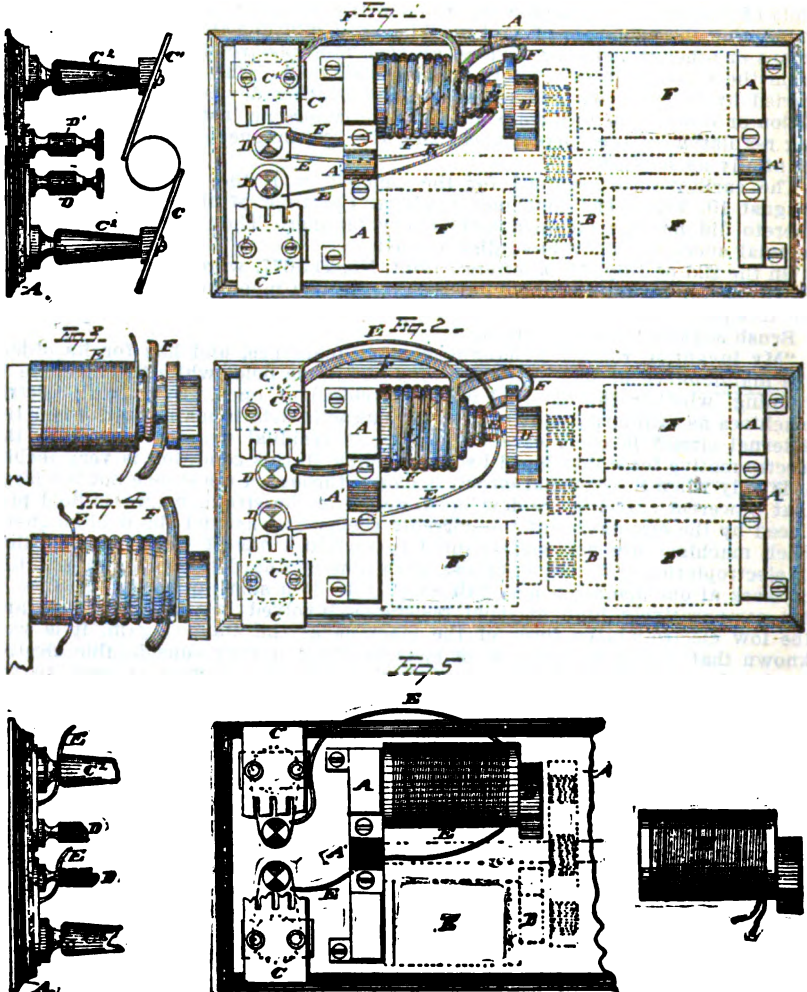
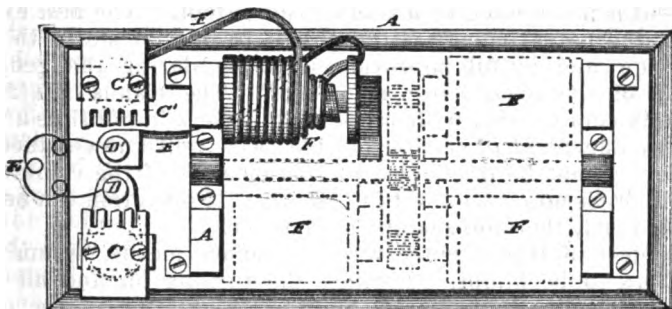


Fig. 5



pose, in the usual manner, then the 'teaser' may be so arranged that the current which passes through it will also circulate in the coarse wire, thus increasing the efficiency of the device. This arrangement, illustrating one of the most common applications of my invention, is shown in Fig. 1 of the drawings. Instead of the teaser and helix F being constructed from wire of different gauges, the size of wire may be alike in both, or the teaser-wire may be coarser than the principal magnet-wire; but in these cases the waste of current through the teaser would be excessive, leaving comparatively little for use in the external circuit. Instead of the magnet being surrounded with both teaser and ordinary helix F, the latter may be omitted, and the teaser increased in gauge and length (thus still maintaining its high resistance) until it will of itself maintain sufficient magnetic field. This modified form of machine is shown in Fig. 5 of the drawings."

After explaining the drawings he says:

"It should be distinctly understood that I do not limit my invention to the form adaptable to any particular dynamo-electric machine, inasmuch as it is susceptible of a variety of modifications, whereby it may be applied to devices of various constructions without any material departure from its spirit and intent, or the essential principles of its construction and operation."

The claims of the Brush patent are as follows:

"(1) In a dynamo-electric machine, the wire or helix E, having a comparatively high resistance and kept constantly in closed circuit while the machine is running, in combination with the magnet-wire or helix F, as commonly employed.

"(2) In a dynamo-electric machine in which the coils around the field-of-force electro-magnets are included in the main or operative circuits, the combination of such main circuit with a constantly closed differential circuit of prescribed resistance, for the purpose of maintaining the flow of the current through the coils surrounding the electro-magnets in the machine when the main or operative (external) circuit is broken, substantially as shown."

The Brush dynamo was intended for use in electroplating devices. A number of machines were built under the Brush patent and were successfully operated long prior to the date of the Edison application. Some of these are operative machines at the present time. Two of them are in evidence.

The defenses are lack of novelty and invention, and noninfringement. The principal defense is lack of novelty, and it is based upon the Brush patent just quoted. The action was commenced December 23, 1893. It was argued February 8, 1898, and was finally submitted March 9, 1898. The record contains 2,453 printed pages, and the briefs 800 printed pages.

Edmund Wetmore and Richard N. Dyer, for complainant.

Henry A. Seymour, Robert S. Taylor, Charles A. Brown, and Seward Davis, for defendants.

COXE, District Judge. Although this record has been expanded beyond reason and precedent, it will be noted that the real issue is one of the simplest that can arise in a patent cause, viz.: whether the patent is invalidated by a single prior patent. The best evidence of what the patent covers is the patent itself. It states that it is for "a new and useful improvement in regulating the generative capacity of dynamo-electric machines." The claims are for the dynamo in combination with translating devices in multiple-arc; but as this arrangement of translators has been well known since 1875, invention cannot be predicated of this element of the combination; indeed, there is no pretense that it can be. If invention can be found at all, it must, therefore, be in the dynamo.

The object of the patentee was to produce means, assuming the translators to be lamps, by which the turning on and off of the lamps shall cause immediately a proper regulation of the current energizing the field-magnet of the dynamo without the help of any other mechanism. In short, the dynamo was expected automatically to adjust its generative capacity. The translating devices shown in the drawings are lamps, but the claims are not limited to lamps, and there is no canon of interpretation familiar to the court which will justify a construction so narrow. The claims do not speak of lamps. The words are "translating devices," and there can be no doubt that any translating devices arranged in multiple-arc are within the claims, which unquestionably cover motors, plating baths, heaters and other similar devices. The drawing shows a rudimentary dynamo of the conventional Edison type. It is the same dynamo which appears, *mutatis mutandis*, in a large number of patents which emanated about the same time from the patent office. The dynamo of the drawing has compound windings, a vertical field-magnet with pole pieces at the bottom and a field wound with two coils—a shunt coil of high resistance and a low resistance coil in series with a lamp circuit. The shunt circuit may, if desired, be supplied from an external source. The main conductor is brought up on one side and wound around the magnet afterwards extending up parallel with the outer conductor of the exterior circuit.

The specification states that when translating devices are first put in circuit the magnet is sufficiently energized by the interior circuit, but as the number of translators is increased the resistance of the exterior circuit is lowered, and as they are thrown out the resistance of the main circuit increases and the energy of the magnet is lessened by the decrease of current in the main conductor. This is practically all there is of the specification. Considering the far-reaching all-absorbing claim which is now asserted for this patent, it must be admitted that the specification is most meager and unsatisfactory. It is almost a skeleton. If it were expressed in the full, clear and concise terms required by law, it is fair to presume that the expert witnesses, at least those on the same side of the controversy, would agree as to its scope and meaning. It will be observed that it says nothing about "constant potential," or, except inferentially, the means of securing constant potential. All details as to the size of the field-magnets, the relative size of the coarse and fine wire and the length and

number of coils of fine wire are omitted, and yet it is maintained that sufficient information is conveyed to enable an electrician to construct the highly organized and efficient machines of the present.

The combination of the first claim contains the following elements: (1) A dynamo. (2) Translating devices arranged in multiple-arc. (3) A field-circuit of constant resistance for primarily energizing the field-magnet. (4) Another field-circuit whose resistance is varied by the addition and removal of translating devices. The elements of the other claims are substantially similar, and in view of the conclusion reached it is unnecessary to consider them in detail. Claim 3 differs from the other two in that the shunt circuit must be supplied from the main conductors. It will be seen that the first claim is not for a dynamo of the Edison type or for the system of electric lighting adopted by him, but, on the contrary, that it is broad enough to cover, and does cover, any dynamo having the described characteristics in combination with any translators in multiple-arc.

The Brush patent relied upon by the defendants was applied for 17 months before, and was granted 1 month before, the earliest date fixed for the alleged Edison invention. The Brush patent is for an improvement in dynamo-electric machines, and has for its object the maintenance in such machines of a magnetic field while the machine is running whether the external circuit is closed or open. Without analyzing the patent in detail, suffice it to say that the description is specific, carefully drawn and clearly illustrated by six diagrams. The dynamo of the patent is a compound wound dynamo having a shunt and series coil, the former of high resistance and the latter of low resistance. In some of the figures the series coil is wound over the shunt coil; in others the shunt is wound over the series, and in another figure the two coils are wound on opposite ends of the same core. The dynamo is designed to generate and maintain a sufficiently constant electro-motive force and produce an amount of current always corresponding to the amount needed by the devices in the working circuit. Mr. Brush shows his machine in combination with electroplating in multiple-arc, and Mr. Edison shows his in combination with electric lighting in multiple-arc. This is the principal distinction between the two. If the one multiple-arc circuit be the equivalent of the other, then it cannot be denied that every element of the patent in suit is found singly and in analogous congenies in the Brush patent, and that they are described there so as to be more readily understood, at least to the uneducated lay mind, than in the Edison patent. Not only is this clear from the Brush patent, but the proof shows that a number of machines were built pursuant to its directions and were commercially used more than two years prior to the date of the application for the Edison patent. These machines exist at the present day, and what is quite remarkable, and almost unique in patent litigation, is the fact that, in an art which has progressed with giant strides, machines made nearly 20 years ago are not only operative, but practically as successful as when first built. Two of these working dynamos have been introduced in evidence, one by the complainant and one by the defendants. Each is capable of doing the same work now as in 1880. All of the Brush

dynamos were originally used in electroplating devices. That a plating bath is a translating device, that the articles placed therein to be plated are connected in multiple-arc, and that such an arrangement is the equivalent of a multiple-arc lamp circuit seems to be established by an overwhelming preponderance of evidence. Not only do the expert witnesses called for defendants testify to this, but so also does the principal expert witness for the complainant whose vast fund of information regarding matters electrical is well known to this court. Not only so, but the proposition has received judicial sanction in the "Feeder Case," where the court of appeals for the Third circuit say:

"In the art of electroplating, as practiced long before 1880, we find an arrangement of circuits substantially the same as that of the patent in suit. Here a large number of articles to be plated simultaneously are suspended in the bath by separate wires attached to a metallic rod placed across the top of the tank; that is to say the articles are arranged in multiple-arc with respect to the electric current." *Westinghouse v. Electric Light Co.*, 11 O. C. A. 342, 63 Fed. 588, 594.

It must be conceded, therefore, that if the claims of the patent in hand are to be construed according to the plain letter of their meaning, without importing therein limitations and refinements not found in the patent, but suggested by subsequent and more accurate knowledge, the patent is invalidated by the Brush patent and the machines made in accordance therewith.

But it is argued that the patent is for a peculiarly regulated compound wound dynamo which secures constant, or nearly constant, potential in combination with incandescent lights arranged in multiple-arc or other analogous devices requiring the same constant potential. In brief, that it is for the Edison dynamo in combination with the Edison system of electric distribution. It is maintained that the Edison patent discloses all this and the Brush patent does not disclose it. Even though this position could be maintained it is still a question whether it involved invention to secure more accurate regulation after the Brush patent had told the electrician how to secure regulation sufficiently perfect to be successful in the electroplating art. It would then seem to be a mere matter of winding within the knowledge of the skilled electrical engineer. But a sufficient answer is that the courts are not permitted to construe a patent by reconstructing it to conform to what the court may think was in the mind of the patentee at the time.

Assuming that the dynamo shown in the Edison patent could be used for electroplating, and was so used in place of the Brush dynamo, it would not have conveyed to the art any information for producing constant potential which was not conveyed by the Brush dynamo. Translating devices which require constant potential should be harnessed to a dynamo which produces constant potential, but it does not follow, because they are shown thus diagrammatically connected, that the dynamo so described will secure constant potential or tell others how to secure it. The Edison patent, as before stated, says nothing regarding constant potential and gives no information as to the means of securing it which is not found equally well stated in

the prior patent. The claims are perfectly clear and intelligible, and there is no precedent for reading into them limitations not found in the patent. *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76; *New Home Sewing-Mach. Co. v. Singer Mfg. Co.*, 68 Fed. 224.

It is doubtful if Mr. Edison had in mind at the time he applied for the patent all of the improvements, perfections and refinements which are now asserted. In 1879 the art of electric lighting was in its infancy. With the modesty which is usually found in men of genius Mr. Edison frankly admits his lack of knowledge upon the subject now under discussion. He says: "As I knew nothing about dynamo machines, I tried to get information from electricians and books." His memory is also vague as to the success of the compound wound dynamos. He recollects that there was a great deal of trouble with the machines, and that none of them worked, but he attributes their failure to variations in the speed of the engine that operated them. Mr. Brush, on the other hand, thoroughly understood compound winding in connection with other devices in the art of electric lighting, and had proceeded far in the successful construction of dynamos. Were it important to inquire which of these two men would be most likely to produce a working machine having the necessary characteristics, there can be little doubt that Mr. Brush would be chosen. But such an inquiry seems irrelevant. The patent law cannot be administered along such lines as these. Patents are formal grants controlled by carefully drawn statutes and strict rules, and must be construed as other similar documents are construed. The court is not permitted to inquire what the patentee might have done or was capable of doing. The question is, what did he do? Conjecture and speculation are out of place in interpreting the claims of a patent. But even if the claims be limited to incandescent lamps in multiple-arc circuit it would seem that they are met by the Brush dynamos. Several tests of these dynamos in connection with lamps were made, one of them being made at the argument. The court makes no pretention to anything but a most superficial knowledge of this complex subject which can hardly be mastered after the engrossing study of years, but it seemed to the court that the test demonstrated what the defendants sought to prove. The machine regulated automatically and maintained a constant electro-motive force within permissible limits of variation. There was no noticeable variation in the lamps from no load to full load. The other experiments described in the record appear to have been similar in character and to have had similar results. The court cannot resist the conclusion that the claims, construed as they must be construed, are invalidated by the Brush patent and the dynamos built thereunder. A Brush plating machine if made now for the first time would infringe these claims; being, in fact, made before, it anticipates them.

But the learned counsel for the complainant insist:

"That even assuming the Brush plating dynamo to be a compound-wound dynamo within the scope of the Edison patent, there was, under all the circumstances shown by the record in this case, invention involved in the employment of such a dynamo in combination with a multiple-arc system of

electrical distribution, on account of the discovery that such a dynamo, when the shunt and series coils were properly proportioned, would secure automatically the peculiar regulation to compensate for variations in the load which is required by such a system."

The doctrine of *Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, is invoked in aid of this contention. As has frequently been pointed out, this case has created no new rule upon the question of double use. The case was peculiar upon the facts, which presented an entirely different condition of affairs from that developed in the case in hand. It has always been the law that invention must be denied to one who merely takes a device which has been used in the same or in an analogous art, and uses it in new environments to accomplish a similar result. *Stearns & Co. v. Russell*, 29 C. C. A. 121, 85 Fed. 218, and cases cited. It requires only the skill of the mechanic in the particular art to make the transfer from one branch thereof to another branch. An engineer who has used his engine to operate a series of looms knows enough to connect his driving wheel with a series of knitting machines, and a competent electrician who has used a dynamo successfully with one series of translating devices should be able to use it in connection with another series of translating devices. In other words, the character of the translating devices does not change the character of the dynamo, and an electrician does not become an inventor because he attaches a series of lamps to a dynamo which had been used in connection with a series of heaters.

The complainant's proposition, if sustained, would lead to the conclusion that Mr. Brush, after having obtained his patent in which the dynamo is described as suitable for an electroplating circuit, could have attached the same dynamo to a well-known lamp circuit and have obtained another patent for that, and so on, as often as he changed the character of the translators. Even though this work required enlargement, adjustment and some change in the winding, it would still be a question of degree within the realm of the skilled mechanic. An electrician would know how to adjust the machine to do the required work and adapt it to the new environment. An illustration is found in the record. Mr. Edison says that the first dynamo made by him did not work because of variation in the speed of the engine occasioned by poor governing "as a compound-wound machine should have a regular speed to utilize the invention; but after a while the demand for close regulation was met, and engine builders were enabled to build engines that were very reliable, and then the conditions for the employment of compound machines were met." It will hardly be pretended that the engine builder who produced better regulation as the demands of the market required it was entitled to a patent. It would seem also that a skilled electrician would know how to adjust the Brush compound wound dynamo to the new conditions of an incandescent lamp circuit the moment the two were brought together. It would be like operating a carriage with a motor which had previously propelled a boat, or using a bullet mold for making pills. To restrict the Brush patent to electro-

plating would be as unfair as to restrict Edison's to electric lighting. The one illustrates his dynamo in connection with the first-named translating devices, and the other with the second-named devices. As before stated the patent cannot be limited to any one multiple-arc system of electrical distribution, but if it could be, invention is not involved in changing one series of translating devices for another. It seems probable that, if this controversy related to any other machine for generating and regulating power, contention would cease the moment a device was discovered in the prior art as near to the patented machine as Brush is to Edison. The mystery and uncertainty which surrounds everything relating to electricity, and the feeling of admiration, almost akin to reverence, for those men who have subdued this unknown and dangerous force and made it do the world's work, make the court diffident about applying those principles which are axiomatic in the patent law. There is always the apprehension that injustice may be done through failure to comprehend the abstruse and difficult problems presented. This fear has been augmented in the present instance, and the difficulties of understanding the problem involved have been vastly increased by a record into which has been dumped haphazard everything which either party believed had a bearing not only upon the point in issue, but upon the general subject of electrical distribution. But even were there more doubt as to the correctness of the conclusion reached, the court should still hesitate to enforce a patent in the sixteenth year of its age, and thus lay the entire art under tribute, when the public has had a right to assume that such a system as the defendants are using would not be molested. The bill is dismissed.

NOTE.

Motions have been made by both parties to strike out testimony. Most of these are based on technical grounds and relate to testimony having little bearing upon the main point in issue. It will not do to strike out the entire testimony covered by these motions, as some of it is relevant and is objected to only on the ground that it was not taken at the proper time. Portions of the testimony criticised contain some pertinent matter and the court does not feel called upon to attempt to separate the wheat from the chaff. As I have frequently had occasion to observe, these motions are inconsequential, they lead to no result and are useful only as they affect the question of costs. Should I enter upon a critical examination of the testimony included in these motions and strike out such portions as are irrelevant, no useful purpose will be subserved. The truth is that both parties are equally at fault for the abnormal size of the record. The difficulty is, of course, largely with the system, but it certainly seems as if counsel could prevent a great part of the tautology, discursiveness, repetition and tedious and aimless dissertations with which these records abound.

This case presents the most flagrant instance of elephantiasis in patent litigation which has come under my observation. To impose such a record upon a court overwhelmed with work is hardly defensible; instead of aiding the cause of truth it obstructs and delays it. Not only is it unnecessary, but, as the counsel who last addressed the court for the defendants expressed it, it is unjustifiable from a "humanitarian" point of view as well. The courts of this circuit have animadverted so frequently and so severely of late upon this practice that it is doubtful if it can be prevented by anything the court can say. The only protection the court has against such records is to deny costs for the irrelevant portions. I have no doubt that at least half

of the defendants' record could have been omitted not only without detriment but with unquestioned benefit to their defense. My impression now is, therefore, that they should recover only half their costs.

THOMAS ROBERTS STEVENSON CO. v. McFASSELL.

(Circuit Court, E. D. Pennsylvania. June 18, 1898.)

No. 47.

1. PATENTS—INVENTION—COOKING RANGES.

There is no invention in changing the location of the circulating boiler of a cooking range so as to place it horizontally upon a supporting frame attached to the top of the range, and in proper connection with the circulating pipes leading to and from the water-back in the fire chamber, thereby dispensing with any brickwork, or in rearranging the warming shelf and other parts, having entirely independent and separate purposes, to conform to this change in structure.

2. SAME.

The Hayes patent, No. 310,276, for an improvement in ranges and stoves, is void for want of invention.

This was a suit in equity by the Thomas Roberts Stevenson Company against Harry W. McFassell, Jr., for alleged infringement of a patent for improvements in ranges and stoves.

Henry E. Everding, for complainant.

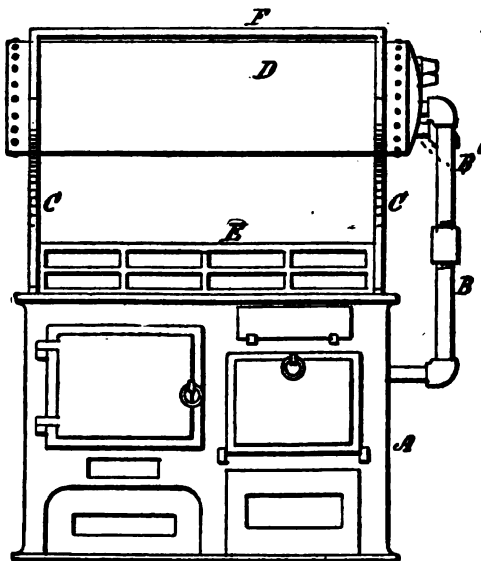
Joshua Pusey, for respondent.

DALLAS, Circuit Judge. This is a suit upon letters patent No. 310,276, dated January 6, 1885, issued to Isaac Hayes, for "a new and useful improvement in ranges and stoves." The specification and claim are as follows:

"My invention consists in constructing a portable cooking range, in which the circulating boiler rests in a horizontal position upon a supporting frame secured to the top of the range, with circulating pipes connected to the boiler and with the water-back in the fire chamber, the object of which is to dispense with brickwork, and thus lessen the cost, and to economize space, and render the parts easy of access in case of repairs or cleaning. My invention is also applicable to ordinary cooking stoves. Reference is had to the accompanying drawings, in which Fig. 1 is a front view of my improvement in portable ranges. Fig. 2 is an end view of the same. Fig. 3 is a perspective view of the supporting frame in which the boiler rests. The portable range, A, Figs. 1 and 2, has inclosed ends and back, and is provided with the ordinary fire chamber, oven, and water-back, with circulating pipes, B, B', leading to the boiler. The supporting frame, Fig. 3, consists of the uprights, C, C', the upper ends of which are made semicircular in form to accommodate the boiler, D. The said uprights, C, C', which may be of any suitable height, are secured at their lower ends, a proper distance apart, to the top of the range, and are also connected to a plate, E, which extends across, and serves as a guard on the back of the range. The boiler, D, which rests in a horizontal position on the uprights, C, C', is connected to the water-back in the fire chamber, as above stated, and has its upper surface covered with a warming shelf, F, the ends of which are made to project downward and fit over the boiler, and are secured to the uprights. What I claim, and desire to secure by letters patent, is the combination of the portable range, A, uprights, C, C', plate, E, warming shelf, F, boiler, D, and pipes, B, B', substantially as shown and described."

Fig. 1 of the drawings, here reproduced, sufficiently exhibits the structure intended to be covered by the patent:

FIG 1



It appears from the specification that the main object of the patentee was to dispense with brickwork, by constructing a cooking range with inclosed ends and back, like an ordinary cooking stove, to which, as he states, his invention is also applicable. In other words, the part of the structure marked "A," whether it be called a stove or a range, is simply a cooking apparatus, "with the ordinary fire chamber, oven, and water-back, with circulating pipes, B, B', leading to the boiler"; and if this and nothing more had been claimed, unquestionably no patent could properly have issued. But it is contended that by associating and connecting with the range, A, in the manner shown and described, the other elements mentioned, Hayes exercised the inventive faculty, and created a patentable combination. I am unable to assent to this. It is quite apparent that the only substantial question to which his attention was directed was that which is suggested at the outset of his specification. In a portable cooking range (that is to say, a range without brickwork), where should the circulating boiler be placed? The ordinary circulating pipes, would, of course, be made to lead to it, wherever it might be; and, no doubt, the place selected for it was a desirable one, and the indicated uprights afforded an appropriate support for it in the horizontal position proposed. This arrangement may be conceded to be a convenient and attractive one, but I am constrained to hold that invention was not involved in making it. The range, the uprights, the boiler, and the circulating pipes were old, and had long been used to effect the several objects which they respectively accomplish when

arranged according to the patent. The patentee but altered the manner of their aggregation. He did not combine them. Furthermore, in view of the state of the art as disclosed by the evidence, and especially by the Whiteley patent, I am persuaded that any skilled mechanic, conversant with that art, who had been told to place the boiler over the range, would have done substantially all that Hayes did. If directed to place it against the wall of the room, he probably would have set it upon suitable brackets, and if required to place it above the floor, and removed from the wall, upon uprights; and, even if the same thing had never been done before, I cannot agree that the creative faculty requisite to invention was exercised when, in order to support the boiler away from the wall, and over the range itself, the necessary uprights were placed upon the latter. The other parts designated as elements of the supposed combination, are the "plate, E," and the "warming shelf, F." But these certainly do not aid the claim. They are quite distinct additions to the structure. They have each an entirely independent and separate purpose, and neither of them is combined with the other portions of the structure so as to contribute to the attainment of any unitary result. Nothing was devised, either as to their construction or mode of attachment, which was not commonplace and obvious. I find it impossible to uphold this patent, and therefore the bill is dismissed, with costs.

EMERSON CO. OF WEST VIRGINIA v. NIMOCKS.

(Circuit Court, E. D. North Carolina. June 25, 1898.)

1. ACTIONS BY CORPORATIONS—PROOF OF CORPORATE EXISTENCE—WAIVER.

Ordinarily, the question as to the corporate existence of plaintiff should be raised by plea in abatement, and, if defendant fully answers, the objection will be deemed waived.

2. SAME—PLEADING.

An answer denying all knowledge of the corporation plaintiff or its creation or corporate existence amounts to a mere general denial, and is insufficient to raise an issue as to plaintiff's corporate existence.

3. EQUITY PROCEDURE—TAKING OF TESTIMONY WITHOUT LEAVE.

Where an application for further extension of time to take testimony is refused, but the party, notwithstanding, gives notice and takes the testimony, the opposite party refusing to attend, the testimony so taken is no part of the record, and must be disregarded.

4. EXPERT EVIDENCE—MODE OF TAKING.

Expert evidence read from typewritten sheets originally prepared by counsel alone, without any notes of the witness, and merely revised by the witness on the morning of testifying, without making material changes, is not entitled to great respect, even if the deposition is not suppressed.

5. PATENTS—VALIDITY—LUMBER DRIER.

The Emerson patent, No. 535,982, for a lumber drier, is void for want of novelty and invention.

This was a suit in equity by the Emerson Company of West Virginia against Robert Mitchell Nimocks for alleged infringement of a patent for a lumber drier.

M. R. Walter, Stewart & Stewart, and Battle & Mordecai, for complainant.

F. N. Busbee, John W. Hinsdale, and Ernest Wilkinson, for defendant.

SIMONTON, Circuit Judge. Before entering upon the discussion of the merits of this case, two preliminary questions must be met and decided.

1. The complainant sues as a corporation, and in its complaint sets out the fact of its corporate existence. The defendant, in his amended answer, denies all knowledge, by information or otherwise, of the corporation, of its creation or present corporate existence of complainant. In taking the testimony in chief, no evidence was offered on this point by complainant's counsel, but when taking the testimony in rebuttal, omission having been discovered, the evidence was offered, and is in the record. Ordinarily, this objection, which goes to the person of the complainant, should have been taken by plea in abatement. 1 Daniell, Ch. Prac. (Perk. Ed.) 654. The defendant, having fully answered, may well be deemed to have waived this objection. *Society for the Propagation of the Gospel v. Town of Paulet*, 4 Pet. 480; *Pullman v. Upton*, 96 U. S. 329. If, however, it be concluded that the answer seeks to avail itself of a defense which could have been taken by plea, it does not accomplish this result. At the most, the answer amounts to a general denial. That will not raise this issue. *U. S. v. Insurance Companies*, 22 Wall. 100; *Steamship Co. v. Rodgers*, 21 S. C. 27; *Association v. Read*, 93 N. Y. 477. And above all, inasmuch as the omission to introduce the evidence in chief was an inadvertence of counsel, this will be excused, especially as the formal testimony is introduced before the taking of evidence has closed, and no possible harm could have come to defendant. *Hood v. Pimm*, 4 Sim. 101; *Beach*, Eq. Prac. § 549. See, also, *Ryan v. Martin*, 91 N. C. 464; *Johnson v. Smith*, 86 N. C. 498.

Another point must be noticed. The time for taking rebuttal testimony in this case on the part of complainant had been extended to July 21, 1897. On 6th September, 1897, application was made by complainant to the circuit court (Judge Purnell presiding), for further extension. This was refused. The application was renewed on 18th September following, and was again refused by Judge Purnell. Notwithstanding this refusal, the complainant went on and took the testimony of Jacob Ulman, which appears at large on the record. The counsel of defendant were notified of the intention to take this testimony, and of the time and place. They did not attend. It is no part of the record, and will be disregarded. It does not stand on the same footing as testimony taken without previous leave of the court, as in *Coon v. Abbott*, 37 Fed. 98, and *Wenham v. Switzer*, 48 Fed. 612. This testimony was taken despite the refusal of the court to allow it to be done.

One other question has been made in this case, important as one of practice. Just before closing the examination in chief of complainant's expert, Prof. Harry Fielding Reid, he was asked the question: "Just state in conclusion what you understand to be the invention of Emerson, as expressed in patent in suit No. 535,982." Replying to this question, he read his answer from typewritten sheets.

To this defendant objected. Upon cross-examination it appeared that these typewritten sheets were prepared by counsel for complainant in his office, not from any notes of the witness, and afterwards submitted to the witness on the morning of the examination. He revised them until they exactly represented his opinion on the subject. The original memorandum was produced, and the changes made by witness were shown. These did not change the memorandum in any material respect. Can this testimony be admitted? If an expert in a patent case had himself reduced to writing the result of his examination of a patent, and had then read it, this may not be objectionable. So much depends upon clear exposition of the thought and a careful use of words and sentences that previous consideration and preparation would help the examination. But when the paper is prepared by counsel, who is cognizant of the strength and weakness of his case, and whose dominant idea must be a plausible presentation of its merits and concealment of its demerits, who also prepares the paper without the restraint of his oath, a very different result follows. All men are prone to fall in with the current of thought in a clear and able presentation of a subject, and unconsciously to give their assent to that which is so well expressed. The course adopted here is perilously near a leading question. According to Greenleaf on Evidence (section 438), a lord chancellor indignantly suppressed a deposition made up by counsel from notes of the witness himself. And the weakness of all evidence offered in the shape of affidavit is that the testimony is by one given in the language of another. In the present case the evidence is that of an expert. It is an opinion. Its value is gauged by the weight to be given to the opinion. Delivered in this way, it loses very much of the respect which otherwise would have been given it. For this reason it is not stricken out.

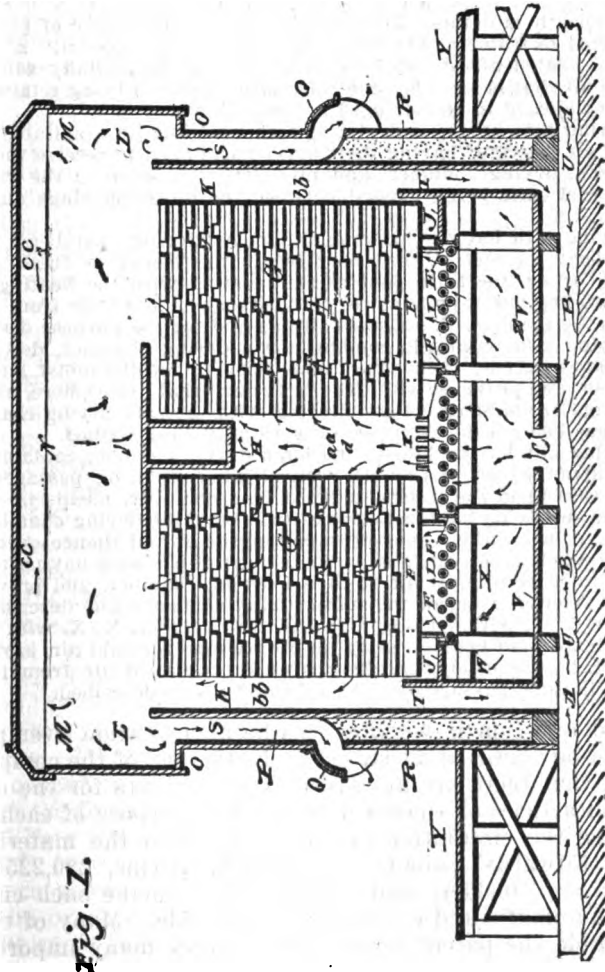
The bill in this case is filed by the Emerson Company of West Virginia, a corporation, against Robert Mitchell Nimocks. It sets up the ownership by the complainant of patents, dated 19th March, 1895, numbered 535,981 and 535,982, tracing its title thereto, and charges that the defendant has infringed the same. In his answer, the defendant denies the originality of the invention claimed by the complainant; averred that it is controverted also by the Standard Dry-Kiln Company, which controversy is in litigation; that the defendant is using a kiln under contract with the Moore-Cain Dry-Kiln Company, and that the patents used by him were originally issued to La Fayette Moore, No. 524,598, 14th August, 1894, and 554,134, February 4, 1896. Subsequently, by leave of court, he filed an amended answer, in which, repeating the defenses in his original answer, he averred that the alleged invention and improvements of the patents claimed by complainant were covered by a number of other patents theretofore issued, setting them out in detail; that the improvements claimed by complainant were really made by La Fayette Moore; that they had been in public use years before; and that there was irregularity, prolixity, redundancy, and concealment in the descriptions and specifications under which the patents of complainant were obtained. The cause being at issue, a mass of testimony was taken, and it comes up for a hearing on the merits. During the taking of the testimony, counsel for complainant gave notice that he would not

rely upon patent No. 535,981 at all, and that he would rely only upon claims 2, 3, 5, 6, and 9 of patent No. 535,982.

The functions and advantages of this Emerson invention are thus described:

"This invention relates to an improved form of drying kiln, designed particularly for drying lumber, but useful in drying any other material by heated air; and the object of the invention is to construct a simple, durable, and inexpensive kiln, which will be effective in operation, economical in heat, and wherein sufficient moisture (derived from the substance of material being dried) will be automatically retained during the initial stages to keep the exposed surfaces of such substance or material from becoming too dry, and to maintain such surfaces in the best condition until the internal moisture therein has been extracted."

The invention is illustrated by a drawing which appears below, and is thus explained:



A represents inlets for cold air; B, B, air passage; C, opening to radiators and drying chamber; D, radiators; E, E, E, E, iron tracks for supporting cars; F, F, trucks for supporting material; G, G, material being dried; H, H, H, parts of the structure acting as deflectors for directing the current of heated air horizontally through the material. I is a perforated floor or walk way. J, J, are covers and walk ways for directing air through radiators. K, K, are spaces between walls of building and the material being dried. L, L, are receivers or separators out of line of upward current, in which the heavier portions of saturated air settle. M, M, is space for the heated portions of air to become separated and draft upward. N is the point where the heated air cushions and forms a return current. O, O, is the heavier portions of saturated air forming into an eddy, and separating. P, P, are ducts or siphons leading downward, carrying the moisture that has been separated by gravitation, and discharging it into the atmosphere. Q, Q, are adjustable covers at outlets of siphons. R, R, are walls of building packed with nonconducting material. S, S, are inner walls of building. T, T, are ducts or siphons leading downward from drying room into cold air chamber at U. V, V, is a floor above air passage. W, W, are walls to ducts or siphons. X, X, is distributing chamber beneath radiators. Y, Y, are landings at each side of kiln building, and connected to frame of kiln structure, and firmly braces it. z, z, is earth. a, a, is dry heated air, denoted by arrows. b, b, is partially saturated air; c, c, heated air that has not become fully saturated, and being retained in kiln.

The claims alleged to be infringed are as follows:

(2) A drying kiln having a drying chamber resting on a suitable base, and descending air passages having their upper parts open to receive the moist air from the said drying chamber, and provided with exits to the external atmosphere, said exits being located between the upper openings and the said base.

(3) A drying kiln having, in combination, a "drying chamber," means for supplying heat thereto, a false floor below the heater, a fresh air supply passage, B, below, the false floor communicating with the heating chamber, and a descending outlet passage for the delivery of moist air from the drying chamber to the passage, B, substantially as and for the purpose described.

(5) A drying kiln having in combination a drying chamber, descending air outlet passages, having their upper ends open to receive moist air from the said chamber, and provided with exits to the external atmosphere, and a lower down passage or chamber communicating with the said drying chamber, and with the base below said chamber, substantially as described.

(6) A drying kiln having in combination a drying chamber containing double tracks, so arranged as to provide vertical air circulating passages between the loaded cars upon the tracks in the drying chamber, means in the drying chamber for supplying heat, communications from the drying chamber extending down and below the means of supplying heat, and thence opening again into the drying chamber, and descending air outlet passages having their upper parts open to receive moist air from the drying chamber, and provided with exits to the external atmosphere, substantially as shown and described.

(9) A floor, V, V, with opening, C, to the air chamber, X, X, with the earth, z, z, beneath the said floor, forming an air passage for cold air, having inlets, A, the duct, T, for conducting the partially saturated air from the drying chamber to the said passage at U, U, substantially as described.

The first question is whether this be an invention over prior art. It seems to be admitted, as stated by Little, one of the complainant's witnesses, that there are upward of 1,300 patents for the drying of lumber and articles of similar nature. The purpose of each of these is to secure the circulation of hot air through the material to be dried (see Edwards' patent, No. 134,529; Ferins, 220,225; Wood, 245,911; Cole, 340,660); and the effort is to make such circulation as nearly automatic and continuous as possible. Many of these patents resemble the patent in question in very many important particulars. Hot air is applied below a chamber in which is placed the

material to be dried. It passes through this material absorbing the moisture in its passage, and ascends to the top of the kiln. Some of the patents provide for the escape of the heated air charged with moisture through a chimney or other opening in the roof. This causes as well a waste of the drying heat as the too rapid drying of the outer part of the material. Others have no aperture at all except the accidental openings or craneries in the structure. In these the heated air is kept within the building, and a circulation of the air is created, and the moisture is absorbed from the material to be dried. This is a slower process, and experience has shown that the result is imperfect. The material is not dried through, or it is dried too suddenly, and cracks. The device of the complainant was intended to remedy the defects in each of these plans. As is expressed in argument, to devise "a structure at once simple and stationary,—that is, having no moving parts,—inexpensive and effective, to dry the lumber by heating it and retaining the evaporated air so as to keep the lumber submerged in a moist atmosphere, and then, at the proper moment, to automatically discharge the moisture, and thoroughly dry the lumber, and to do all this quickly and with an economy of heat." Others had conceived the same idea, and had sought to obtain the same result. Van Osdel, 363,704; Morton & Andrews, 426,463; Moore, 524,598. The patent in question endeavors to accomplish this object by means of deflectors, base floor, tracks, trucks, and cold-air inlets. All these appear and are shown in prior patents in evidence. Leary's, No. 514,832; Rogers, 497,687; Moore, 524,598; Myers, 295,667. The novelty claimed by complainant is in providing overhanging separators or receivers, L, L, and the combination, arrangement, and location of the ducts, P, P, and, T, T. The whole theory of complainant's patent is that the heated air passing through the material to be dried, and absorbing the moisture in its passage, becomes heavier by reason of the moisture, and, as it is driven above the material, it descends by reason of its gravity in the duct, K, down through T, where it meets the outer atmosphere coming in at U, and its moisture is condensed. It then passes up again into the heating apparatus, through the material to be dried, and repeats the same operation. When the moisture has all been taken from the material, and so the air is lighter, the passage down K and T ceases, and the heated air goes out through P, to Q, into the outer air. In this operation, L, L, acts as a receiver or separating chamber. This theory that air, in absorbing moisture, becomes heavier, and, by force of gravity, will descend, is not sustained either in actual observation or in science. Kimbal, Prop. Cas. p. 89. Be this as it may. With regard to L, L, the experts for complainant and defendant concur in the opinion that they are unnecessary, and do not perform the function assigned to them. T, T, shows ducts which appear and have the same uses in Servoss' patent, No. 469,067. We are thus left to the position and arrangement of the ducts, P, P. The evidence shows that these ducts act simply as chimneys discharging the overheated air into the outer atmosphere. They thus perform the same function as the chimney in the roof of the earlier patents. The location at the side of these outlets checks the flow

of heated air and aqueous vapor. But the same result could take place with chimneys in the roof by the use of dampers. From this point of view there is no novelty in this patent. The complainant relies largely upon the function performed by these ducts, P, P, and their outlet, Q, Q; and it charges that the defendant has infringed his patent, because he has, under his patent of 1896, taken out as an improvement of his patent of 1894, No. 554,134, and has made openings in his structure, which it is charged perform the same function as P, P, with the outlets, Q, Q. But the preponderance of the evidence shows that while in the Emerson structure the air passes out of these openings, and none or scarcely any comes in, in the defendant's structure the outer atmosphere continuously comes into the kiln through his opening. Thus, it is demonstrated that P, P, with its outlet, performs the part of chimneys, while the opening of the defendant admit the outer air, instead of discharging air from the kiln. The length of this opinion forbids any further extended discussion of the case. The specifications accompanying the patent are confused, abound in the use of terms and in theories which evidently were not clearly understood by the draftsman. And in this they are calculated to mislead the public, both as to the character and the extent of the claim. *Merrill v. Yeomans*, 94 U. S. 568. There is no evidence of a convincing character of the utility of the invention; and, examining the exhibits in the case offered by complainant, it does not appear that any kilns have been manufactured in accordance with the patent. One exhibit offered by defendant (defendant's Exhibit No. 1), and shown to be an exact representation of the patent of complainant, is dissimilar in important details from the exhibits of complainant itself. The bill is dismissed.

WILSON et al. v. CONSOLIDATED STORE-SERVICE CO.

(Circuit Court of Appeals, First Circuit. June 14, 1898.)

No. 237.

1. PATENTS—PRELIMINARY INJUNCTIONS.

Sometimes a preliminary injunction may issue in a suit on a patent when the validity of the patent is clear, though it has not been sustained by a prior adjudication or public acquiescence.

2. SAME—PRIOR ADJUDICATIONS—INTERFERENCE PROCEEDINGS.

A decision in interference proceedings cannot be invoked, as against strangers to it, as a ground for the issuance of a preliminary injunction.

3. SAME—PRIOR JUDGMENTS AND ACQUIESCENCE.

With reference to a prior judgment or general acquiescence, there must be the same freedom from doubt, in behalf of a party applying for a temporary injunction, as if the question were one of validity alone. And a judgment rendered in a cause which, by reason of an adjustment among the parties, became practically a mere case before it was judicially passed upon, is not sufficient ground for granting such an injunction.

4. SAME—CASH CARRIERS.

An order granting a preliminary injunction against infringement of the Osgood patents, Nos. 357,851 and 293,192, for a cash carrier, or store-service apparatus, reversed on appeal because the validity of the patent is doubtful, and because there was no clear adjudication sustaining the patent after bona fide contest, and no sufficient proof of public acquiescence.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Consolidated Store-Service Company against John W. Wilson and others for alleged infringement of letters patent No. 357,851, issued February 15, 1887, to Edwin P. Osgood, and No. 293,192, issued February 5, 1884, to Byron A. Osgood and Edwin P. Osgood, which patents are for cash carriers, or store-service apparatus. In the circuit court a preliminary injunction was granted (83 Fed. 201), and the defendants have appealed.

Charles E. Mitchell and Elihu G. Loomis, for appellants.

Frederick P. Fish and Guy Cunningham, for appellee.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

PUTNAM, Circuit Judge. This is an appeal from an order granting an ad interim injunction in a patent suit. Apparently, the hearing on the application for the injunction occurred only a short time before the complainant below might have brought the case to an issue on bill, answer, and proofs. Meanwhile a voluminous record was made up on the application, which apparently had in view a determination as on the full merits of the cause. These matters were not brought to the attention of the court below, and we would not be justified in commenting on this particular record in these respects. We refer to them only because we do not wish to leave any presumption that we impliedly approve that parties should proceed with a voluminous hearing on a mere motion for an ad interim injunction at a time when a final hearing may be accomplished almost as speedily. Under the circumstances, there are some grounds for presuming that both parties intended to waive all objections as to the issues to be determined on the motion. At the hearing before us, however, the appellants took the usual special objections against the issue of temporary injunctions. Consequently we are not justified in assuming that the parties intended any waiver.

Coming to the rules applicable under these circumstances, it cannot be denied that a preliminary injunction may properly issue in a patent suit, where the validity of the patent is clear, although it has not been sustained by a prior adjudication or public acquiescence. Of course, there must in every instance be an equitable necessity for relief by injunction; but we are not required to consider this necessity, because the case at bar clearly falls within the rule stated by this court in *Davis Electric Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 621, 60 Fed. 276, 282, that:

"The fundamental basis of jurisdiction in equity in relation to patent rights and trade-marks is the necessity of protecting established enterprises from the great uncertainty caused by infringements, and by the difficulty of measuring the direct and indirect losses if infringements continue."

When the effect of a temporary injunction is merely to maintain matters statu quo until a final hearing, one may well be granted, notwithstanding the rights of the complainant are doubtful, and sometimes even when very doubtful. But in patent suits such an

injunction does not ordinarily have that effect. On the other hand, the respondent, while under the injunction, is ordinarily a constant loser, and never regains his losses unless the complainant has given a bond. Therefore in this class of cases the courts usually hold that unless the patent is supported by public acquiescence or prior adjudication, or some other peculiar condition, the complainant's rights must be free from doubt, to entitle him to a preliminary injunction. It is sufficient for this to refer to Rob. Pat. § 1173 et seq., and *North v. Kershaw* (1857) 4 Blatchf. 70, Fed. Cas. No. 10,311, and to the expressions of the circuit court of appeals for the Seventh circuit, in *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A. 100, 56 Fed. 718, 719, reaffirmed by the same court in *Williams v. Manufacturing Co.*, 23 C. C. A. 171, 77 Fed. 285, 286.

The case at bar is not an exceptional one in other particulars, so that the questions are as follows: Is the validity of the patent clear? or has there been a prior adjudication? or has there been sufficient acquiescence?

The validity of the claim in issue in each of the two patents in suit is far from clear. It is sufficient to say that we are all of the opinion that the validity of each claim is very doubtful, although we do not deem it necessary at this stage of the proceedings to elaborate the matter. Indeed, we regard it prudent not to do so, in view of the fact that the case may again come before us on final hearing.

The complainant below relies on the result of certain interference proceedings in the patent office as constituting a prior adjudication; but the defendants below were not parties to that proceeding, and the authorities cited by the complainant are limited to privies. The issues on an interference proceeding are narrow, when compared with the broad question of the validity of a patent, and the method of procedure in the patent office is so unlike that of judicial tribunals that a use made of the latter furnishes no precedent for a use to be made of the former. Walk. Pat. (3d Ed.) § 674, states that an interference proceeding cannot be invoked against strangers on the question of a preliminary injunction; and Judge Lacombe, who carefully reviewed the decisions in regard to this matter, in *Dickerson v. Machine Co.*, 35 Fed. 143, 147, came to the just conclusion that the only adjudication which can support such an injunction, is a judicial one. This leaves to be considered, on this point, the prior suit of *Store-Service Co. v. Whipple*, 75 Fed. 27, in which an interlocutory decree was rendered sustaining the claims now in suit. The rule as to prior litigation was stated by the circuit court of appeals, in the Seventh circuit, in *Electric Mfg. Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834, 836, and, as there stated, was approved by this court in *Bresnahan v. Leveler Co.*, 19 C. C. A. 237, 72 Fed. 920, 921. It requires "a bona fide and strenuous contest," resulting in favor of the validity of the patent. With reference to a prior judgment or general acquiescence, it is clear, on principle, that there must be the same freedom from doubt, in behalf of a party applying for a temporary injunction, as if the question was one of validity alone. A court would be no more jus-

tified in granting such an injunction on a doubtful case of a prior judgment than it would on a doubtful case of validity. Neither can a doubtful case of a prior judgment be assisted by a doubtful case of acquiescence, and vice versa. It is plain, on principle, that the complainant's right must be clear, either as to the validity of the patent, or on the question of a prior judgment, or on the question of acquiescence, although, of course, judgments rendered by consent may be admissible on the proposition of acquiescence, even when not so on that which we are now considering. The position with reference to the decree against Whipple is as follows: Whipple was the agent of a corporation known as the Fuller Company, and was sued by the complainant below because, as agent of the Fuller Company, he had leased or constructed cash-carrier systems, to or for various users, alleged to infringe the patents in suit. The suit against him was begun on June 20, 1894, and the defense was assumed by the Fuller Company. At that time the complainant below had made an adjustment with a corporation, known as the Lamson Company, of certain controversies in regard to the patents in issue here. This adjustment was of such a character that, although its terms are somewhat confusing, yet its effect gave that corporation all the same practical advantages with reference to all parties with whom it had dealt, or might afterwards deal, as though it had become a co-owner of the patents. Afterwards, on August 15, 1895, the Lamson Company, having then this broad contract with the complainant below, purchased from the Fuller Company its business, and stipulated with it that the Lamson Company would obtain from the complainant below licenses under the patents in suit, and waivers of all claims for damages, covering all the customers of the Fuller Company, not exceeding 2,000 stations, and that, so far as it did not accomplish this, it would assume the defense of the suits of the complainant below against the Fuller Company, its agents and customers. Thereupon the counsel who had been employed by the Fuller Company in the Whipple suit was superseded in that suit by the counsel of the Lamson Company. Whipple was not a customer, but an agent; and it is possible that a full investigation of all the facts, and a careful construction of the two contracts referred to (that is, the contract between the complainant below and the Lamson Company and that between the Lamson Company and the Fuller Company), might leave some remnant for a proceeding against him by the injunction which the interlocutory decree directed to issue against him. But the Lamson Company had no interest in preventing the issue of an injunction against Whipple, as, under its contract with the complainant below, it could at once license Whipple as its own customer, and thus practically annul the injunction. It is true, the interlocutory decree which was entered in the suit against Whipple may be assumed to have provided for an assessment of damages and profits; but there is no evidence that this was ever done, or that, under the contracts between the parties which we have referred to, it could have resulted in anything substantial. On the other hand, as, under its adjustment with the complainant below, the Lamson Company was practically enjoying the advan-

tages of a co-ownership of the patents in suit, it was apparently for its interest to have the patents sustained, even if, as a consequence thereof, it might be compelled to pay some damages pursuant to its contract with the Fuller Company. On the whole, the best conclusion which can be formed, on the record as presented to us, is that the suit against Whipple, before it was finally passed on judicially, became a moot case. Apparently, the question of patentability, which, rather than that of mere anticipation, is the important one, was not presented in that suit; and it is plain that under the rule which we have cited, as to the requisites of a prior adjudication as the basis of a temporary injunction, the decree therein is not sufficient on the questions now on appeal. The complainant maintains that it prosecuted the case against Whipple vigorously, and that it ought not to be made to suffer for any matter which was omitted by the Lamson Company in defending it. This is not at all relevant, because the question is not whether it can be made to suffer in consequence of that suit, but what it shall gain by virtue of it.

General acquiescence in the patents in suit is set up in the bill, but it has not been pressed on us. The law as to this is succinctly stated in *Sargent v. Seagrave*, 2 Curt. 553, 558, Fed. Cas. No. 12,365. While acquiescence, even of a qualified or doubtful nature, may give aid to a patent on a final hearing, yet, as already said, when relied on to support a temporary injunction it must be clear in its character and extent. There is nothing in this record answering this requirement. The bill gives the result of the litigation with the Lamson Company, as shown by the adjustment to which we have already referred; and, if that corporation had been the only infringer, the claim of acquiescence would be established. But the bill states that there were many other infringers, against some of whom suits are still pending. Also, the record leads to the inference that the patents have been in constant litigation, although it is alleged that, so far as the litigation has been determined, it has resulted in favor of the patents. This undoubtedly refers to various adjustments of suits, because no decision of any court is produced, except that in the Whipple Case.

The result is that whether we look at the question of validity, or at that of a prior adjudication, or at that of alleged public acquiescence, the position is too doubtful to justify a temporary injunction in a patent suit. The order appealed from is reversed, and the costs of appeal are awarded to the appellants.

THE L. B. X.

(District Court, W. D. Missouri. March 1, 1898.)

1. FEDERAL COURTS—TERRITORIAL JURISDICTION—ADMIRALTY SUITS.

An admiralty suit in personam is a "suit," in the meaning of the act of February 28, 1887, § 4, providing that "all suits" to be brought in the federal courts in Missouri, not of a local nature, shall be brought in the division having jurisdiction over the county where the defendants reside.

2. ADMIRALTY PROCEEDINGS—SUITS IN PERSONAM AND IN REM.

When the cause as instituted is one in rem, and the process issued directs the seizure of the res only, the fact that the marshal treats the cause as a personal action, and serves the owner with process in the usual form, does not make the suit one in personam.

3. SAME.

The act of February 28, 1887, dividing the Western district of Missouri into four divisions, and establishing district and circuit courts in each division, creates a distinct district, and distinct courts, having all the essential features of a district and a district court as originally created; and such courts are limited in their jurisdiction over proceedings in rem in admiralty to cases in which the res is situated within their territorial limits.

This was a libel in admiralty by the Weber Gas & Gasoline Engine Company against the steamboat L. B. X. The cause was heard on motion by the claimant to dismiss the libel for want of jurisdiction.

Wash. Adams and Chas. B. Adams, for libellant.

S. D. Chamberlin, for claimant.

ADAMS, District Judge. This is a proceeding in admiralty instituted in this court by libellant against the steamboat L. B. X. The prayer of the libel is for the arrest of the vessel, and a monition to any and all persons claiming any interest in her, to the end that libellant may be awarded the amount alleged to be due it for work done and material furnished in her repair. Upon filing of the libel a warrant of arrest was duly issued, commanding the marshal of this district to arrest the vessel, and cause public notice of such arrest to be given by publication in the Kansas City Mail, admonishing and summoning all claimants to the vessel to appear in this court on the 4th Monday (the 25th day) of April, and interpose their claims, if any they had. The marshal, acting under this warrant, made a seizure of the vessel at her home port, at Jefferson City, Mo.; the same being in the Central division of this district. It appears from the return of the marshal that he also delivered a copy of the warrant of arrest and of the libel to Henry Strutman, who is alleged in the libel and in the warrant to be the owner and master of the vessel. Strutman, as such owner, now comes and files a motion in this court to dismiss the libel for the following alleged reasons: (1) Because at the time of its filing and service upon him he resided at Jefferson City, in the county of Cole, in the Central division of this district; and (2) because the vessel at the time of its arrest was at its home port, Jefferson City, and not in any county over which this court, in the Western division of the district, has jurisdiction. Counsel have argued this motion as if the suit were a proceeding in personam. While I do not think they are correct, yet, with a view of answering their argument, and at the same time disclosing historically the legislation which bears on the subject for its appropriate use in disposing of the motion, I have concluded to first treat this suit as a proceeding in personam.

The question raised by the present motion is whether the division of the Western district of Missouri into four subdivisions by the act of congress approved February 28, 1887 (24 Stat. 424), has any effect

on the jurisdiction in admiralty and maritime causes as it existed before such subdivision was made. Section 9 of the judiciary act of September 24, 1789 (1 Stat. 73), provides "that the district courts shall have original cognizance of all civil causes of admiralty and maritime jurisdiction, including seizures," etc., within their respective districts, as well as upon the high seas. By the act of March 16, 1822 (3 Stat. 653), the state of Missouri was made a judicial district, to be known as the "Missouri District," and a district court was established therein. By the act of March 3, 1857 (11 Stat. 197), the Missouri district was divided into two judicial districts, to be known respectively as the "Eastern and Western Districts"; an additional court was created, and the jurisdiction over the state divided between the two courts. By the act of January 21, 1879 (20 Stat. 263), the Western district was divided into two divisions, to be known as the "Eastern and Western Divisions of the Western District of Missouri," and jurisdiction over the former Western district was divided between two courts,—one for each division, as specified by the act. Section 3 of the act provides, in substance, that all civil suits thereafter to be brought in either of said courts shall be brought in the court having jurisdiction over the division in which the defendant resides. By the act of February 28, 1887, *supra*, the Western district of Missouri is divided into four divisions, to be known respectively as the "St. Joseph, the Western, the Central, and the Southern Divisions." Section 2 specifies the different counties which shall constitute these several divisions. Section 3 in direct terms establishes a district and circuit court in each of the several divisions (except the Southern division, in which the district was by that act alone created), and provides for the holding of two separate terms of the district court in each and every year in each of said divisions, and requires the judge of the Western district of Missouri to hold these several courts. Section 4 provides as follows:

"That hereafter all suits to be brought in the courts of the United States in Missouri, not of a local nature, shall be brought in the division having jurisdiction over the county where the defendants, or either of them, reside, but if there be more than one defendant, and a part of them reside in different divisions or districts of said state, the plaintiff may sue in either division, or either district where one of such defendants resides, and send duplicate writs to the other division or district directed to the marshal of said district."

Section 5, among other things, provides:

"That process issuing out of the courts of either division of said district shall be directed to the marshal of the district in which the division is located, and may be executed by him or his deputies upon the party or parties against whom issued wherever found within his district."

Comparing the language of the act of March 16, 1822, *supra*, creating the Missouri district, and the court therefor, with the act of February 28, 1887, *supra*, dividing the Western district into four divisions, and establishing district courts for each division, and defining their respective territorial jurisdictions, it appears that greater particularity is employed in the latter act than in the former. Language is there employed clearly creating separate jurisdictions, and a court for each such jurisdiction, and in terms confining the jurisdiction of each court, so far as personal actions are concerned, to causes

in which the defendant resides within the division where the action is brought. In other words, each of these divisions, and the courts created therein, have all the essential features of a district and a district court as originally created. Taking counsel at their word, and treating this suit as a proceeding in personam against the master or owner of the vessel, as if libelant were proceeding by simple monition, under rule 2 of the admiralty rules, there would, in my opinion, be no jurisdiction over such owner or master. He did not reside within the Western division of the Western district of Missouri, over which this court has jurisdiction. This cause certainly comes within the comprehensive and general term "suit," and according to the requirement of section 4 of the act of February 28, 1887, "all suits" must be brought in the division having jurisdiction over the county where the defendants, or either of them, reside. Different provisions, however, are made in the event the owner may have property or credits within a given district, and resides elsewhere. In such case the libelant, under rule 2 of the admiralty rules, might have secured an order for the attachment of the property, or for the garnishment of debtors to the owner. In *re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587; *Cushing v. Laird*, 107 U. S. 69, 2 Sup. Ct. 196; *Ex parte Devoe Mfg. Co.*, 108 U. S. 401, 2 Sup. Ct. 894. This process for the attachment of property and garnishment of credits seems to be treated by the authorities as in lieu of personal service in cases where the owner or master cannot be served with process, but may have property or credits within the jurisdiction of the court. *Manro v. Almeida*, 10 Wheat. 474. The remedies above referred to are applicable to cases in personam only. Whatever may have been the distinction drawn in some of the cases referred to by proctors of libelant, founded upon the rule that a proceeding in admiralty is not a "civil cause," within the meaning of section 9 of the judiciary act of 1789, it is believed that such distinction cannot now be made in a proceeding brought since the passage of the act of February 28, 1887, supra, which provides, as already seen, in terms, that "all suits" (not civil causes only, but all causes of action whatsoever) which parties may desire to institute in any of the courts of the United States (including, of course, the district court in any branches of its jurisdiction) shall be brought in the division having jurisdiction over the county where the defendants, or one of them, reside. If, therefore, this were a proceeding in personam, as argued by counsel, against the owner or master of the vessel, it could not have properly been instituted in this court, but should have been instituted in the district court for the Central division of this district, which has sole jurisdiction over Cole county, in which the owner and master resides.

I do not understand that the foregoing conclusion is at variance with the doctrine of the case *In re Louisville Underwriters*, supra, relied upon by proctors of libelant. That case simply decides that when a foreign insurance company has, in compliance with the law of Louisiana, appointed an agent at New Orleans, on whom legal process might be served, and when a monition issuing out of the district court for the Eastern district of Louisiana in a suit in personam, in admiralty, was there served upon such agent, it was effective to bring

into that jurisdiction, in a personal action, the insurance company, incorporated in Kentucky. It is also authority for the proposition that a suitor in admiralty is not compelled to resort to the home of the defendant when its goods or credits can be attached in other jurisdictions. The case of *The Willamette*, 18 C. C. A. 366, 70 Fed. 874, is authority only for the proposition that when a suit in admiralty was commenced in the Western division of the state of Washington, and the owner of the ship lived in the Northern division, and the ship was seized in the Northern division, the owner, as claimant, may waive the objection to the jurisdiction, if any there was. In considering the applicability of that case, it should be observed that the act of congress creating the judicial district of Washington divides it into four divisions, "for the purpose of holding terms of the district court." 26 Stat. 45. If, therefore, the case was otherwise applicable to the question now under consideration its facts might distinguish it from this case.

So it appears that the cases relied upon by the proctors for libelant do not affect the conclusion already reached in this case. If, therefore, this suit could be construed as a suit in personam, inasmuch as the jurisdiction of this court is assailed at the outset, and no waiver thereof made, the motion to dismiss for want of jurisdiction would necessarily be sustained. But in my opinion this is not a suit in personam. It is true, the marshal makes return on the warrant of arrest that he executed it by delivering a copy of the writ and the libel to Henry Strutman, the owner and master of the vessel. This action of the marshal in treating Strutman as a defendant personally interested in the case cannot change the character of the suit itself. The duty of the marshal, under rule 2 of the admiralty rules, was to arrest the vessel, her engines, machinery, etc., and take the same into his custody for safe-keeping, and to cause public notice thereof, and of the time assigned for the return of process and the hearing of the suit, to be given by publication in a newspaper as required by the warrant of arrest. The fact, therefore, that the marshal treated this as a personal action, and served the owner with process in the usual form of such actions, is insignificant. The cause, as instituted, was one in rem. The process issued pursuant to the prayer of the libel was to seize the res only. It already appears that the home port of the vessel was at Jefferson City, within the territorial jurisdiction of the district court for the Central division of the Western district, and that the vessel was not at the time of the institution of the suit, or at the time of the issuance of the process, within the territorial jurisdiction of this court. The marshal, it appears, seized the boat at Jefferson City, and now has her in his custody at that place. The question now remaining for solution is whether, under the facts so disclosed, this court has jurisdiction of this cause, as a suit in rem, and may proceed therewith to a final determination. On this question, also, there is no waiver of the jurisdiction by any persons, claimants to the vessel, or otherwise. On the contrary, the owner of the vessel now appears, under this view of the case, as a claimant challenging the jurisdiction of the court over this vessel. The chronological consideration already had of the legislation creating the courts

—First, of the Western district of Missouri; second, of the Eastern and Western divisions of the Western district of Missouri; and, third, of the St. Joseph, Western, Central, and Southern divisions of the Western district of Missouri, and defining their territorial jurisdictions—is convincing to my mind that the several divisions, and certainly those created by the act of February 28, 1887, *supra*, were intended by congress to be jurisdictional subdivisions, and that the courts established in them are limited in their jurisdiction over real actions and proceedings in rem to cases where the real estate or the res proceeded against is situated within its territorial limits. As already seen, the act of February 28, 1887, not only divides the Western district into four divisions, but establishes a district and circuit court in each of the several divisions, and particularly confers jurisdiction upon such courts, and limits the same to the counties composing the division. The language of the act of March 16, 1822, *supra*, creating a judicial district out of the state of Missouri, and establishing a district court therein, is not so clearly expressive of the legislative intent to confine its jurisdiction to the limits of the state as is the more specific language of the act of February 28, 1887, to confine the jurisdiction of the district court for the Western division of the Western district of Missouri to the confines of the several counties composing that division. It is manifest that congress never intended these subdivisions of a district as mere convenient arrangements for holding the courts of the district. This appears from the specific and accurate language employed, which is entirely inconsistent with such intent, and also from the language employed in other acts creating courts for mere convenience. See specially the act of February 24, 1879 (20 Stat. 418), as construed in *Logan v. U. S.*, 144 U. S. 263–297, 12 Sup. Ct. 617. It is true, the act of February 28, 1887, *supra*, makes no specific provision for jurisdiction over real actions, or proceedings strictly in rem; but considering the familiar satutory rule respecting real actions in state courts, requiring them to be brought in the court of the county where the land is situated; considering also the strict limitations imposed by the act in question, as already observed, with respect to personal actions, and considering especially the manifest purpose of congress to create separate territorial jurisdictions for each court in the several divisions of this district,—I cannot doubt that congress intended that all proceedings in rem, involving a seizure of the res, as well as all real actions of every kind, should be brought in the court of that division having jurisdiction over the territory where the real estate or res might be. Rule 23 of the admiralty rules requires that, if the libel be in rem, the libel shall state that the property or res is within the district. These rules were revised and corrected by the supreme court of the United States, under an act of congress conferring the power, at its December term, 1870. At that time divisions of districts, as they now exist in some of our states, were unknown; and in the light of legislation already referred to creating these divisions, with separate courts, and jurisdiction limited to certain prescribed territory, it is my opinion that the divisions thus made constitute districts, within the true meaning of this rule, and require all suits in admiralty,

in rem, to be brought in the division of the district in which the res is located. The procedure in admiralty has been, from very ancient times, determined by considerations of the demands of trade, and the necessities of those interested in promoting it; and courts have been vested with jurisdiction so as to promote safety and convenience of commerce, and a speedy decision of controversies when delay might often be ruin. Practice and procedure have been adopted in harmony with this general policy, and therefore the supreme court says, in *Re Louisville Underwriters*, supra:

"To compel suitors in admiralty, when the ship is abroad, and cannot be reached by a libel in rem, to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons, or his goods or credits attached, would not only often put them to great delay, inconvenience, and expense, but would in many cases amount to a denial of justice."

This general policy is not violated by the conclusion reached in this case. No practical difficulty can be experienced in cases like this, arising in a locality where courts are so numerous and accessible, in resorting to the court with jurisdiction over the territory of the home port of the vessel, or where she can be found. I am aware that section 5 of the act of February 28, 1887, supra, provides that process may be executed by the marshal upon the party or parties against whom issued, wherever found within the district itself. This, however, cannot be held to enlarge the jurisdiction of the court as specifically conferred. It means only that process, like writs of execution, contemplated by sections 985, 986, Rev. St., and writs of subpoena, as provided by section 876, which may lawfully reach beyond the territorial jurisdiction of the court issuing it, shall be executed by the marshal. Treating this suit, therefore, as a proceeding in rem, I am constrained to hold that this court has acquired no jurisdiction, and the motion to dismiss must be sustained.

THE HIGHLAND LIGHT.

THE OCCIDENTAL.

TOWNSLEY v. BARNESON et al.

(District Court, D. Washington, N. D. June 25, 1898.)

1. ADMIRALTY PLEADING—CROSS LIBELS.

Admiralty Rule 53 is to be given a construction sufficiently broad to allow all matters in dispute between the parties, which must necessarily be considered in the determination of the original case, to be fully considered for all purposes, so that the rights of both parties may be fully protected and finally adjudicated in one suit.

2. SAME.

To a libel in rem to recover money earned by libelants as stevedores in loading certain vessels, a cross libel may be filed, under Admiralty Rule 53, to recover damages for breach of a promise by plaintiffs to render certain towage services to the vessels in question, where the agreement for loading the vessels and for furnishing the towage were both embodied in the same instrument, and the mutual promises of the parties constituted the consideration of the contract.

This was a libel by John Barneson and Richard Chilcott, co-partners doing business under the firm name and style of Barneson & Chilcott, against the bark Highland Light and the ship Occidental, to recover for services rendered as stevedores in loading these vessels. The claimant, T. F. Townsley, having filed a cross libel against the libelants, claiming damages for breach of an agreement to furnish tug boats for towing the said vessels, has now moved for an order requiring libelants to give security for the payment of any judgment which may be recovered against them on the cross libel.

Harold Preston, for cross libelant.

Wm. H. Gorham, for respondents.

HANFORD, District Judge. This cause has been heard upon an application by the cross libelant for an order requiring the firm of Barneson & Chilcott, who are original libelants in several suits in rem against the bark Highland Light and the ship Occidental, to give security for the payment of any judgment which may be recovered by the cross libelant, as provided by the fifty-third admiralty rule, prescribed by the supreme court, and also upon exceptions to the cross libel. Barneson & Chilcott are suing to collect the amounts which they have earned by their services as stevedores in loading the vessels named, pursuant to a written contract made and entered into by and between said firm and the cross libelant, who is the charterer and manager of said vessels. The cross libelant claims damages for a breach, on the part of the original libelants, of a provision in the same written contract by which the libelants promised and agreed to furnish tug boats for towing the Highland Light and the Occidental into and out of certain ports of Puget Sound, when required, during the time of the life of said contract. The application for security is resisted, and the cross libel is alleged to be defective and insufficient, on the ground that the cross libel is not founded upon any counterclaim arising out of the same cause of action for which the original libels were filed. The libelants insist that, although the written contract provides for services as stevedores in loading the vessels, and also for towage services, it is not a single and entire contract, but that two contracts are contained in one written instrument, and they dispute the right of the cross libelant to file a counterclaim for damages growing out of the transaction under the contract for towage services in a suit to recover compensation for services under the contract for stowing the cargoes.

The fifty-third admiralty rule does not permit new and distinct matters not involved in the issues tendered by an original libel to be the basis of a cross libel, but any cause of action in favor of a party called upon to defend against the original libel founded upon the same contract, or arising out of the same transaction, is a counterclaim which may be set up by a cross libel. A construction must be given to the rule sufficiently broad to allow all matters in dispute between the parties which must necessarily be considered in the determination of the original case, to be fully considered for all purposes, so that the rights of both parties may be protected and finally adjudicated in one suit. *Genthner v. Wiley*, 85 Fed. 797.

The demand pleaded in the cross libel may be properly set up as a defense in the original suits. In so holding, I base my opinion, not alone upon the fact that the agreement for towage service is contained in the same written instrument which contains the agreement under which the libelants worked as stevedores, but also upon the fact that the contract is by its own terms founded upon the mutual promises of the respective parties as its consideration, and there is no other consideration to make the obligations of each party binding, except the sum of one dollar paid by each to the other, which, in effect, leaves the contract to rest entirely, as to consideration, upon the mutual promises of the parties. The agreement, therefore, of the libelants to supply tug boats to perform towage services is the consideration for the agreement of the cross libelant to employ the libelants and pay them for loading the vessels, and a demand for damages resulting from a breach of the contract to perform towage services is clearly a counterclaim arising out of the same cause of action for which the original libels were filed. The exceptions to the cross libel will be overruled, and an order will be entered requiring the libelants to give security in favor of the cross libelant to the amount of \$25,000, and proceedings in the original suits will be stayed until the security is given.

THE CRESCENT.

(District Court, D. New Jersey. June 27, 1898.)

1. **MARITIME LIENS—STATE STATUTES—PRIORITIES.**

A lien under a state statute, for work and materials furnished in the home port, takes precedence of a mortgage executed after the work was completed.

2. **SAME—WAIVER—TAKING NOTE.**

The rule that a note taken for the amount of a maritime lien for repairs is presumptively taken as collateral security, and does not, of itself, defeat the lien, applies to the case of a lien acquired under a state statute.

This was a libel by Henry M. Sciple and others against the proceeds arising from the sale of the steamer Crescent, to enforce a lien for work done and materials furnished.

Harrison H. Voorhees, for petitioners.

Howard Carrow, for intervening petitioner.

KIRKPATRICK, District Judge. The petitioner, Sciple, claims a lien for work done and materials furnished the steamer Crescent in April, May, June, July, and September, 1896, which became a part of the vessel, and were furnished on the credit of the boat and master at her home port in New Jersey. They claim a lien by virtue of the state statute which provides that "for work done or materials or articles furnished in this state for or toward the building, repairing, filling, furnishing or equipping such ship or vessel," the debt incurred therefor "shall be preferred to all other liens thereon, except mariner's wages." 2 Gen. St. p. 1966, § 46. Charles Betchner intervenes for his own interest, as the holder of a mortgage on the steamer;

dated September 28, 1896, by virtue of which he claims to be entitled to a preference in payment over petitioner Sciple. Both claims are liens by virtue of the state law, and their respective priorities must be determined by it. The work was done prior to the date of the mortgage, and the lien attached when the work was completed. Betchner, in his answering petition, contends that the Sciple lien was merged in a mortgage upon the vessel, which was registered subsequent to his own. The proofs fail to substantiate this claim. It appears from the evidence that notes were accepted for the greater part of the debt incurred to Sciple, but they were not paid. "The acceptance of notes by persons entitled to maritime lien for repairs does not defeat the lien. There is a presumption that the note is only taken as collateral security." *The Ella*, 84 Fed. 471. There is no reason why the same principle should not apply where the lien is given by state statute. As between Betchner, the holder of a mortgage given subsequent to the time when the work was done and materials furnished by petitioner Sciple, the latter is entitled to priority of payment.

THE PACTOLAS.

(District Court, S. D. New York. June 21, 1898.)

SEAMEN—SHORT ALLOWANCE—SCURVY—PROOF INSUFFICIENT.

Upon claims for damages for short allowance and alleged consequent scurvy, on a voyage from Shanghai and Manilla to New York, *held* not sufficiently established by the evidence.

George Whitefield Betts, Jr., for libelants.

Wm. M. Ivens, Harrington Putnam, and E. W. Ivens, for respondents.

BROWN, District Judge. Two libels have been filed in this matter by 13 seamen on board the *Pactolas* on a voyage from Shanghai and Manilla to New York, to recover compensation for short allowance of provisions, and damages for alleged scurvy arising from this cause. The first libel was filed by 11 of the seamen against the *Pactolas* in rem, and the other by 2 of the crew against the owners in personam. The answer denies all the charges of the libel.

A very considerable amount of evidence has been taken, including also the testimony of various medical experts as respects the disorder from which several of the seamen were suffering on arrival at New York. The clear preponderance of the medical evidence is that the disorder was beriberi and not scurvy, except possibly in the cases of Olsen and Smith, who showed some symptoms of swelling and bleeding gums and loose teeth, if their testimony is to be believed, which might possibly indicate scurvy; but their recovery in two or three days seems hardly consistent with this theory.

As respects the provisions and any complaints by the seamen, the evidence is very contradictory. The master, first officer and carpenter contradict most explicitly all the charges of the seamen as respects any deficiency of provisions, or any substantial complaints in regard

to the food, its quality or amount. There is so much inconsistency also in the testimony of the seamen on this subject, that I find it impossible to base any decree upon their statements, unless corroborated by other circumstances.

The libelants' counsel claims that their story is confirmed by comparing the number of running days on the voyage with the amount of the beef and pork consumed or supplied. The master testifies that the beef and pork were loaded at New York before departure for Shanghai and that no other was taken on board. He testifies to taking about 21 or 22 tierces of beef; but he refers to the store book kept by him, in which the amount of beef in stock on leaving New York is stated to be 20 tierces, and the amount of pork 14 barrels. The run to Shanghai was made in 177 days. After lying about two months there, the ship went to Manilla upon a run of 19 days, and after a delay of several months at Manilla, sailed for New York, making the trip in 131 days. None of the beef or pork was used during the ship's stay in port, and some fresh provisions were taken on at each place. The master's store book further shows, that on leaving Shanghai he had on board 11 tierces of beef and 8 barrels of pork, not counting opened barrels; and on arrival at New York two of each remained unopened. A tierce contains about 300 pounds of beef; a barrel, about 200 pounds of pork. According to this testimony there was the same amount of beef and pork, viz. 3,900 pounds, used during the trips from Shanghai to Manilla and from Manilla to New York, occupying 150 days, that was used in the trip from New York to Shanghai, occupying 177 days; and yet the testimony of the seamen is explicit that there was sufficient beef and pork on the trip to Shanghai, which was 27 days longer than the trip back to New York. This weakens very much the force of their evidence.

The libelants' proctor submits some arithmetical computations as to the amount that should have been supplied to the men, reckoning $1\frac{1}{2}$ pounds per day of either beef or pork for each of the 22 persons on board the ship. Computed on this basis the ship would not have been sufficiently stocked at the start for 327 days at sea. Several deductions however should be made in this computation. At each port there were fresh provisions supplied, lasting for a certain period. Again, 5 of the 22 persons were in the cabin, for which the testimony shows that there was a very considerable supply of miscellaneous canned meats, which would much diminish the use of salt pork and beef in the cabin, and one of the 5 in the cabin moreover was the captain's wife; so that as respects beef and pork it is doubtful whether the cabin should count for more than 2 persons. The data for any exact arithmetical computation are wanting.

If the 150 days from Shanghai be taken with the stock of beef and pork on hand as given by the captain and confirmed by the entry in the store book, which contains nothing on its face tending to discredit it, and allowing 10 days' fresh provisions taken at the two ports, there would appear to be about 28 pounds of beef or pork consumed per day; and this, making some deductions as respects the cabin consumption, as above stated, would indicate very nearly a full supply to the crew. The officers, moreover, testify explicitly that there was

no restriction ever given as respects the amount of pork or beef to be furnished to the crew; and upon arrival in New York there were 1,000 pounds remaining unopened, besides parts of a tierce and barrel unconsumed, making an abundant supply for more than 30 days. It is hardly probable that the crew would have been kept upon a short allowance with so considerable an amount of surplus beef and pork to remain over at the end of the voyage.

As to the articles of vegetable food and lime juice, the libelants' case is certainly not made out.

The libels are dismissed, but without costs.

HAVERON et al. v. GOELET et al.

(District Court, S. D. New York. June 4, 1898.)

SHIPPING MASTERS—SUPPLYING SEAMEN—SEAMEN'S BOARD.

Where seamen for a yacht are procured by shipping agents at the master's request, sign articles, and at the master's request are supplied with board until the master may call for them, but are afterwards discharged, the shipping agent's services and supplies are maritime, and within the jurisdiction of a court of admiralty.

This was a libel in personam by John Haveron and Michael Brennan against Mary R. Goelet and George G. De Witt, as executors of the last will and testament of Ogden Goelet, deceased, to recover for services in procuring a crew for a yacht, and in boarding them at the master's request. The cause was heard on exceptions for want of jurisdiction.

George W. Dease, for libelants.

Theodore De Witt, for respondents.

BROWN, District Judge. In determining the exceptions to the jurisdiction the averments of the libel are to be taken as true; namely, that the libelants at the request of the master of the respondents' yacht obtained the seamen for the contemplated voyage, procured them to sign an agreement in the nature of shipping articles for employment on the vessel on and after February 21, and that at the master's request, the yacht not being ready to receive the crew, the libelants procured board and lodging for them for 30 days, at which time the voyage was abandoned and the seamen discharged, in consequence of negotiations for the sale of the yacht to the United States; and that the libelants have become liable for the board of the men during this time to the amount of about \$900, and were further entitled to the customary charge of \$3 for each seaman shipped.

I cannot distinguish the present case from that of *The Gustavia*, Blatchf. & H. 189, Fed. Cas. No. 5,876, in which Judge Betts in 1830 upon almost identical facts held that the services of the libelants were not only maritime but constituted a lien upon the vessel, the ship there being foreign though the seamen never went on board. In the present case, as the yacht is a domestic vessel there is no maritime lien; but the libelants' services were maritime within the decision

in that case; and as *The Gustavia* seems never to have been overruled, it is my duty to follow that decision. The distinction between that case and various others in which the services are held to be not maritime is that in that case the procuring of seamen was held to be furnishing necessary supplies to the ship, i. e. the means indispensable for the contemplated voyage, and furnished at the express request of the master. It is the same here. By signing the agreement, which in the case of a yacht stands in the place of shipping articles, the seamen were virtually brought by that contract under the control and disposition of the master; and they were at all times in readiness to obey his orders. Their board while the yacht was not ready to receive them, was also at the master's request and was for the benefit of the yacht, inasmuch as from the time they were engaged to be on board, viz. February 21st, the yacht was bound to support them. The seamen were virtually delivered to the yacht and to the master as in the case of any other necessary supplies or goods, which are held to be delivered to the ship, when placed under the control of the master, whether actually on board or not.

The exceptions are therefore overruled.

On subsequent hearing of the cause the right to commission was established, but the claim for board of the seamen was disallowed, no shipping articles having been signed by the master, and otherwise no authority existing to bind the owners.

THE FLORENCE.

(District Court, N. D. New York. July 6, 1898.)

1. TOWAGE—INJURY TO TOW—LIABILITY OF TUG.

A tug is liable for injuries happening to a boat in its tow through any want of proper knowledge by the master of the difficulty of navigation in the waters which are the theater of the tug's operations, or from so making up the tow that it cannot safely pass between a known obstruction and the shore.

2. SAME—EVIDENCE—UNKNOWN OBSTRUCTIONS.

Positive evidence of persons on different boats in a tug's tow that one of the boats therein struck upon the bottom, and that they heard a grating noise, is not to be overcome, as evidence of negligent towage, by mere negative evidence, such as that other tugs with similar tows passed the same place without striking; and such evidence is not to be accepted as proof that the boat struck an unknown obstruction, so as to relieve the tug from liability.

Libel by Franklin Allen, master of the canal boat *J. W. Whitney*, against the steam tug *Florence*, to recover damages for negligent towing of the canal boat on the 31st day of August, 1897, at a point on the Hudson river about opposite the arsenal wharf at Watervliet, N. Y.

The libel alleges that the *Florence* agreed to tow the *Whitney*, having a cargo of corn, from Troy to Albany for an agreed price. The *Whitney* was placed by the tug in the forward tier of the tow, there being two tiers and three canal boats abreast in each tier, the *Whitney* occupying the port side. The *Florence* had entire charge of the fleet and did the steering. This was

customary and proper. After proceeding about a mile and a half down the middle of the river the tug passed over to the easterly side, and attempted to tow the fleet between a dredge anchored in the river and the easterly shore and negligently ran the Whitney aground, causing the injuries complained of. The faults imputed to the tug are that she was negligent in arranging the boats three abreast in view of the position of the dredge, in attempting to pass the dredge with the boats so arranged and in towing the Whitney into the shallow water on the east side of the river. The answer denies all negligence on the part of the tug, and alleges that when the Whitney reached West Troy on the previous day she was in a damaged and leaky condition and that whatever damages were suffered by her were occasioned by reason of her own negligence in not being in a seaworthy condition.

Ingram & Mitchell and John W. Ingram, for libellant.

Harris & Rudd and Worthington Frothingham, for respondents.

COXE, District Judge (after stating the facts). On the 31st day of August, 1897, the libellant's canal boat Whitney, while being towed by the respondents' tug Florence down the Hudson river from Troy to Albany, sprung a leak of so serious a nature that it became necessary to beach her on Beverwyck island, at the northerly limits of the city of Albany. The theory of the libellant is that the damage thus produced was due to the negligence of the tug in not properly making up the tow and in going too near the shoals on the easterly side of the river. The theory of the defense is that if a collision occurred at all it was with a hidden obstruction unknown to experienced rivermen. No negligence is imputed to the canal boat. The duty imposed upon the master of a tug in such circumstances is to use the caution and skill which belongs to prudent navigators. He is required to exercise ordinary diligence and see to it that the tow is properly made up and that the lines are strong and securely fastened. He must know the condition of the river, the width of the channel and the tow and the effect of the tide. He must determine whether canal boats when lashed together can pass safely between the edge of the channel and any obstructions which may be in the river. He is the pilot of the voyage and responsible for the navigation of both vessels. If accident results from the want of proper knowledge on his part of the difficulties of navigation in the waters which are the theater of his tug's operations, the owners of the tug are liable. *The Margaret*, 94 U. S. 494; *The Niagara*, 20 Fed. 152; *The M. J. Cummings*, 18 Fed. 178, and cases cited. Although the master of the tug is bound to know of snags, sand bars, sunken barges and other dangers of navigation, he is not responsible for a loss occasioned by striking an unknown rock. *The Angelina Corning*, 1 Ben. 112, Fed. Cas. No. 384; *The Mary N. Hogan*, 30 Fed. 927; *The Robert H. Burnett*, Id. 214; *The Pierrepont*, 42 Fed. 687.

The evidence is overwhelming that the Whitney was in a seaworthy condition at the time she was taken in tow by the Florence. The respondents offered some evidence of admissions by the Whitney's master that, on her journey from Buffalo, she struck upon sharp rocks at a point where blasting was going on and received injuries which caused her to leak. This is denied by the master and every member of the crew testified that nothing of the kind occurred. Admissions

are most unsatisfactory proof of facts and should not be accepted against positive proof to the contrary. Assuming, then, that when taken in tow the Whitney was in the ordinary condition of canal boats of her class, the inference is plain that something must have occurred on the way down the river to cause the sudden and dangerous leaking. She was then wholly in charge of the tug. There is some evidence that there were eight boats in the tow. Assuming, however, that there were but six, three in each tier, the tow was some 54 feet broad by 200 feet long with no propelling force or steering power of its own. The "stone crusher" was anchored about the middle of the channel and the evidence is clear, both from the testimony of witnesses and the chart introduced by the respondents, that the channel was deeper upon the west side than upon the east side of the crusher. There is no dispute that the tow proceeded down the river upon the east side of the crusher, and several witnesses upon the Whitney and upon other boats of the tow testify positively that she struck bottom when about opposite the crusher. Several heard a grating noise and one witness testifies that he saw the bow of the Whitney rise when she came in contact with the bottom. It also appears that after the Whitney was placed on the dry dock a long scar, apparently made by a hard, sharp instrument and extending from the bow backward for 60 feet, was discovered. This might have been made by a rock or by the anchor of the crusher. To meet this testimony the respondents offered a large amount of testimony of a negative character. It is said, that if the tow had come in contact with any obstruction it would immediately have been telegraphed to the engine and would have retarded or stopped the tug. And, again, it is proved by a number of river pilots that they proceeded up and down the river in safety upon the day in question and upon the previous day with tows similarly made up. Of course this latter evidence is of little value, unless the draught of the tows, the condition of the tide and the position of the crusher are shown to be similar to the conditions at the time of the accident. The presumption is that something occurred while the tow was in charge of the Florence to cause the leak. The testimony of the libellant's witnesses is positive and conclusive that this was occasioned by the negligent towing of the Florence. Such testimony cannot be overthrown by mere inference drawn from negative testimony of the character mentioned. Upon the whole case the court is satisfied that the injury in question was occasioned by lack of prudence upon the part of the Florence.

The theory that the Whitney may have struck an unknown rock or other obstruction in the channel cannot be maintained. It is based wholly on conjecture. There is absolutely no proof of such an obstruction. It would require unusually strong evidence to convince the court that such an obstruction could exist in a channel only about 250 feet in width and traversed daily by a multitude of boats. There should be a decree for the libellant with a reference to compute the amount due.

SCOW NO. 15.

(District Court, S. D. New York. April 4, 1898.)

WHARFAGE—STATUTORY RATES—SCOWS.

Under the classification of vessels by the New York statute prescribing different rates for wharfage, *held*, that scows should be classed with "barges," and charged at the same graded rates.

Alexander & Ash, for libellant.

Peter S. Carter, for claimant.

BROWN, District Judge. The libel was filed to recover statutory compensation for wharfage for 26 days in September and October, 1896, under the New York statute of 1882 (Consolidation Act, § 798). The scow was of 302 tons measurement, and was engaged in carrying stone from 134th street, North river, to Glen Cove, Long Island Sound. The libellant claims wharfage at the rate of two cents per ton for the first 200 tons, and half a cent per ton for 102 tons above 200, in accordance with the first clause of section 798. The claimant contends that this clause is not applicable to the scow in question, and also that the libellant as lessee of the wharf covenanted to observe all rules and regulations prescribed by the dock department, as respects rates of wharfage, which it was alleged allowed but 50 cents a day for such boats.

On the trial, though there was evidence of a practice to some extent on the part of the city to charge such boats only 50 cents a day, no evidence could be produced or found of any rule or regulation of that kind. The libellant is, therefore, entitled to charge statutory rates.

Section 798 does not provide any rate to be charged for the wharfage of scows, under that specific name. Section 799 relates only to vessels engaged in the clam or oyster trade; and section 800, to canal boats or vessels engaged in freighting brick on the Hudson river. Neither of the latter sections has any application to this case. Returning, therefore, to section 798, it will be observed that it makes provision for three groups or classes of vessels:

(1) "Every vessel of 200 tons burden and under, two cents per ton; and for every vessel over 200 tons burden, two cents per ton for each of the first 200 tons and one-half of one cent for every additional ton"; except

(2) "Vessels known as North River barges, market boats and barges, sloops employed upon the rivers and waters of this state, and schooners exclusively employed upon the rivers and waters of this state," which are charged a graded rate; the rate for vessels of between 300 and 350 tons is \$1.25 per day.

(3) "Every vessel or floating structure other than those above named or used for transportation of freight or passengers, double the first above rates, except floating grain elevators, which shall pay one-half the first above rate."

Looking at the various provisions of this section, as well as the two following sections, I am of the opinion that the scow in question should be classed with the second group. It does not belong to the third group, for the reason that the scow was used for the transportation of freight; and not to the first group, for the reason that that class seems designed to embrace the ordinary vessels engaged in com-

merce and navigation that are complete in themselves, and not the subsidiary and inferior class of vessels that have no motive power of their own and are dependent upon other vessels for their navigation.

Scow 15 had no masts or motive power of her own. Considering that every other kind of inferior craft has a lower rate expressly prescribed by the statute, there is at least a general presumption that the larger plenary rate was not intended to be imposed upon scows, which belong to the most inferior and helpless class. The libellant contends that the words "every vessel" include scows, because scows are not expressly excepted. But I am not satisfied that the term "barges" in the second group may not properly be held to include "scows." The evidence does not show any such precise signification in the general term "barges" as to exclude scows. The statute uses these two terms "North River barges" and "barges." This shows that the word "barges" has both a narrower and a more general sense. The North River barges are a superior and specific class to which evidently this scow would not belong. But the terms "market boats and barges" seem to be used in a very general sense. The evidence as to the kind of boats which might be included under these terms is not very precise. The libellant's witness, Darrow, though he calls this boat a scow, says a scow is larger than some barges. He says that "they are both built on the same plan, and both take their cargo in the same way." The libellant, on the other hand, says a barge has always an overhanging guard and a small hull, while this (scow) carries all her load on deck with no guard. But the context indicates that he is speaking of a "North River barge," which is a special kind of barge. The claimant says that this scow is known as "a ballast scow or barge"; and that it is of the same build as brick scows, which are chargeable only at the rate of 50 cents per day.

That the words "every vessel" in the first group were not intended to apply universally except to those vessels specifically excepted in group 2, must be inferred from the language of group 3, which provided a still different rate for "every vessel or floating structure other than those above named."

Classing the scow in question under the general term of "barges," the libellant is entitled for 26 days to \$32.50, with interest from March 12, 1897, for which a decree may be entered with costs.

THE NEW HAMPSHIRE.

(District Court, S. D. New York. April 20, 1898.)

SWELLS NEAR PIERS—EXCESSIVE SPEED—NEGLIGENCE IN MOORING.

The steamer Y., moored at pier 1 North river, had her windlass broken by the sudden strain of surging in and out in the swells of the steamer N. H.; *held* that the damage was due to unusual swells made by the N. H., either through her excessive speed or going too near to the piers, and also to the failure of the Y. properly to take in her slack lines as the tide changed; and that the damage should be divided.

This was a libel in rem by Robert Mackill against the steamboat New Hampshire to recover for damages to a steamship from swells while moored in the slip.

Convers & Kirlin, for libellant.

Hoffman Miller, for claimant.

BROWN, District Judge. The above libel was filed to recover for damages to the steamship Yarrowdale, moored on the south side of pier 1, North river, by swells caused by the steamboat New Hampshire in passing near the slip at about 5:15 on the morning of August 3, 1897. The steamship was moored to the wharf with her bow in. She had two lines leading forward, one of them a manilla hawser, which was fastened around the port end of the drum of the windlass, and the other a steel wire rope, which coming from the spile through the steamer's forward starboard chock took one turn around the starboard end of the windlass, and was then carried to the iron bitts about four or five feet aft of the windlass. Her witnesses testify that the New Hampshire passed a few hundred feet from the end of the slip, and that her waves were unusual and caused the Yarrowdale to surge forward on her lines with such force that on the recoil the windlass was broken on the starboard side in taking up the strain from the wire rope.

There is considerable conflict in the testimony about the speed of the New Hampshire and the size of the waves she caused. She is a large Sound steamer, plying regularly between New York and Stonington. There is no evidence that, as ordinarily run, her waves do damage to vessels moored in the slips. On the other hand, it appears that the Yarrowdale had been moored at the same place for two weeks in the same manner that she was moored on the morning of the 3d, and that she had received no injury from any passing vessel. The New Hampshire, making three trips a week, must have passed this slip at least 12 times previously while the Yarrowdale was moored there.

As evidence that the New Hampshire could not have been going at an excessive rate of speed, it is urged that in rounding the Battery she had been obliged to slow, and that she only started up her engines when about opposite pier 1; while the witnesses for the libellant testify that her rapid speed was noticed and commented on just before the damage was done.

The primary question is not the question of the precise speed of the New Hampshire. In passing the slips a steamer is bound to go at such moderate speed and at such a distance away that her waves will not do damage to ships properly moored in the slips that she passes. If a given steamer at a speed of 10 knots within 500 feet of the slips, sends damaging waves into the slips, that speed and proximity are not lawful for her. The size of each steamer's waves when they reach the slips depends upon her model, the speed of her propeller, and her distance from the docks; and every steamer must take the risk of regulating her speed and distance accordingly. I am satisfied from the evidence that the waves of the New Hamp-

shire on the morning in question were much above the usual wave disturbance. This may have arisen partly from being nearer the slip than usual, and partly from putting her propeller at full speed ahead opposite the wharf.

The weight of evidence, I think, establishes the fact that it has long been the customary practise to use wire ropes for mooring and for fastening around the windlass; so that I cannot hold this to have been improper in this case. But from the great rigidity of steel ropes, there is more need of attending to the slack of the fastenings than when manilla ropes alone are used, to prevent injurious surging.

I must sustain the defendant's contention that there was negligence on the part of the Yarrowdale in not taking up the slack of her lines at about the time of this accident. The master's evidence is explicit that such changes in the lines are proper and necessary at different stages of the tide. At the time of the accident, the tide was near low water. If the slack was less, and the need of taking it up was somewhat diminished by the fact that the vessel was low down when her loading was completed, the evidence does not warrant the finding that it could be neglected altogether. The watchman, indeed, testifies that the lines at the time of the accident were right. But the circumstances satisfy me to the contrary. The lines had not been changed during the 12 hours previous. The accident, as I find, arose from the combined effect of unusual waves from the New Hampshire while passing too near the slip or at too great speed, together with too much slack in the lines of the Yarrowdale. The accident would not probably have happened without both causes concurring; and it follows, therefore, that the damages should be divided.

Decree accordingly.

MENANTIC S. S. CO., Limited, v. PEIRCE et al.

(District Court, S. D. New York. July 5, 1898.)

CHARTER PARTY—CONSTRUCTION—"FULL REACH OF WHOLE CARGO CAPACITY"—ACQUIESCENCE IN DISPUTED CLAIM—PROTEST.

A charter of the steamship M. for a fruit cargo and other merchandise from Mediterranean ports at a lump sum, granted the "full reach of the whole of the cargo capacity including half deck." At Palermo the charterer claimed the right to load fruit in the cattle spaces on the spar deck, for which the M. had been fitted; the captain refused to load in those spaces, and the dispute was referred to the owner in London, who telegraphed: "Allow cattle deck, but under protest and shipper's risk": whereupon the fruit was received, but the master lodged a protest claiming extra freight for the fruit so carried, and by this libel sues for this extra freight money. *Held*, that the charter granted all cargo spaces for which the ship was arranged and adapted, and included the "shelter deck" for fruit, which was less burdensome and inconvenient to the ship than cattle in the same spaces; (2) that the receipt of the fruit on the owner's order, was a voluntary acquiescence in the respondent's claim of right, without duress, and allowed no subsequent right of recovery of extra freight, contrary to the intent of the charter; and that the master's claim thereto in the protest was without authority and ineffectual.

This was a libel in rem by the owner of a steamship to recover from her charterers freight collected by them for cargo alleged to have been carried in excess of the charter obligations.

Convers & Kirlin, for libelant.

Wilhelmus Mynderse, for respondents.

BROWN, District Judge. The libel was filed by the owner of the steamship *Massapequa* against the charterers of that ship to recover the freight collected by the charterers on green fruit carried on the upper deck in the cattle spaces of the steamer, on the ground that this carriage was in excess of the charter obligations.

The case turns upon the construction of the language of the charter, and the effect to be given to the dealings of the parties.

The charter was dated April 29, 1896, for the transportation from Mediterranean ports of a cargo of fruit or other lawful merchandise. It gave to the charterers the "full reach of the whole of the cargo capacity including the half deck," and no cargo to be taken in any part of the steamer without consent of the charterers. The ship took on board about 2,000 tons of white stone, and the rest of the cargo was green fruit, mostly from Messina and Palermo, the fruit occupying much the greater space.

On the upper spar deck near the center of the ship, and on each side of the smokestack, there was an inclosed space about 80 feet long. There was a similar inclosed space from 18 to 20 feet long at each end of the ship. The libelant's manager testifies that the inclosed space in the center of the ship forward of the smokestack, was what was understood as the "half deck," the inclosed spaces at the extreme ends being used as quarters for the seamen or officers. Between these inclosed spaces the deck, as the ship was originally built, was wholly open. Afterwards these open spaces, each about 80 feet long, both forward and aft of the central inclosure, were themselves mostly inclosed for the purpose of transporting cattle, and they were fitted up with suitable fixtures for that purpose, the spaces being boarded up firmly with two-inch plank, and a roof built over the inclosures of sufficient strength for use in the discharge of cargo. These spaces were called by the libelant the "shelter deck," presumably as affording shelter for the cattle. In the roof of each of these two cattle inclosures there was a large opening immediately above the hatches of the spar deck, somewhat larger than the hatches themselves, being about 20 feet long by 18 feet wide. These openings had no coamings and no hatch covers and were always open for ventilation. There were other openings in the sides of the inclosures to promote circulation of air.

The respondents, who were engaged in the transportation of fruit, had for several years been accustomed to load two other steamers (not of the libelant's line) that had similar cattle structures on the spar deck; they had been accustomed to use the cattle spaces for the stowage of green fruit along the side of the ship, and these spaces were considered the most desirable for fruit of all the spaces in the ship, owing to the superior ventilation.

In the negotiations preceding the execution of this charter, the *Massepequa* was described as having a permanent wood shade deck for cattle, but a spar deck of iron. Such a spar deck, if not covered or in any way sheltered from the sun, would be deemed objectionable for fruit cargo, owing to its greater transmission of heat.

A portion of the fruit was loaned at Messina, and the balance at Palermo. At Palermo the respondents' agents proposed loading fruit on the shelter deck. The master objected that the charterers were not entitled to the use of this space under the terms of the charter, and that it was not a proper place to carry fruit. The respondents claimed that it was a part of the ship's "cargo capacity" to which they were entitled. The dispute was referred to the owner in England, who telegraphed to the master: "Allow use of shelter deck under protest and at charterers' risk." The cattle spaces were accordingly used for fruit, and the respondents, it is agreed, collected freight amounting to about \$1,300 upon the fruit stowed in those spaces. The libel seeks to recover from the respondents the amount of freight thus collected, as collected for the libellant's use.

In the case of *Neill v. Ridley*, 9 Exch. 677, where a charter had let the "whole reach of the vessel's hold from bulkhead to bulkhead, including half deck," and the charterers had loaded a few cattle in the cattle spaces on deck, after notice that the freight therefor must be paid to the owners, it was held that the owners were entitled to the freight for the cattle, on the ground that the terms of the charter excluded the use of the deck spaces. Here the terms of the charter not only contain no such exclusion but give to the charterers the "whole cargo capacity of the ship, including half deck," and exclude the owner from carrying any cargo at all without charterers' consent. There is no doubt that cattle, when carried, are part of the cargo of the ship. The phrase "cargo of cattle" is not unfamiliar. Cattle are merchandise, and under that term have been held covered by a policy of insurance. Strictly, therefore, it cannot be said that the space designed to be used for the transportation of cattle, is not "cargo capacity of the ship," although from its exposure it may not be suitable for ordinary merchandise. The form of charter used in this case was that of a fruit charter, and so headed at the top. But it was designed, as it states, for the purpose of carrying fruit and other lawful merchandise. About 2,000 tons of white stone were carried in the hold; and had the charterers insisted on carrying some cattle on the shelter deck, making their own provisions for doing so, there is certainly nothing in this charter or in the evidence which would exclude them from this use of the shelter deck, or require them to account to the owner for the freight on cattle so carried. The use of the same spaces for fruit instead of cattle, was less burdensome, and less inconvenient to the ship, than the carriage of cattle would have been; so that I fail to see any equity in the ship's present demand.

The libellant claims that the expression "including the half deck," excludes by implication the use of the shelter deck. The circumstance however that appears in evidence, namely, that the half deck is sometimes used for the ship's coal, as it was in fact used on this

voyage, is a sufficient explanation of this express provision, and imports no limitation, therefore, of the broad grant of "the whole cargo capacity" to the charterers.

In my judgment this broad grant of "the full reach of the whole of the cargo capacity" of the ship, includes all the cargo spaces wherein any lawful merchandise could properly be stowed, except only such spaces as the charter itself reserves, or such as are usually and necessarily reserved for the uses of the ship in the prosecution of the voyage. The expression naturally imports all the cargo spaces for which the ship is adapted and fitted. This is strengthened by the clause excluding the owner from any right to carry cargo without the charterers' consent. The fact that cattle spaces were provided on the upper deck, is sufficient proof that that portion of the ship was not necessary for the use of the ship in navigation; nor is it contended that more of these deck spaces were used for fruit than might have been used for cattle, or more than was reasonably compatible with the ship's own needs. No doubt in loading cargo in an exposed part of the ship the charterers must take the risks belonging to it, as they did in this case, and as the evidence shows they expected to do from the first. Their use of these spaces was beneficial to themselves, but it was also in harmony with the ship's arrangements; and from their prior use of similar spaces in other vessels, and the fact that notice that this ship was provided with these spaces was communicated to them and to their agents at the very outset of the negotiations for this charter, I think they were justified from the first in expecting this use of the ship's cattle spaces for fruit. Had the owner wished to exclude the use of the shelter deck, which by the very plan of the ship as she was then fitted up and represented, contemplated the use of this part of the ship for cargo, he should have excepted this part of the ship, instead of granting the "full reach of the whole cargo capacity," an expression that seems to me the strongest that could be used to grant every part of the ship that was designed or fitted to carry cargo.

The dealings of the parties leading to the carriage of the fruit in the cargo spaces also seem to me to preclude the libellant from recovery in this action. On the 23d of May the fruit was alongside of the vessel at Palermo. The master had persistently refused to receive it. The charterers had insisted on their legal right to the use of the shelter-deck spaces from the first, as a part of the cargo capacity, and on that ground they had prepared a protest against the master's refusal to receive the fruit in these spaces, while allowing the ship to sail, though in violation of their rights as they conceived them. At that moment the master received a telegram from the owner: "Allow cattle deck but under protest and shippers' risk." The fruit was thereupon loaded the same evening. The master testifies that when notice of this telegram was given to the respondents' agent, he also told the agent that he would charge freight for the fruit. The agent contradicts this testimony, and I think this notice was probably not given till the next day, when the ship's protest was prepared and served upon the respondents' agent. This instrument, after reciting that the captain, in consequence of 'he

charterers' and their local agent's insistence and explicit orders to load cargo on the cattle-shelter deck, had allowed the charterers to stow an extra quantity of cargo in the space above mentioned, "protested against the charterers and their agents, holding them responsible for the breach of said charter party in the use of said cattle-shelter deck, and claimed the extra amount of freight due for such space at the rate of 1/6 per box above and beyond the sum due by charterers under the charter party, and reserved the right to proceed against the aforesaid charterers at time and place convenient."

I do not regard it as material whether notice that extra freight would be claimed was given before the cargo was put on board, and before the ship's protest was made or not; first, because such a claim was not within the master's authority, and second, because without effect. The dispute between the charterers' agent and the master as to the right of the former to the use of the shelter-deck spaces had been referred for decision to the owner; and his decision was made and communicated by the telegram above stated. The master had no authority to add to the terms and conditions of this telegram, or to the permission to load which it granted. The master's claim to freight was also without effect, because he could not by any such mere notice create a right to extra freight which would not otherwise exist. The circumstances show plainly that the charterers did not acquiesce in any such claim, and the captain knew it. The charterers claimed the use of the shelter deck as a claim of right. The owner so understood it, and the owner finally assented to the use of this space at the charterers' risk, though under protest. This assent was voluntary on his part. There was no duress or constraint upon the ship, the master or the owners. The direction to take the goods under protest, emphasizes the voluntary character of the assent by asserting that the ship was not bound to take them. The protest had no other effect. It could not create any obligation on the charterers' part to pay freight to which they did not assent, nor weaken their claim of right, nor did it qualify the voluntary acquiescence of the owner in the carriage of the goods, inasmuch as there was no duress or constraint. Such an unconstrained acquiescence in a claim of right, though accompanied by a protest, in my judgment gives no ground for a subsequent recovery, any more than a voluntary payment of money under protest can be recovered back where the payment has been made with full knowledge of the facts. The best authorities are adverse to any such subsequent right of action. *Preston v. City of Boston*, 12 Pick. 713; *Flower v. Lance*, 59 N. Y. 603; *Doyle v. Rector, etc., Trinity Church*, 133 N. Y. 372, 31 N. E. 221; *Silliman v. U. S.*, 101 U. S. 465.

The case would have been quite otherwise had the circumstances indicated anything in the nature of a temporary compromise between the master and the charterers with an express or implicit agreement to submit to future legal determination the question as to which should be held entitled to the freight. To permit the owner to recover in this action would be in effect a violation of the express provision of the charter that the owner should carry no cargo without the consent of the charterers. The intent of this phrase is in ac-

cord with the previous provision that the charterers should have the whole benefit of the ship's cargo capacity, and it was intended to exclude the owner from any benefit from the carriage of cargo except with the charterers' consent. Manifestly the charterers have never consented that the owner should have the benefit of this freight. My conclusion is that upon the terms of this charter the owner has no legal right to the freight in question; first, because the goods were carried within the "full reach of the cargo capacity of the ship"; and second, if this were doubtful, the acquiescence of the owner in the respondents' claim of right, would preclude any subsequent recovery, notwithstanding the protest, in the absence of any agreement, express or implied, to submit the question for future decision.

The libel should be dismissed with costs.

THE WORDSWORTH.

(District Court, S. D. New York. April 6, 1898.)

GENERAL AVERAGE—APPARENT DANGER—OPENING SLUICES—DAMAGE TO CARGO.

Voluntary damage to cargo to avoid an apparent danger menacing both ship and cargo is sufficient to support a general average. At sea the W.'s fore-peak was found suddenly filled with water, believed by the master and officers to come from a hole below the water line, which, if true, would prevent the voyage from being prosecuted, as ship and cargo would be in danger. To make the necessary examination of the fore-peak, the sluices were opened to the next compartment, and the water allowed to run through it, and some flour stowed there was necessarily damaged thereby. The leak was by that means discovered to be in the hawse pipe only. It was repaired, and the voyage proceeded with. *Held*, that the water damage to the flour was a proper general average charge.

Evarts, Choate & Beaman (Harrington Putnam, of counsel), for libellant.

Owen & Sturges, for claimant.

BROWN, District Judge. The above libel was filed to enforce a claim for general average contribution, on account of the alleged sacrifice and damage of the libellant's cargo to the amount of \$3,500, on board the steamship Wordsworth, upon a voyage from New York to Rio de Janeiro in October, 1895. The answer, while admitting the loss and the damage, denies that the loss was incurred for the safety of the ship and cargo, or that it was a proper subject for a general average contribution.

The libellant's cargo consisted of flour, of which 4,000 barrels were stowed in the forward No. 1 hold. The steamer left Sandy Hook about noon on October 12, 1895. She soon met a heavy and confused sea, lasting a day and a half, and shipped much water over her bows. At 5 o'clock in the afternoon of October 13th, the carpenter reported the fore-peak full of water. This compartment held 150 tons. It had filled some time after noon of that day, when it was examined and found dry. On immediate inspection of the ports, none were found broken, and no cause for the heavy leak could be discovered. The

master consequently formed the judgment that a hole had been stove in forward. He testifies that at that time there was a "strong south-east wind, half a gale. We had, he says, a heavy cross sea and I was nearly paralyzed, knowing that my ship was in good condition when we left. I was perfectly satisfied that there was nothing more that mortal man could do to make her more perfect. I said to myself, it must be below the water, the damage. I then said to myself, knowing that the upper part of the vessel was in a good condition, if it is, as I suppose, a hole below, I must open all the sluices and let the water run to the engine room where they have powerful pumps, and put back to New York."

The sluices of the collision bulkhead were accordingly opened, as there was no other possible method of getting the water out of the fore-peak. The consequence of opening these sluices was that, although the pumps in No. 1 compartment were kept working, about a foot of water unavoidably accumulated in that compartment, where the libellant's flour was stowed, and the damage in question was thus incurred. The master knew when he ordered the sluices opened, that some water damage would be thus caused; but believing that there was a hole forward, he considered that the safety of the ship required this to be done as "the only way to save the ship," as he stated on his first examination. He then further stated that with this amount of water in the fore-peak, and the ship plunging in heavy weather, the collision bulkhead, he thinks, would have carried away; and the ship with a hole forward as he then believed, "would have been in great danger." There can be no doubt that he supposed the leak had arisen from a hole forward. It was under such circumstances, and upon that judgment formed at the time, that this damage was voluntarily incurred by opening the sluices.

When the water by this means had been reduced in the fore-peak sufficiently to allow persons to go down and examine in the inside, it was found that the leak arose from a break in the port hawse pipe, and this break was soon repaired. The master in his testimony accordingly adds:

"Then there was no necessity to open the sluices and let the water go into the engine room, and I could have proceeded to Brazil in that condition, provided the bulkhead had held on. It might not in the swash of the sea."

Although the officers, when subsequently testifying in the present case, stated that the safety of the ship was not in fact involved, and that the only result of the breaking down of the collision bulkhead, if the water in the forepeak had not been lowered, would have been merely greater damage to the cargo in No. 1 compartment, yet it is plain that this testimony is all based upon the facts ascertained after the act of sacrifice had been done and the loss incurred; and that the facts could not have been ascertained except by means of that very act of sacrifice, nor could the vessel have been put into such a condition of apparent safety as would permit the prosecution of the voyage. The first officer says that, if master, he "would not have proceeded on the voyage without finding out where the break was"; and that there was no other way of finding out than by opening the

sluices. The opening of the sluices was, therefore, a necessary condition of any further prosecution of the voyage, and the loss attending that act was a sacrifice in the interest of all concerned. The judgment formed at the time when the act was done as respects the danger to all, and the necessity of opening the sluices very clearly appear not merely from the master's first testimony above referred to, but also in the final testimony of the first officer, who states distinctly: "I supposed it would be for the safety of the ship; but not as it proved afterwards."

In other words a situation of imminent danger to the whole enterprise was believed to exist, and did apparently exist, such as apparently required this sacrifice to be incurred; and it was upon that judgment and belief that the sacrifice was made, and made, as supposed and understood at the time, necessarily in the interest and for the safety of all concerned.

This is sufficient to support a general average charge, where the judgment of the master was in good faith, as is here evident, and was formed upon reasonable grounds. In such cases the master, as the authorized agent of all interested in the adventure, acts in behalf of all, and binds all to contribute for the sacrifices made for the common benefit, even though his act may turn out to be a mistake. This principle was unequivocally declared by the supreme court, as respects a jettison, in the case of *Lawrence v. Minturn*, 17 How. 100, 110. In *Hobson v. Lord*, 92 U. S. 397, 403, it is also said that all interests are bound to make contribution "if it appears that the expenses or sacrifices were induced or occasioned by an impending peril apparently imminent."

Other instances of the application of this principle are the allowance of a general average charge for a jettison made through apprehension of an enemy mistakenly supposed to be bearing down upon the vessel; or for a voluntary stranding resorted to in order to avoid an apprehended greater disaster just before a sudden and unexpected cessation of a storm, so that the stranding was in fact unnecessary, though at the time judged by the master to be necessary. The doctrine above set forth is sustained also by the general authorities (*Dix. Ins.* 121-123; *Gourl. Gen. Av.* 11, note), and requires the allowance of a decree for the libellant with costs.

**INDEMNITY MUT. MARINE ASSUR. CO., LIMITED, OF LONDON, v.
UNITED OIL CO.**

(District Court, S. D. New York. July 6, 1898.)

**MARINE INSURANCE — MEMORANDUM CLAUSE — "EXTRAORDINARY LEAKAGE"—
PAROL EVIDENCE.**

A marine policy by a memorandum clause for an extra premium agreed to cover "extraordinary leakage, loss to be paid by the company if amounting to 3 per cent. of the amount insured." The application was through a broker, for a broad policy to cover all risks "without qualification as to how the leak was caused." The insurer knew this and agreed to issue a policy in the form asked for; and subsequently issued the memorandum clause as above stated. *Held*, that the language used nat-

urally imported and was designed to express insurance for all loss by leakage, howsoever caused, and could not be varied by parol evidence of an "understanding" with the broker, not made known to the assured, that "no claim would be made for leakage unless caused by sea perils."

This was a libel by the Indemnity Mutual Marine Assurance Company, Limited, of London, against the United Oil Company.

Cox & Tappan, for libellant.

Conway & Westbrook, for respondent.

BROWN, District Judge. The above libel was filed to recover insurance premiums. The debt was admitted and a tender made of the amount due less an offset of \$101.98, which the answer alleges to be due to the defendants from the libellant for leakage from barrels of oil on the steamers Scindia and Clive within the terms of the libellant's policy. There was no distinct proof that the leakage of the oil arose from sea perils, although the natural inference from the proof that the barrels were delivered in New York in apparently good condition, would be that the loss arose from sea perils, no other cause of loss appearing. The main question litigated, however, is whether the memorandum clause is to be limited to leakage occasioned by sea perils, or whether it extends to leakage generally, without reference to its cause.

The printed form in the body of the policy provides:

"Not liable for leakage from molasses or other liquids, unless occasioned by stranding or collision with another vessel."

The memorandum clause was as follows:

"It is also understood and agreed that for and in consideration of an agreed additional premium this insurance is to cover leakage of the following named oils * * * It being understood and agreed that one-half of one per cent. of the quantity laden shall be first deducted as ordinary leakage, the excess of such one-half of one per cent. to be considered as extraordinary leakage, loss to be paid by this company if amounting to three per cent. on the amount insured."

The leakage of oil on each vessel in this case exceeded 3 per cent. The libellant declined to allow the loss except upon specific proof that it was occasioned through sea perils, and it is contended that this condition is to be read into the memorandum clause by implication.

It is well settled in marine policies that general words such as "all other losses" following the specific enumeration of various sea peril causes, are to be construed ejusdem generis with the particular causes previously specified, as being presumptively the intention of the parties; but it would be a perversion of this rule and wholly outside of the reasons for it, to apply it to a single specific cause of loss, viz. leakage, specially provided for by a memorandum clause and an extra compensation, where the natural import of the language suggests no such limitation to sea perils, but the contrary. The body of the policy includes two of the chief sources of loss by sea perils, namely, collision and stranding. It does not cover leakage caused by rolling and pitching, a sea peril,—nor leakage through insufficiency of packages or through careless handling, which are not sea perils. It is often impossible for the insured to ascertain which is the true

cause of the loss; so that if a policy on leakage is restricted to sea-peril causes, he will often lose all benefit from his policy because the true cause of loss cannot be ascertained. The only satisfactory insurance against leakage, therefore, is a general insurance without reference to its cause. This was what was desired and what the memorandum clause by its very language, as it seems to me, plainly purports to insure. The distinction it draws is between ordinary leakage and extraordinary leakage; not between sea perils and non sea perils. It declares that a loss of one-half of 1 per cent. shall be deemed "ordinary leakage," and a loss in excess of that to be "extraordinary leakage," which is "to be paid by the company if amounting to three per cent. on the amount insured." In my judgment this is a clear and positive engagement to pay any such extraordinary loss above 3 per cent., and cannot be varied by parol evidence of any understanding between the parties to the contrary.

The evidence leaves no doubt that both parties understood this to be the meaning of the language used in the memorandum clause. The policy was negotiated by Mr. Hunter, a broker, who was paid a commission by the insurers, and by Mr. Appleton, the representative of the insurers. Mr. Hunter sought the defendants and induced them to take out this policy. He was told that defendants "wanted absolute insurance * * * to be covered for all risks." From Mr. Appleton's testimony it is plain that this was communicated to the libellant. Mr. Appleton in testifying to his conversation with Mr. Hunter before the policy was issued says:

"My recollection is that it bore upon the question of leakage in connection with the oil to be insured; the purport of it was that they wanted a very broad policy and did not want any particular qualifications to be put in as to how that leakage was to be caused. I told Mr. Hunter the policy would be given in the form he asked."

It is clear, therefore, that Mr. Appleton understood that the language of the memorandum clause meant no qualification as to how leakage was caused. Mr. Appleton adds, however, that this was "with the distinct understanding that no claim would be made for leakage unless caused by sea perils, and he (Hunter) said that would be satisfactory." This "understanding" with Mr. Hunter was a limitation directly contrary to what Mr. Appleton knew the insured wanted and authorized Mr. Hunter to obtain; and contrary also to the language of the policy which he promised to issue and did issue. Mr. Hunter had no authority to assent to any such understanding. No notice of it was given to the defendants. The policy was issued to them, the company took the premium, and Mr. Hunter took his commissions, and when the loss happened within the terms of the policy, the insurers set up an unauthorized and a virtually secret "understanding" with the broker contrary to the language of the memorandum. If it is strange that such a defense should be interposed, it would be stranger still if the law could sustain it.

Decree for the defendant with costs.

THE ALGONQUIN.

(District Court, S. D. New York. February 24, 1898.)

SUPPLIES—EQUITABLE OWNER—HOME PORT—BONA FIDE SALE.

Supplies were furnished to the yacht A. at Boston on the order of the master appointed by the equitable owner, C., who was in possession and who resided in Boston, Mass. The legal title was still held by W. of New York, the vendor, as security for a part of the unpaid purchase money. The material man had no knowledge of W. or his interest in the yacht, and dealt only with C. and his master, and after knowledge of all the facts also, he delayed several months in filing the libel: *Held* (1) that there was no maritime lien; (2) if there was, it was lost by laches as against a bona fide purchaser.

This was a libel in rem by John Morrison against the steam yacht Algonquin to enforce an alleged lien for supplies.

Convers & Kirlin, for libellant.

Cowen, Wing, Putnam & Burlingham, for claimant.

BROWN, District Judge. Under the contract of sale, Carter was equitable owner of the yacht and in possession, running her for his own account, and with no power to bind Watson, the holder of the legal title. Carter was a resident of Boston; the yacht was there, and that was the actual home of the yacht. Watson, a resident of Rochester, N. Y., merely held the legal title as a mortgagee might hold it, as security only for the unpaid portion of the purchase money. The supplies furnished by the libellant were ordered by Carter's master, and not by the master of any foreign owner; and the libellant was referred to Carter for payment, and collected a prior bill from Carter. The libellant had no knowledge of Watson, or of his nominal legal title, and the yacht was not in any way represented to be a foreign vessel. Being, however, foreign built, she was not entitled to registry, enrollment or license; and she had no ship's papers whatever, but the libellant was ignorant of this fact. She bore no foreign name, nor did she fly any foreign flag; and when the libellant supplied the coal he had no reason to suppose that she belonged to any one else than to Carter, to whom he was referred for payment. The libellant made no inquiries, and was in no way misled.

In the case of *Weaver v. The S. G. Owens*, 1 Wall. Jr. 359, 29 Fed. Cas. 489, Mr. Justice Grier says:

"As between the parties and those who dealt with the vessel, and where the national character is not in dispute, a person rightfully in possession, navigating the vessel for his own use and profit by officers and mariners appointed and employed by himself, will be considered the special owner, whether he be lessee, mortgagee, or parol vendee, notwithstanding some other person may be the registered owner and have the so-called legal title and general ownership in himself."

On this ground it was there held that a maritime lien could not be sustained, the home of the special owner being considered as "the home port of the vessel." The same principle was involved in the decision of *The J. L. Pendergast*, on appeal to the circuit court, 32 Fed. 415. See, also, *The Alice Tainter*, 14 Blatchf. 41, Fed. Cas. No. 195;

The Plymouth Rock, 13 Blatchf. 505, Fed. Cas. No. 11,237; The Island City, 1 Low. 375, Fed. Cas. No. 7,109.

The decision in *The Island City* was not overruled by Judge Lowell in the subsequent case of *The George T. Kemp*, 2 Low. 477, Fed. Cas. No. 5,341, but some of its general statements were qualified. In this latter case a decision opposite to the ruling in *The Alice Tainter*, *supra*, seems to have been reached, and a maritime lien upheld; but this was upon the ground that the parties had deliberately put the vessel into a foreign ownership for the purpose of obtaining the benefits of the foreign law and of flying a foreign flag which were held to be representations of her character. In the present case no such elements exist; and in any event, I should follow the adjudications of the circuit court in this circuit.

The case seems to be entirely within the class described by Mr. Justice Grier and the other cases above cited. I must hold this yacht, therefore, to be equitably and for all practical purposes as respects supplies, a Massachusetts vessel. The libelant had at hand all possible means of inquiry to acquaint him with the facts; and several months before the sale of the vessel to Mr. Webb, a bona fide purchaser, the libelant was made acquainted with the substantial facts, and yet took no measures to enforce any supposed lien against the yacht. Had Carter been a charterer of the vessel, instead of a vendee in possession, it would be impossible, I think, under the other circumstances stated, to maintain a maritime lien against the vessel, since the decision of the supreme court in the case of *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323. The same principles would seem to preclude the libelant from treating the vessel as foreign.

2. If it were otherwise, however, and a lien deemed originally acquired, I think the libelant should be held to have lost it by laches as against Webb, a bona fide purchaser from Carter. This sale was not made until seven months after the supplies in question were furnished. During all this time the yacht was mostly in Boston, and the libelant had abundant means of proceeding against her had he desired to do so. Long before the sale to Webb, the libelant had express information that Carter was the equitable owner. When Webb purchased of Carter, he caused all reasonable inquiries to be made for any liens or incumbrances, and was assured there were none. In truth, these facts, and some expressions in the testimony of Anderson, go far to sustain the inference that the supplies were not furnished to the yacht upon the credit of the vessel, notwithstanding the fact that the bill was made out as usual to the ship and owners, but in reliance alone upon the general responsibility of yacht owners.

The libel must be dismissed.

SCOW NO. 190 and FOUR HUNDRED AND FIFTY BALES COTTON.

(District Court, D. Maryland. July 12, 1898.)

CARRIAGE BY SEA—CONNECTING LINES—DAMAGE IN TRANSIT—PRO RATA FREIGHT.

When goods, shipped for long distances under through bills of lading, which recognize several distinct carriers and stages of transportation, are damaged at one of the recognized points of transshipment so that their further transportation becomes impracticable, and an immediate sale is necessary for the interests of all concerned, the carrier which has performed the last stage of the carriage, and advanced the freights of preceding carriers, is entitled to pro rata freight.

J. Southgate Lemmon, for Baltimore Steam-Packet Co., intervening petitioner.

Schumacher & Whitelock, for claimant of cotton.

MORRIS, District Judge. This suit originated in a libel for salvage filed May 18, 1898, by one Schultz, owner of a steam tug, against the Bay Line scow No. 190 and 450 bales of cotton. On May 17, 1898, about noon, a fire broke out on the wharf of the Baltimore Steam-Packet Company, usually called the "Bay Line," in the port of Baltimore, while a scow belonging to said Bay Line was lying at its wharf, having on it 450 bales of cotton, just brought from Norfolk by one of the Bay Line steamers, and which was about to be sent on board an ocean steamer of the Johnston Line, to be carried to Liverpool. The libellant, Schultz, alleged that about 1 o'clock on the day of the fire he discovered the scow adrift in the harbor, with the cotton on fire, and that he had towed the scow to a place of safety, and, by pumping water upon the burning cotton, he had, with some assistance from other steam tugs, finally quenched the fire, and had saved the scow and a great part of the cotton. On the 20th May, Mr. William Cunningham, as agent of the owners of the cotton, filed in the case his claim for the cotton; and the Baltimore Steam-Packet Company, its claim for the scow. By agreement the damaged cotton was delivered to Mr. Cunningham, in order that he might deal with it for the benefit of all concerned. Upon a survey the cotton was found to be much burned and wet, and the bales bursted, and marks not decipherable, so that it was totally unfit for shipment to Liverpool; and the surveyor recommended that it be sold. On the day after the fire the agents of the Johnston Line, learning of the condition of the cotton, notified the steam-packet company that they would not receive it. Mr. Cunningham had the cotton at once put in condition for immediate sale, and on May 26th it was sold at auction as wet and damaged cotton. The sound value of the 450 bales was \$13,685.45. The net proceeds of the sale were \$8,560.03. Out of these proceeds, Mr. Cunningham has, by agreement, settled the claim for salvage, and other expenses, and has in hand the remainder, subject to such decree as may be passed in the matter now before the court. The present controversy arises upon a petition of the Baltimore Steam-Packet Company to be allowed out of the fund a claim for freight pro rata itineris. The cotton had been shipped

from places in Georgia to be carried by railroad to Norfolk, Va., and from there had been brought on a steamer of the Baltimore Steam-Packet Company, called the "Bay Line," to Baltimore, to be delivered by it, upon lighters, to a steamship of the Johnston Line, to be carried to Liverpool. For 200 of the bales there had been issued through export bills of lading, at an agreed through rate of so much per 100 pounds, from Newman, Ga., to Liverpool. These bills of lading called for transportation by the Atlantic & West Point Railroad to Atlanta, by the Southern Air Line to Norfolk, by the Bay Line to Baltimore, and by the Johnston Line to Liverpool, with different stipulations for different parts of the route. The other 250 bales had been brought from Georgia by railroad to Norfolk, and a bill of lading had there been issued by the Bay Line and the Johnston Line at a through rate per 100 pounds from Norfolk, via Baltimore, to Liverpool. There was a memorandum on the bill of lading that \$301.63 back charges had been paid. It was also stipulated that a delivery by the Bay Line (the cotton being lightered at shippers' risk) to the Johnston Line should end the liability of the Bay Line. The through rate was divided among the carriers by agreement, and, according to their understanding, each paid when it received the cotton the accrued freight charges of the preceding carriers. This was, however, an arrangement between the carriers which did not concern the shippers, as they were only to pay the through rate upon landing of the cotton at Liverpool, but it was notice to them that the cotton was to be carried from point to point by successive carriers. With regard to the condition of the cotton after the fire, it was obvious to all concerned that it was, commercially speaking, impossible to send it forward. A considerable quantity had been burned up. All the bales had been burst open, or so defaced that the baling and the marks were gone. The agents of the ocean steamer would not touch it, for fear that fire might break out again in some portion of it. There were no appliances in Baltimore for putting it into merchantable shape, if it were anywhere possible to do so. It was recognized by all that the only sensible course was to accede to Mr. Cunningham's suggestion,—that he, as representing the underwriters and owners, should take the damaged cotton in charge, and dispose of it promptly, before the damage and expenses made the loss greater.

The general rule is that the freight cannot be recovered unless the stipulated voyage has been actually performed, or is prevented or is dispensed with by the shipper; and there is at common law no implied promise to pay pro rata itineris for carrying the goods a part of the voyage unless the owner of the goods voluntarily, and not under compulsion, accepts the goods at an intermediate point in such a way as to raise a fair inference that further carriage of the goods was intentionally dispensed with. *Vlierboom v. Chapman*, 13 Mees. & W. 230; *Osgood v. Groning*, 2 Camp. 466; *Hunter v. Prinsep*, 10 East, 378; *Mitchell v. Darthez*, 2 Bing. N. C. 555; *Caze v. Insurance Co.*, 7 Cranch, 358; *Hurtin v. Insurance Co.*, 1 Wash. C. C. 530, Fed. Cas. No. 6,942; *The Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032; *Hutch. Carr.* § 455 et seq.; 1 Pars. Adm. 239. Under the old rule applicable to continuous voyages, it would seem

that when goods were damaged in the course of the voyage, and from necessity sold at an intermediate port, they were not liable for any freight whatever. *The Nathaniel Hooper*, 3 Sumn. 542-549, Fed. Cas. No. 10,032. But more recently, and with respect to the carriage of goods for long distances under bills of lading which recognize several distinct carriers and stages of transportation, it has been held in the admiralty that when the further transportation of the goods is prevented by some incapacity in the goods themselves, and a condition of things arises which makes a sale, or delivery to those representing the owner of the goods, at one of the recognized points of transshipment, and where there is a market for the goods, the only really practicable course, then a reasonable rule of partial compensation for the service performed may be applied. The case of *British & Foreign Marine Ins. Co. v. Southern Pac. Co.*, heard first in the district court for the Southern district of New York (55 Fed. 82), and then on appeal in the circuit court of appeals for the Second circuit ([1896]; 18 C. C. A. 561, 72 Fed. 285), was in its facts substantially similar to the present case. The finding of facts in that case does not state the difficulties of forwarding the damaged cotton as strongly as the evidence shows them to have been in this case. But the difficulty was in fact the same. No refusal by any ocean steamer was proved, as in that case; but it is obvious that no steamship company would want to take on board for an Atlantic voyage a lot of partially burned cotton, recently in a fire, and no merchant would want to send such merchandise to Liverpool. It seems to me to be making impractical distinctions, likely to confuse and embarrass business transactions, to attempt to distinguish the facts of that case from this. In the case referred to it was held in both the district court and in the circuit court of appeals that the Southern Pacific Company, which had brought the cotton to New York from ports in Texas, and had advanced freights to the preceding carriers, who had brought it from the interior,—it all being billed through for shipment from New York to European ports by steamers from New York,—was entitled to be paid pro rata freight on the cotton damaged by fire while on the pier or in lighters at New York, and which was sold because damaged and not fit to be carried forward. It was held that acceptance or acquiescence by those representing the owners of the cotton under such circumstances raised a fair inference that further carriage of the cotton was dispensed with, and implied an agreement to pay pro rata freight. In these commercial cases the rule should be uniform and certain and easily applied, and it is important that the courts should not lend themselves to confusion by subtle distinctions. The rules of general average, and for settling losses arising from disasters, must be somewhat arbitrary; but it is most important that they should be fixed, in order that merchants, carriers, and insurers may make their contracts understandingly. Accepting, therefore, the decision of the circuit court of appeals of the Second circuit as the rule to govern this case, I hold that the petitioner is entitled to receive the back charges for freight paid by it in respect to the cotton not destroyed, and its freight charges on the cotton not destroyed.

These items of freight and back charges nonallowed the petitioner must contribute its proportionate share of the salvage and attendant expenses. In respect to the cotton destroyed, the petitioner can recover neither the back charges nor its freight.

THE JOHN F. GAYNOR.

(District Court, D. Connecticut. June 27, 1898.)

COLLISION—SCHOONER AND TUG.

A schooner and tug colliding in Long Island Sound at night, *held* both in fault,—the schooner for changing her course, and luffing up into the wind, probably through the inattention of the captain or mate or both, who were the only persons on board, and who had been long on duty without sufficient sleep; and the tug for going for at least half a mile at right angles to the course of the schooner, and then changing course in order to cross her bow, when it was certain the schooner could not avoid the tug's hawser and tow without changing her course.

This was a libel in rem by John B. Eaton and others, owners of the schooner Dreadnaught, against the steam tug John F. Gaynor, to recover damages resulting from a collision.

Alling, Webb & Morehouse and Harrington Putnam, for claimants.
Samuel Park, for libelants.

TOWNSEND, District Judge. At 5 o'clock on the morning of November 22, 1897, the claimant's steam tug Gaynor, 91 feet long, and having a scow in tow, ran into, struck, and sank libelants' schooner Dreadnaught, 39½ tons, at a point in Long Island Sound about one mile west of Bartlett's Reef lightship. The wind was northwest, and blowing a good breeze. The tide was at the last quarter of the flood. The tug was on a voyage from Point Judith, R. I., to Sachem's Head, Conn. The schooner was bound from New York to Westerly, R. I., running free, and each vessel was going at about six miles an hour. Each boat carried the regulation lights. It was a good night for seeing the lights, and each vessel claims that it sighted the other at a good distance away. The libelants contend that the schooner kept about on a due east course, but that the tug failed to keep out of the way of the schooner, and changed her course so as to cross the schooner's bow. The claimants allege that the schooner changed her course, and thereby caused the collision. The evidence was almost entirely in the form of depositions, and is full of inconsistencies and contradictions. The theory of the collision advanced by the claimants receives some support from the admitted facts and other sources. It is admitted or proved that there were only two men on the schooner,—a captain and mate and steward; that the captain had been on duty, pumping, every 20 minutes, or steering the schooner, without rest or sleep, from half past 4 Sunday afternoon until the time of the collision, 5 o'clock Monday morning; that the mate-steward, who was paid extra because he did not have very much sleep when on these trips, either had been without sleep for 8½ hours or was below asleep until the captain called him, just

before the collision; and that the captain of the schooner admitted that he had seen the red light of the tug for a considerable time before the collision. In view of the evidence as to Stewart, the schooner's mate, coming on board the tug without his coat, in view of the long hours of arduous work imposed on the captain and mate of the schooner, and of the whole evidence, I conclude that after the tug had ported her helm, and the vessels were going red to red, the schooner changed her course, and luffed up into the wind, through the inattention of the captain or mate or both, and that this change of course contributed to cause the collision. The question, then, arises as to whether the tug also was negligent. The principal witness for the claimants was Pendleton, the mate, who was steering the tug. According to his testimony, the schooner, when he first saw it, showed both lights, then for a few minutes only her red, and when she was a mile (afterwards changed by him to a half mile) away she luffed to port, showing her green light only, and from that time to the time of the collision kept a northeast course. He admits that for half a mile he thus proceeded at right angles in the then course of the schooner, and that near the close of the half mile he changed his own course to northwest, and struck the schooner amidships. He also admits that if he had simply kept his course after the schooner changed to the northeast, he would have avoided her, and that, although the schooner might have avoided his tug, she could not have avoided the tow without again changing her course. In thus going for a half mile at right angles to the course of the schooner and then changing his course in order to cross her bow, when it was then certain that the schooner could not avoid his hawser and tow without changing her course, was negligence.

Certain testimony as to a conversation between the captain of the schooner and the pilot of the tug was admitted subject to exception with the request that the court would afterwards rule thereon. The testimony as to the admissions of the pilot is admitted only for the purpose of qualifying the statements contained in his deposition. Let a decree be entered dividing the damages, and referring the matter to a commissioner.

THE ROSEDALE.

THE OREGON.

(District Court, S. D. New York. March 28, 1893.)

L. COLLISION—SIGNALS NOT NOTICED—SIGNALS OMITTED—ROUNDING OUT OF SLIP.

The ferryboat O. rounding out of her slip at Broadway, Williamsburg, and going up the East river against the ebb tide, came in collision at a small angle in about mid river off S. Fifth street, with the passenger steamer R. coming down at 12 to 13 knots speed. The R. when about 600 yards away gave one whistle and ported. The O. did not hear that signal and gave no whistle until too late; she claimed that the R. was so close to the Brooklyn shore that the O. was obliged to go to the left, but the contrary was found upon the evidence. *Held*, that the O. was in fault; (1) for lack of lookout and attention to the R.'s signal; (2) for giving no signal, if she, designed to cross the R.'s bow, which was on the O.'s star-board hand; (3) for not rounding to pass to the right of mid river as she

might easily have done, the courses of the two vessels as she rounded, coming about head and head. *Held*, also, that the R. was justified in counting upon that navigation by the O., in the absence of any signal to the contrary, but that the R. was to blame for her speed above the statute limit of 10 knots, and that the damages should be divided.

2. DAMAGES—PERSONAL INJURIES—NERVOUS SHOCK—CARGO—HARTER ACT.

Claims for injuries to passengers or for loss of baggage are not within the third section of the Harter act; and for loss of cargo, the exemption of one vessel from paying her share, in case of mutual fault, does not increase the liability of the other vessel.

Carpenter & Park, for the Rosedale.

Wilcox, Adams & Green, for the Oregon.

W. W. Culver, Dudley R. Horton, M. A. Lesser, and I. A. Ourwitch, for creditors.

BROWN, District Judge. The above petitions to limit liability grow out of a collision which occurred in the East river off South Fifth street, Williamsburg, at about 11:30 a. m. on September 3, 1896, between the steam, passenger and freight boat Rosedale, plying between New York and Bridgeport, Conn., and the ferryboat Oregon, plying from the foot of Broadway, Williamsburg, to Twenty-Third street in the East river, N. Y. By the collision the Rosedale was sunk; the Oregon was damaged; and claims to personal injuries, and also for loss of goods on the Rosedale, have been interposed.

At the time of the collision the tide was at the last of the ebb and weak. The Rosedale was coming down the East river, and as her officers allege, about in the center of the river. The Oregon's witnesses say she was close over to the Brooklyn shore. When off about South First street, the Oregon was seen just leaving her slip at Broadway and rounding to come up her usual course in about mid river. The Oregon was then about 600 yards below the Rosedale, and as the officers of the latter say, about a point on their port bow. In a few seconds the Rosedale gave her a signal of one whistle, to which no answer was received, nor was any signal given by the Oregon at any time until alarm signals shortly before the collision, too late to be of any service. Shortly after signaling, the Rosedale ported her wheel slightly, so as to change her head about half a point more to starboard; and soon after, receiving no answer from the Oregon, she slowed. When about 150 to 200 yards apart, both vessels sounded an alarm and gave the order to reverse. They came in collision in about mid river, the Oregon striking with her port bow the port side of the Rosedale about 20 feet from her stem; neither vessel, as I find, being stopped at the time of collision. The angle of collision is not definitely fixed, but was probably small. It would be at once increased, because both boats were immediately turned to the westward by the force of the collision, and that would naturally give the impression of a larger angle at the moment of contact.

The East river at the place of collision is from 1,600 to 1,800 feet wide. For the Oregon it is claimed that the speed of the Rosedale was at the rate of from 14 to 15 knots, instead of only 10 knots, the

limit prescribed by statute; that when the Rosedale was first seen off South First street, she was not more than from 300 to 400 feet off the Brooklyn shore, and heading about straight down river, and that she was therefore wholly out of the way and to the eastward of the usual course of the Oregon, so that the Oregon did not need to give her any further attention, and that the Oregon was occupied in avoiding a tug and tow that were coming up a little to the westward of the center of the river; that it was the duty of the Rosedale to keep along the Brooklyn shore; and that the collision was brought about solely by the fault of the Rosedale in her excessive speed and change of course of at least two or three points to starboard.

1. There is great contradiction in the testimony as to the place of the Rosedale in the river. Several of the witnesses for the Oregon are inconsistent in their different statements; others now testify differently from their statements before the local inspectors. The usual course of the Rosedale was down the middle of the river. No reason appears why she should have departed materially from that course upon this trip. There were no other vessels in the way; and in or near the middle of the river she had a more favorable tide at the last of the ebb than she would have had near the shore where it would be slacker. Her own officers could best know and judge of her position; and their testimony that she was in about mid river is substantiated by much other independent testimony. After porting half a point, she went not more than 800 feet to the place of collision, and this would give only about 80 feet westing to mid river where the collision occurred. My conclusion on this point, notwithstanding the opposite testimony, is that when she signaled the Rosedale was but little nearer to the Brooklyn shore than to the New York shore, and was not materially out of mid river.

In the slack ebb, the ferryboat would naturally be expected to go up in about mid river, and at this time necessarily so, as the tug Anthracite with her tow was but little on the New York side of mid river and opposite the ferryboat, so as to prevent her from crossing beyond mid river. As the ferryboat rounded up the river she and the Rosedale would have come "nearly head and head," i. e. so as to show each other, if it were night, their two colored lights. It was the duty of each, therefore, to go to starboard under a port wheel, as when rounding a bend in a tortuous stream. The *John S. Darcy*, 29 Fed. 644, 647, affirmed in 38 Fed. 619. The Rosedale navigated in accordance with this rule, giving, as was her duty, a signal of one whistle. Had the ferryboat observed the rule and done likewise, no collision would have ensued. Nothing was in the way of the ferryboat to prevent her from observing it and going to the right. She came out of the slip with her helm only half over to port; not for a considerable time afterwards, nor until collision was imminent, did she put it hard a-port. As she was heading about straight up river at the time of collision, the result leaves no doubt that had she ported more when the Rosedale was first seen, or when the latter gave her a signal of one whistle, she would have passed well clear of the Rosedale, port to port, as the rule required.

2. On coming out of her slip, the Oregon had the Rosedale on her starboard hand. The Rosedale was less than a third of a mile away and on a crossing course. It was, therefore, the Oregon's duty to keep away from the Rosedale, and under the circumstances to do this by going to the right, as that course was practicable, easy and safe, while crossing her bows was at best dangerous. In any event, had she designed to cross the Rosedale's bows, it "was her imperative duty," as stated by the court of appeals in the case of *The Albany*, 81 Fed. 966, 971, "to signal such intention by a two-blast signal and obtain assent to it." Had such a signal been given, the collision no doubt would have been avoided.

This collision in my judgment is primarily attributable to the fault of the Oregon, first, in having no lookout properly attending to his duties, and the inattention to the Rosedale, or to her signal of one whistle; second, to the pilot's inattention or perhaps ignorance of the rules of navigation, in apparently supposing he had the right of way; thirdly, to the pilot's failure to give a signal of two whistles to the Rosedale, when he meant to cross her bows. The position of the Anthracite was no real embarrassment to the ferryboat, and furnishes no excuse for her pilot's inattention to the Rosedale and her signal; since the tug and tow did not require his wheel to be more than halfway to port, as usual, in rounding up river. Had he properly attended to the Rosedale, or observed the ordinary rules of navigation, his duty was plain and easy,—either to put his helm hard over and go to the right, as he could have done without stopping, or to have stopped until the Rosedale had passed. The slight porting of the Rosedale, instead of interfering with the performance of this duty, facilitated it. The Rosedale, receiving no signal of two whistles from the Oregon, had the right to assume that the Oregon would keep to starboard.

3. The Rosedale had no lookout forward. But it is plain that the Oregon was seasonably observed from her pilot house, and that a lookout forward would have added nothing to the observation and knowledge of the officers, for the purpose of avoiding collision. The absence of a lookout forward was, therefore, immaterial.

I think the evidence shows, however, that the Rosedale was in fault for excessive speed beyond the statute limit of 10 knots. There is much outside testimony to her rapid movement, while the evidence of her officers, in this regard, is necessarily uncertain, and the direct testimony as to her revolutions leaves no doubt in my mind that she was making from 12 to 13 knots (besides the tideway) when the ferryboat was first seen. In several ways this clearly contributed to the collision, and I must, therefore, hold her also to blame.

4. The claim of damages for personal injuries in behalf of Mrs. Tilden, presents a very difficult question. By the collision she was thrown against a chair. She showed no injury at the time. It is claimed that she subsequently became incapacitated to perform her household duties from this cause, and still remains so. She called no physician until some nine days after the accident, and since then has been more or less under medical treatment. Her complaints, though seemingly genuine and attended with undoubted suffering, are not

wholly explicable. The most skillful examination finds some spinal irritability, with such discomforts as attend that condition. The case seems to belong to the class of nervous shock occasioned by the circumstances of the collision. She is slowly improving. There is great diversity of opinion, even in the medical profession, as regards the extent of the incapacity of persons suffering from these nervous disturbances. On the whole evidence I conclude to allow to her the sum of \$1,250; and to her husband the sum of \$250.

5. A claim has been interposed by Gross & Co., now represented by their assignee, for the loss of a case of clothing shipped as merchandise at Bridgeport on the Rosedale, consigned to Catskill, and to be transported by the Rosedale to New York as a part of her cargo. As respects the liability of the Rosedale for this loss, I must hold the claim barred by the third section of the Harter act (Act Feb. 13, 1893; 27 Stat. 445; 2 Supp. Rev. St. p. 81), since the fault by which the loss occurred, so far as the Rosedale is involved, was a fault in the "navigation or management of the ship." It is suggested that the lack of a lookout forward was a lack in "manning or equipping" the vessel, for which the owners are responsible. I have found, however, that the absence of a lookout forward on the Rosedale was not in this case a contributing cause of the collision, and therefore was not the cause of the damage. But aside from this, there is no evidence or presumption that the vessel was not properly manned and equipped. The evidence is to the contrary. Whether a lookout is stationed forward or not, when the ship has a competent crew, as she did have in this case, depends wholly upon the management or direction of the officers; in other words, it is a part of the "management of the ship," for which the owners are not responsible to the shippers of cargo. Under the law as it existed prior to the passage of the Harter act, in cases of collision by the common fault of two vessels, where each is required to pay half the damage, it has been adjudged by this court that the third section of the Harter act, in relieving the carrier vessel and her owners from responsibility for their half of the damage to cargo, was not designed to increase thereby the damage payable in such cases by the other vessel. *The Viola*, 60 Fed. 296; *The Niagara*, 77 Fed. 329, 335. The claim for the case of goods, therefore, can be proved to the extent of one-half the damage against the *Oregon*; but it must be disallowed as against the *Rosedale*.

6. Injuries to passengers, and claims for loss or damage to their personal baggage, not shipped as merchandise and not paying freight, are not in my judgment within the exemptions of the first clause of the third section of the Harter act. These claims, therefore, can be proved against both vessels. The claim for loss of baggage will be referred back to the commissioner to ascertain the amount, if not admitted.

Decree accordingly.

MOSES v. HAMBURG-AMERICAN PACKET CO. et al.

(District Court, S. D. New York. April 12, 1898.)

COLLISION—PERSONAL INJURIES—TICKET EXEMPTIONS—\$100 LIMITATION—HARTER ACT.

On a collision in New York harbor causing loss of the hand of a boy four years old, a steerage passenger, *held* that the steamer, being in fault, was not exempted by the third section of the Harter act, nor by a limitation to \$100 for any personal injuries expressed in the ticket, this not being a reasonable provision; nor by exemptions from liability for negligence.

Libels in personam to recover damages for personal injuries.

Grossman & Vorhaus (De Lagnel Berier, of counsel), for libelants.
Wheeler & Cortis, for Hamburg Line.
Robinson, Biddle & Ward, for Clyde Steamship Co.

BROWN, District Judge. In the collision between the steamships *Persia* and *Saginaw*, for which both vessels were held to blame (84 Fed. 705), the libelant Jacob Moses, then four years and eight months old; and a steerage passenger with his mother on the *Persia*, suffered such injuries of the right hand that it was amputated just below the wrist. Libels were filed for damages in his own behalf and also by the father, Abraham Moses. By stipulation between the parties, it was agreed that the decision upon the trial of the principal cause between the *Persia* and the *Saginaw*, as respects the question of negligence, should stand as the decision in the present case; and that issue is therefore disposed of in favor of the libelants.

The answer of the Hamburg Company, the owners of the *Persia*, set up as a further defense, (1) the provisions of the Harter act (Feb. 13, 1893; 2 Supp. Rev. St. p. 81); and (2) the following provision in the contract of carriage:

"Neither the ship, the shipowner or the agent is responsible beyond the amount of \$100 for loss of or injury to the passengers of the *Persia*, arising from steam, latent defects in the steamer, * * * default or negligence of the shipowner's servants, whether on board the ship or not, or from the negligence in navigation of any other vessel."

Neither of these defenses can I think be sustained. The first is not consistent with previous adjudications in this court, or with the proper construction of the act of 1893, as recently expounded in the case of *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516. In the latter case the libel was filed by the master, owner and crew of the tug *Talisman* to recover damages arising from a collision of the *Delaware* with the *Talisman* through the faulty navigation, as it was determined, of the *Delaware* alone. Upon an appeal from a decree in favor of the libelant, the question was submitted upon certificate to the supreme court, whether the Harter act afforded any defense. The third section of that act, read literally, is broad enough to include all damages inflicted upon other vessels by collision; just as it is claimed in this case that the statute is broad enough to include, and must, it is therefore urged, include personal injuries to passengers. The supreme court, however, held otherwise as respects col-

lision damages to other vessels; and in the opinion of the court, delivered by Mr. Justice Brown, it is said:

"It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and the care and delivery of the cargo." Page 471, 161 U. S., and page 522, 16 Sup. Ct. "It is true that the general words of the third section above quoted, if detached from the context and broadly construed as a separate provision, would be susceptible of the meaning claimed, but when read in connection with the other sections and with the remainder of section 3, they show conclusively that the liability of a vessel to other vessels with which it may come in contact was not intended to be affected." Page 474, 161 U. S., and page 523, 16 Sup. Ct.

The entire course of reasoning in the opinion in support of the decision of the court that the only object of the act is "to modify the relations previously existing between the vessel and her cargo," is equally applicable in excluding the act from any application to passengers.

A further consideration not there referred to, but suggested by the present case, is the fact that section 3 is expressly limited in its application to vessels "transporting merchandise or property." The *Persia* carried merchandise as well as passengers. But there are many vessels that carry passengers only, and to those vessels the act cannot apply. But it is not conceivable that congress intended by this act to discriminate between these two classes of vessels in respect to their liability for negligent injuries to passengers, and to provide that the one class should be exempt from liability and the other class not exempt, simply because the former carries merchandise and the latter does not. The restriction of the third section to "vessels carrying merchandise" is indicative of the limited scope of the act, as construed by the supreme court, extending only to the relations between the vessel and her cargo, or its owners. See *The Viola*, 59 Fed. 632, 634; 60 Fed. 296; *The Niagara*, 77 Fed. 335. That the third section does not apply to passengers or their baggage was ruled by this court in the recent case of *The Rosedale* and *The Oregon*, 88 Fed. 324.

2. In cases not within the exemptions of the Harter act, the law of this country in respect to the liability of carriers for damages arising though the negligence of their servants, as established in *Railroad Co. v. Lockwood*, 17 Wall. 357, has not been changed. A reasonable provision, however, in the bill of lading or other contract, limiting the extent of the carrier's liability for loss or injury of goods, operating as a liquidation of damages in advance, and having reference to the price of carriage, is sustained. *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151. If the provision of the contract of transportation in this case were a reasonable provision of that character, I think it should, therefore, be upheld. But considering the nature of the injuries liable to happen to passengers through careless navigation, including, it may be, the loss of life or limb, and the large awards often made therefor, which the courts have often held to be not unrea-

sonable or excessive, it seems to me that a stipulation that the damages for any possible personal injury shall not exceed \$100, cannot be seriously considered as any reasonable or substantial provision whatever. Where the right to limitation as respects damages to property has been sustained, there has been at least some reasonable or appreciable proportion between the sum fixed and the loss contemplated. In this stipulation, there is no such reasonable relation. The sum of \$100 is scarcely more than a nominal sum. Under the decision above referred to I must, therefore, find that this clause of the contract cannot be upheld as a reasonable provision.

3. The father, in the present case, was engaged in the clothing business, as a manufacturer or dealer in a comparatively small way. The son was likely to be brought up in the same or a similar business. Taking all the circumstances into account, I think an allowance should be made of \$2,500 to the son, and \$500 to the father, for which sums decrees may be entered with costs.

THE KENSINGTON.

(District Court, S. D. New York. July 6, 1898.)

1. **CARRIERS BY SEA—PASSENGERS' BAGGAGE—SEA PERILS—BURDEN OF PROOF—STOWAGE—EXEMPTIONS FOR NEGLIGENCE—FOREIGN LAW—HARTER ACT.**
Extraordinarily rough weather warrants a finding of damage to cargo or baggage by sea perils, provided proof of ordinary good stowage is first given by the ship. This preliminary burden is upon the ship, and cannot rest upon mere presumption. Exemptions for negligence contracted for in a foreign port on a foreign vessel, though valid where made, will not excuse torts and consequent damage within our territorial jurisdiction. The Harter act does not apply to passengers or their baggage.

2. **SAME—LIMITING LIABILITY BY CONTRACT.**

It is competent for carriers by sea to limit their liability for passengers' baggage to a specified sum, unless higher rates are paid for any excess in value; and when this provision is plainly incorporated in the body of the ticket, and ample opportunity is afforded the passenger to know it and comply with it, it becomes a part of the contract of carriage and binding, and in this case was held to limit the libelants' recovery.

Roger Foster, for libelants.

Robinson, Biddle & Ward, for claimant.

BROWN, District Judge. The above libel was filed by Mrs. Bleecker and her daughter to recover for the loss of their trunks and personal effects upon their passage by the British steamship Kensington, of the Red Star Line, from Antwerp to New York in December, 1897. The defense was a loss by sea perils, and second, a limitation to the sum of 250 francs under the provisions of the passenger ticket.

The libelants' trunks were stowed in what was known as No. 2 upper steerage in the after part of the third deck above the hold, sometimes used for passengers. A few other trunks were stowed there, and some crates of china. The steamer sailed from Antwerp December 11th. The voyage was extremely rough. For the most of the time the passengers were not allowed on deck. On December

20th the steamer met a very heavy gale in which she labored heavily and was obliged to lie to for 14 or 15 hours, which had not previously occurred in the master's experience of 23 years. The steamer was a first-class ship of about 8,000 tons. In this gale some of the baggage got adrift, both in No. 2 steerage and in the steerage on the deck below. As soon as it was possible the apartment where the libelants' baggage was stowed was examined, and the captain describes it as being in a state of chaos. Trunks and crates were broken and damaged by water in the apartment, coming from the condensation of steam from a steam pipe which had been carried away in the storm. The vessel arrived in New York on the morning of December 23d. The value of the contents of the trunks was above 250 francs for each of the two passengers, and it is stated in the libel to have been of the value of \$2,000. The libelants had been traveling in Europe for about a year. The evidence leaves no doubt that the ticket for the two passengers, which is marked "Claimant's Exhibit A," was purchased by Mrs. Bleecker in Paris on December 2d. She testifies that at that time she paid part of the money for the passage and afterwards on arrival at Antwerp paid the rest. The ticket is dated at Paris December 2, 1897; and there is a stamped receipt beneath the signature of the ticket, dated at Antwerp, December 10th, for the balance of the passage money. This accords with the testimony of Mrs. Bleecker, that she paid this balance at the office of the company in Antwerp on the day before the steamer sailed, and at the same time delivered her trunks and received her baggage check, stating that it was shipped "subject to the conditions contained in the company's ticket and bill of lading."

In the body of the ticket, under the head of "Notice to Passengers," it is stated as follows:

"It is a condition upon which this ticket is granted and is mutually agreed for the consideration aforesaid that" * * *. Here follow 10 paragraphs in type somewhat smaller than the preceding type, but perfectly clear and legible, stating numerous conditions. These 10 paragraphs are followed by the provision: "All questions arising hereunder are to be settled according to Belgian law with reference to which this contract is made;" after which is the signature of the company's agent. The third paragraph provides that "the shipowner or agent are not under any circumstances liable for loss, default, injury or delay to the passenger or his baggage, arising from the act of God, public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the sea, rivers, or navigation, accidents to or of machinery, boilers or steam" * * * "or from any act, neglect or default of the shipowners' servants, whether on board the steamer or not."

"The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor and freight paid in advance on the excess value at the rate of one per cent. or its equivalent."

At the time when her baggage was delivered to the company at Antwerp on the 10th of December, Mrs. Bleecker made no statement of its value, and paid no freight on its excess over 250 francs.

No evidence was introduced as to the particular mode of stowage, except that it was stowed by the company's stevedore at Amsterdam under the supervision of the third officer, who at the time of the trial was sick there.

1. Contrary to the libelants' contention, I must hold upon the authorities that a ticket of the character above described for a transatlantic passage is a unilateral contract, and like a bill of lading is binding upon the person who receives it, so far as its provisions are reasonable and valid. It is essentially of the same character as the ticket in the case of *Steers v. Steamship Co.*, (57 N. Y. 1,) where Johnson, J., in reference to a claim similar to this observes:

"The plaintiff, by her agent, was an applicant for a passage to Europe by the defendant's ship, the voyage to be commenced at a future day, and received on payment of the price a written engagement from the defendant expressing its undertaking. A printed facsimile of this paper is before us, and although part of it is in smaller type than the rest, no part of it is in such type as to suggest to the mind the idea of concealment as the possible motive for its being so printed." * * * "Looking to the course of business, the court may take notice that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or for freight. There is, therefore, no room in such a case for the suggestion that the party is surprised into a contract, when he supposes himself only to be taking a token indicative of his right. The paper in evidence ought, therefore, to be regarded as having received the mutual assent of the parties, and as being, as its language purports, their contract touching the voyage in question."

I find nothing later diminishing the force of these observations. See *Zimmer v. Railroad Co.*, 137 N. Y. 460, 463, 33 N. E. 642.

2. One of the exemptions specified in this ticket or contract is losses "by perils of the sea," and upon the evidence, if preliminary proof of good stowage had been given, I think a prima facie case of loss by sea perils would have been made out, which it was incumbent on the libelants to rebut by proof of negligence in the ship. The evidence leaves no doubt that the passage was one of very extraordinary severity, such as might account naturally for what happened, viz. the baggage getting adrift and breaking the steam pipe, even though the baggage was well stowed; but it might also have happened from poor stowage, of which some evidence was sought to be given, though I do not regard it as of much weight. There is no direct evidence of the mode of stowage, but only that the baggage was stowed by the regular stevedore of the line. It is urged that this furnishes a reasonable inference of customary good stowage; and when there is proof, as there is in this case, of very extraordinary weather and rolling of the ship, such as would naturally cause baggage stowed with ordinary care to get adrift, it is claimed that the authorities indicate that the burden of proof is on the libelants to show some negligence, but for which the loss might nevertheless have been avoided. See *Clark v. Barnwell*, 12 How. 272, 280. The supreme court in that case approved the ruling of Lord Chief Justice Denman in *Muddle v. Stride*, 9 Car. & P. 380:

"That if on the whole it be left in doubt what the cause of the injury is, or if it may as well be attributable to perils of the sea as to negligence, the plaintiff cannot recover," * * * "but the jury were to see clearly if the defendants were guilty of negligence before they could find a verdict against them."

In the case of *The Neptune*, 6 Blatchf. 193, Fed. Cas. No. 10,118, the same point was ruled where a steamship "encountered on the voyage an unusually violent storm which fully accounted for the damage within an exception in the bill of lading"; and it was held by Mr. Justice Nelson that this threw the onus on the shipper to establish carelessness or negligence on the part of the master or owner of the vessel leading to the particular loss; and for failure to establish this a decree dismissing the libel was affirmed. See *The Fern Holme*, 24 Fed. 502, 503; *The Portuense*, 35 Fed. 670. These cases, however, do not dispense with the usual proof of good stowage by the ship. To assume proper stowage upon mere inference, and to throw upon a shipper or passenger the burden of proving the contrary, without any proof by the ship, seems unreasonable and inequitable, considering that proof on this subject is peculiarly within the power of the ship to produce, and comparatively easy for her, but difficult if not impossible for the passenger or shipper. Proper stowage, moreover, is essential to seaworthiness as respects cargo, or baggage; and hence this essential preliminary condition of seaworthiness should have been established by the ship by proof of proper stowage, just as in *The Edwin I. Morrison*, 153 U. S. 210. 14 Sup. Ct. 829, it was held necessary to be established by proof of proper inspection. In *Clark v. Barnwell*, supra, it is expressly stated in the opinion of the court (page 281) that the stowage was good. The record and the opinion of Shipman, J., in the court below in the case of *The Neptune* show the same; and the same appears in the other cases above cited. This branch of the defense, therefore, I cannot sustain.

3. The limitation of liability to 250 francs, is a limitation which it was competent for the defendant company to make. *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151. The libelants are chargeable with notice of this provision whether they read the contract or not. The ticket was in their possession for more than a week before the ship sailed, and before the baggage was delivered to the company. Every European traveler knows how much more exacting there than with us are the usual conditions as respects the transportation of luggage, and the extra charges therefor. There was nothing to justify the libelants in supposing there were no restrictions as to baggage; and they had abundant opportunity to examine the clear provisions of their ticket; and if they were ignorant of them it was by their own choice. It is not unreasonable that carriers should refuse for an ordinary charge to hold themselves answerable for an extraordinary or indefinite responsibility, and to charge extra compensation for increased risks; if travelers pay no attention to the provisions on these points incorporated into the contract of carriage, it is right that they should themselves bear the additional risk.

In the recent case of *Calderon v. Steamship Co.* (April 25, 1898) 18 Sup. Ct. 588, the supreme court, in refusing to the carrier the benefit of any limitation, did so upon the distinct ground that the limitation there sought was against all liability, and recognized the validity of such a limitation as is here provided.

4. Proof was taken by depositions that the Belgian law sustains exemptions of carriers from responsibility for the negligence of servants when the contract so provides. In the answer to the cross interrogatories on this point, the witness did not state at length the authorities and decisions in the sense in which the libelants' counsel intended by his interrogatories that the witness should state; but the answer is in such form, with a reference to the authorities relied upon, that I do not think there was any intent on the witness' part to evade the question, which in translation into another language may have appeared only to call for the references to the authorities instead of the language of the decisions; and indeed the language of the decisions was not in terms asked for by the interrogatories. I do not think the failure to answer the cross interrogatories more fully, therefore, detracts from the credit to be given to the deposition, which is in fact in accord with the general law of Continental Europe. The libelants' counsel, however, in preferring to proceed to trial rather than incur the delay of sending the commission back to the commissioner for further answers on this point, in effect waived any objection on this score.

This contract of carriage was, however, to be performed in part within our own jurisdiction, by the delivery of the baggage here in good condition; and though the presumed negligence as respects proper stowage was negligence abroad, it cannot be said that none of the consequent damage occurred within our jurisdiction. Upon the evidence I think that damage to the extent of at least 250 francs, as to each libelant, did occur here; so that the cause of action in part arose here; and in such cases our own law, as respects exemptions that are against public policy, must, I think, control. It is not competent for the respondent to defend a tort committed here by proof of a foreign contract void as against our public policy. It is a question of comity purely; and comity does not require us to reverse our own policy as respects torts committed within our own territorial jurisdiction. *The Brantford City*, 32 Fed. 324.

I have heretofore held that the Harter act has reference to the transportation of "cargo," and does not apply to the transportation of passengers, nor to their baggage when not shipped as cargo, or on payment of freight. *The Rosedale and The Oregon* (March 28, 1898) 88 Fed. 324.

Decree for the libelants for the equivalent of 250 francs each, with interest and costs:

THE ROMAN PRINCE.

(District Court, S. D. New York. April 20, 1898.)

SALVAGE—FIRE—PROMPTNESS—PERSONAL DANGER—FIRE DEPARTMENT.

The tug D. being prompt to render assistance, and the deck hand incurring some exposure in rendering effective aid, though the engines of the fire department soon appeared in force, was allowed \$300, one-half to owners, and one-half to master and crew, of which the deck hand and master were each awarded \$50.

This was a libel in rem, by Augustus Demarest and others against the steamship Roman Prince to recover for salvage services rendered in extinguishing fire.

Cowen, Wing, Putnam & Burlingham, for libelants.
Convers & Kirlin, for claimant.

BROWN, District Judge. At about 6 p. m. of May 4, 1897, shortly after the discharge of the steamship Roman Prince had begun at the Atlantic Docks, a fire broke out in the steamship's middle hatch among some bales of wool and liquorice. The libelants' tug Defiance, attracted by the smoke, arrived alongside about five minutes after the fire broke out; her aid was asked by the ship's officers, and her pump and hose were immediately applied to the fire; first, through the middle hatch, and a few minutes afterwards, through a small side hatch, down which the deck hand Le Fontaine went with the hose, at some peril to himself and at the cost of some burns. The steamship's donkey pump and hose, as I must find upon the evidence, were also used from the first. Upon signal to the fire department of Brooklyn, several engines arrived about 10 or 15 minutes after the fire broke out; but at that time it was nearly under control, and no flames were then visible, in consequence of the previous service of the pumps of the steamship and of the Defiance combined. Pumping was continued for some time afterwards to extinguish the smoldering fire; and so successful was the result, that the entire damage amounted to only about \$1,200.

The chief elements of merit in this case are (1) the great promptness of the tug in rendering assistance; (2) the close application of her hose where most needed, by going down the small hatch; and (3) the success in preventing any large damage from a fire, which if not immediately checked, would probably have caused a far greater loss. The aid obtainable from the fire department, however, and its appearance on the scene, in force, only a few minutes after the arrival of the Defiance, must prevent any large award. Upon all the circumstances, I think an allowance should be made to the Defiance of \$300; of which \$50 should go to the master, \$50 to Le Fontaine, who took the hose down the hatch, and \$50 to the rest of the crew in proportion to their wages; the residue, to the owners. Decree accordingly with costs.

In re STUTSMAN COUNTY, N. D.

(Circuit Court, D. North Dakota, S. E. D. June 24, 1888.)

1. REMOVAL OF CAUSES—SUITS TO COLLECT TAXES.

The proceeding for the collection of delinquent taxes provided for by chapter 67 of the Laws of 1897 of North Dakota is a "suit" within the meaning of Act 1887-88.

2. "SUIT" DEFINED.

A proceeding in a court of common law or equity, which culminates in a judgment that conclusively determines a right or obligation of the parties, so that the same matter cannot be further litigated except by writ of error or appeal, is a "suit," within the meaning of the federal judiciary acts. In re City of Chicago, 64 Fed. 897, criticised.

3. JURISDICTION—MATTERS OF PROCEDURE.

The act of 1887-88 does not require, as a condition of the removal of a case to the federal court, that in matters of procedure the case be one that could have originally been commenced in such court.

4. SAME—SEPARABLE CONTROVERSY.

The proceeding under the North Dakota act of 1897 is not a single suit, but as many suits as there are parcels of land; and, if the same person owns several parcels, such suits are consolidated by his joining all the parcels in a single answer.

5. SAME—DIVERSE CITIZENSHIP.

Where jurisdiction depends upon the citizenship of the parties, it is the party that is named in the record that is meant; and an objection that there might be other parties entitled to defend, but not named in the record, will not avail to defeat jurisdiction.

Frederic Baldwin and S. E. Ellsworth, for complainant.

James B. Kerr, for defendant.

AMIDON, District Judge. Chapter 67 of the Laws of 1897 of the state of North Dakota makes provision for the collection of delinquent taxes by a proceeding in the district court. The enactment is taken from a statute that has long been in force in the state of Minnesota. Section 1 provides that the county treasurer shall make a list of all taxes upon real estate in his county which have been delinquent for certain years. The list is required to contain a description of the parcels of land upon which the taxes have not been paid, and opposite such description the name of the owner to whom assessed, if known, and the amount of the tax, with penalty and interest. Such list is to be verified by the affidavit of the treasurer, and is then filed in the office of the clerk of the district court of the county. "The filing of such list shall have the force and effect of the filing of a complaint in an action by the county against each piece or parcel of land in such list described, to enforce against it the taxes therein appearing against it, and the penalties and interest for the several years for which such taxes shall remain unpaid, and to obtain a judgment or decree of the court for the sale of such piece or parcel of land to satisfy the amount of such taxes remaining unpaid, with penalties, interest, and costs; and also the effect of notice of the pendency of such action, to all persons interested in such lands." Section 2 provides that, in case the land is rented, a writ of attachment shall issue, upon the application of the county treasurer, to seize such rents, and have the same applied in payment of the taxes. Sections 3 and 4 provide that the

clerk shall make a copy of the list so filed with him, and shall publish the same in a newspaper in the county once in each week for three consecutive weeks, and shall attach to the list as thus published a notice to all persons who have or claim any estate, right, title, or interest in, or claim to, or lien upon, any of the several parcels of land in the list described, stating, in substance, that the list has been filed by the county treasurer pursuant to the act in question, and requiring each of such persons within 30 days after the last publication of the notice to file in the office of the clerk of the court his answer, in writing, setting forth any objection or defense against the tax, or penalty, or interest thereon, as to any piece or parcel of land described in the list as to which he claims any interest or lien; and in default thereof that judgment will be entered against such piece or parcel of land for the taxes in the list appearing against it, and for all penalties, interest, and cost. Section 5 requires answer to be filed in the office of the clerk of the district court within 30 days after the last publication of the notice, verified as pleadings in civil actions, and setting forth the defense or objections to the tax or penalty. Section 6 provides for judgment by default as to parcels in respect of which no answer is filed. Section 7 provides as follows: "If answer shall be filed within the time hereinbefore provided as to the taxes or penalties upon any pieces or parcels of land embraced in such list as published, such answer shall stand for trial at any general term of the district court in the county. * * * The court shall proceed without delay, without a jury, and summarily hear and determine objections or defenses made by the several answers, and shall dispose of all such answers, and direct judgment accordingly, at said term, and in the trial thereof shall disregard all technicalities and matters of form not affecting the substantial merits, and any person making answer as herein provided, shall be entitled to a separate trial upon the issues raised by his answer." Section 8 provides for the entry of judgment for the amount of taxes if the court at the hearing shall sustain the same. If the court sustains the defense to the taxes and penalties as to any parcel of land such parcels are by the judgment discharged from the taxes in the list set down against them, and from all penalties, and the court may, in its discretion, award disbursements against the county laying such taxes, and in favor of the party answering, as to the pieces or parcels so discharged. Section 9 provides that, if all the provisions of law in force at the time of the assessment and levy in relation to the assessment and levy of taxes shall have been complied with, of which the lists so filed with the clerk shall be prima facie evidence, then judgment shall be rendered for such taxes, and the interest, penalties, and costs. But no omission of any of the things provided by law in relation to such assessment and levy, or of anything required by an officer to be done prior to the filing of the list with the clerk shall be a defense or objection to the taxes appearing on any piece or parcel of land unless it be also made to appear to the court that such omission resulted to the prejudice of the party objecting, or that the taxes against such piece or parcel of land have been partially, unfairly, or unequally assessed; and in such case, but in no other, the court may reduce the amount of taxes upon such

piece or parcel, and give judgment accordingly. It is a defense when made to appear by answer and proof that the taxes have been paid, or that the property is lawfully exempt from taxation. Section 10 provides that the judgment which the court shall render shall be final, except that upon application of the county, or other party against whom the court shall have decided the point raised by any defense or objection, the court may, if in its opinion the point is of great public importance, or likely to arise frequently, make a brief statement of the facts established bearing on the point, and of its decision, and forthwith transmit the same to the clerk of the supreme court. Provision is then made for a speedy trial by the supreme court of the question so certified. The remaining provisions of the act relate to the sale of property against which judgment has been entered by execution issued upon the judgment.

Under the provisions of this act the treasurer of Stutsman county filed a list of delinquent taxes in the office of the clerk of the district court of that county. Among the lands appearing in this list are several hundred parcels formerly owned by the Northern Pacific Railroad Company, and now held by Edwin H. McHenry and Frank G. Bigelow, as receivers, appointed in an action pending in the circuit court of the United States for the district of Wisconsin, on the 25th day of May, 1896, and in the same action, in the circuit court of the United States for the district of North Dakota, on the 27th day of May, 1896. Within the time provided by the statute for answering, the receivers presented their petition, together with a bond, to the district court of Stutsman county, for the removal into this court of the controversy existing between them and the county. Thereafter motion was made by counsel for the county to remand the cause to the state court. Jurisdiction of this court is asserted upon two grounds: (1) That the suit presents a controversy wholly between citizens of different states, to wit, between the county of Stutsman, a corporation organized under the laws of the state of North Dakota, and the petitioners, one of whom is a citizen of the state of Minnesota and the other a citizen of the state of Wisconsin. (2) That the suit arises under the laws of the United States. Jurisdiction of this court is resisted upon the grounds: First, that the proceeding for the collection of delinquent taxes provided by the statute of North Dakota is not a "suit" within the meaning of the act of 1887 and 1888; second, that such proceeding, if it is a suit, is not a suit of which the federal courts are given original jurisdiction; third, that there is no separable controversy in the proceeding between the county of Stutsman and the petitioners; fourth, that, the notice to answer being addressed to all persons having any interest in or lien upon the property, it may well happen that there are other persons who are residents of North Dakota who are entitled to answer and defend against the taxes, and that for this reason the action, even as to the taxes against the property of the petitioners, involves defendants whose presence would defeat the jurisdiction of this court; fifth, that there may be other persons who have a right to answer and defend against the taxes, who are either citizens of North Dakota or of other states, and who should join in the petition for the removal, and that the possible

presence of such defendants precludes the petitioners from removing the cause into this court upon their petition alone.

In support of the first objection to the jurisdiction of this court it is urged that the proceeding is a purely administrative one for the enforcement of taxes by a sale of the property. An examination of the statute will not sustain this position. Its primary object is to have the validity of the tax judicially determined, and all defenses cut off before the property is sold. The judgment of the court not only sustains such taxes as are found to be legal, it also cancels those that are found to be void. If the only object was to obtain a sale of the property, there was already ample provision in the revenue laws for this, as the treasurer was authorized to sell all property against which taxes had been delinquent for a certain period. Such a sale, however, left the validity of the tax open to contest, and seriously impaired the efficiency of the proceeding as a means of securing the collection of the public revenue, and the object of the statute was to place the judicial determination of all questions affecting the legality of the tax before the sale, instead of after it. The proceeding has every element of a "suit," within the meaning of that term as defined by the supreme court in construing the federal judiciary acts. It "involves the determination of questions of law and fact, and there are parties litigant to contest the case on the one side and the other." *Upshur Co. v. Rich*, 135 U. S. 467, 477, 10 Sup. Ct. 654. "A claim of the parties, capable of pecuniary estimation, is the subject of the litigation, and is presented by the pleadings for judicial determination." *Gaines v. Fuentes*, 92 U. S. 10-20; *Pacific Railroad Removal Cases*, 115 U. S. 19, 5 Sup. Ct. 1113. It has been expressly held by the supreme courts of Minnesota and North Dakota that the proceeding under this statute is a suit, and the same conclusive force is given to a judgment entered therein as to judgments and decrees in actions at law and suits in equity. *Chauncey v. Wass*, 35 Minn. 1, 25 N. W. 457, and 30 N. W. 826; *Wells Co. v. McHenry* (N. D.) 74 N. W. 241. It is difficult to appreciate the force of that reasoning which attaches to a proceeding in court, as to its effect upon the rights of the parties, all the consequences of a suit, but, for the purpose of determining the jurisdiction of the federal courts, holds the same proceeding to be purely administrative.

In support of the ground for the motion to remand, now under consideration, counsel rely mainly upon the case entitled *In re City of Chicago*, 64 Fed. 897. Whether that case was correctly decided must depend upon the effect to which the judgment of the county court, upon the report of the commissioners in the proceeding there under review is entitled. The supreme court of Illinois has repeatedly passed upon that question, and has uniformly held that such judgments possess the same force as judgments in ordinary civil actions, and are open to collateral attack only upon the ground that the court failed to acquire jurisdiction. They conclusively establish all matters affecting the validity of the assessment which precede their rendition, and forever bar a defendant from again litigating any matter which he might have presented by answer. *Lehmer v. People*, 80 Ill. 601; *Clark v. People*, 146 Ill. 348, 35 N. E. 60. It is true, as stated in

the opinion in 64 Fed. 899, that the power of taxation is, as to its source, legislative, and, as to its exercise, administrative; but the power of finally determining the validity of a tax is judicial. Before the property of a citizen can be taken, or conclusively charged with liability for a tax, he has the right to a judicial determination of two questions: First, whether the law authorizing the tax is a constitutional exercise of the legislative power; and, second, whether the administrative officers, in imposing the tax, have pursued the authority vested in them by the statute. The determination of these questions by a judgment which can only be assailed by writ of error or appeal is judicial. It can make no difference whether such determination is made in the course of a proceeding by the county or municipality to levy or enforce the tax, or in a proceeding by the owner of the property to defeat it. A judgment which conclusively determines a right or obligation, so that the same matter cannot be further litigated, except by writ of error or appeal, is an exercise of judicial power; and a proceeding in a court of common law or equity, which culminates in such a judgment, is a "suit," within the meaning of the federal judiciary acts. Any other determination exalts matters of form above those of substance. Inasmuch, therefore, as the proceeding under the Illinois statute terminates in a judgment having this conclusive force, it would seem that it ought to be regarded as a suit for the purpose of determining the jurisdiction of federal courts.

It has been held in several decisions that a case cannot be removed into the federal courts unless it could originally have been begun there. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 462, 14 Sup. Ct. 654; *Railroad Co. v. Davidson*, 157 U. S. 201, 208, 15 Sup. Ct. 563; *In re Cilley*, 58 Fed. 977. An examination of these decisions, however, will show that the limitation mentioned is based, not upon matters of procedure, but upon those elements specified as essential to jurisdiction in the first section of the act of 1887-88. To confer original jurisdiction, the following facts, and no others, are necessary: (1) A suit of a civil nature at common law or in equity. (2) It must involve at least \$2,000, exclusive of interest and costs. (3) It must arise wholly between citizens of different states, or present one of the other conditions mentioned in the last part of the first section. A proceeding which presents these elements is within the original jurisdiction of the federal courts, notwithstanding it may involve matters of procedure which would prevent its commencement in those courts. The section defining the right of removal makes no reference to suits which might have been begun in the federal courts, and the phrase, "of which the circuit courts are given jurisdiction by the preceding section," ought not to be considered as requiring elements not mentioned in the preceding section. The jurisdiction of the federal courts cannot be made to depend upon formal or modal matters; otherwise it would be in the power of the states to defeat that jurisdiction entirely by hostile legislation hedging about the commencement of suits by a statutory procedure, which could not be employed in the federal courts. *Railway Co. v. Jones*, 29 Fed. 193; *In re Jarnecke Ditch*, 69 Fed. 161, 163. It has been uniformly held

that matters of procedure are not jurisdictional, but personal, and are subject to waiver by the parties. *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264; *Duncan v. Associated Press*, 81 Fed. 417; *Fales v. Railway Co.*, 32 Fed. 673. So, notwithstanding the proceeding under the North Dakota statute for the collection of taxes is of such a character, owing to its procedure, that it could not be commenced in the federal courts, the controversy which has been removed by the petitioners presents every element mentioned in the first section of the judiciary act as essential to original jurisdiction, and jurisdiction on removal is therefore complete. The case *In re Cilley*, 58 Fed. 977, rests upon the ground that a proceeding to probate a will has never belonged to the jurisdiction of courts either of common law or chancery, but has for centuries been assigned to separate courts of probate. Such is not the case with a proceeding to determine the validity of taxes. Those proceedings have uniformly been referred to the jurisdiction of courts of chancery or common law.

The other grounds urged by counsel for the county in support of the motion to remand may be considered together. The matter which has been removed to this court is not a "separable controversy," but a separate suit. By section 1 of the statute of North Dakota the proceeding presents as many suits as there are parcels of land, but a defendant owning several parcels would be entitled to a consolidation, and by joining them in his answer, he accomplishes that result. Section 7 of the act contemplates this by expressly providing for a separate trial of the issues raised by each answer, and thus, in effect, makes the controversy presented by each answer a separate suit. See, also, *Pacific Railroad Removal Cases*, 115 U. S. 1, 22, 23, 5 Sup. Ct. 1113.

The objection that there might be other parties than the petitioners entitled to defend as to the same parcels, whose presence would defeat jurisdiction, is more imaginary than real. In the case of *Osborn v. Bank*, 9 Wheat. 738, 857, Chief Justice Marshall lays it down "as a rule that admits of no exception, in a case where jurisdiction depends on the party, it is the party named, in the record." In the proceeding under consideration there are no parties defendant named in the record except such as appear and answer, and the petitioners are the only defendants who have thus appeared with respect to the parcels of land mentioned in their petitions.

It is not necessary to decide whether the jurisdiction of this court can be maintained upon the ground that the suit is one arising under the laws of the United States. That would depend upon whether a formal complaint for the enforcement of the taxes would disclose the fact that petitioners hold the property as receivers appointed by a federal court. If such averment would be necessary, then its omission, by reason of the statute making the list a substitute for the complaint, could not avail to defeat jurisdiction. *Railroad Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703. But, if such an averment is not essential to a complaint for the enforcement of the taxes, then the suit is not one arising under the laws of the United States, so as to confer jurisdiction on the federal courts. *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738.

It is urged, in support of the motion to remand, that, if this court takes jurisdiction of the matter removed, it will necessarily bring into this court the entire proceeding which was presented to the state court. That, however, is not the case. As already stated, the proceeding which has been removed is, to all intents and purposes, a separate suit, and as to all parcels of land mentioned in the list filed in the office of the clerk of the district court of Stutsman county, except those mentioned in the receivers' petition, the proceeding remains before the state court, wholly unaffected by the removal. The motion to remand is denied.

COX v. GILMER et al.

(Circuit Court, W. D. Virginia. April 30, 1898.)

1. FEDERAL JURISDICTION—FEDERAL QUESTIONS—PLEADING.

In an action for false imprisonment, averments in the declaration that defendants, acting as judges of an election, caused plaintiff's arrest and imprisonment under color of a state law which is repugnant to the constitution of the United States, are not open to the objection of anticipating the defense for the purpose of showing that a federal question is involved. *White v. Greenhow*, 5 Sup. Ct. 923, 962, 114 U. S. 307, followed.

2. CONSTITUTIONAL LAW—DUE PROCESS.

The Virginia statute authorizing the judges of election to order the arrest and confinement, for not exceeding 24 hours, of any person who, after being ordered to desist, persists in interfering with, coercing, or intimidating voters at the polls (Act March 5, 1890), is not void for want of due process of law.

This was an action by Lewis W. Cox against J. Frank Gilmer, Samuel McCue, and Percy F. Payne to recover damages for false imprisonment. The case was heard on demurrer to the declaration for want of federal jurisdiction.

John E. Roller and Turner A. Hackman, for plaintiff.
Sipe & Harris and Geo. W. Morris, for defendants.

PAUL, District Judge. This is an action of trespass brought by the plaintiff against the defendants to recover damages for false and malicious imprisonment. The plaintiff and the defendants are all citizens of the state of Virginia. Omitting the names of the plaintiff and the defendants, the declaration is as follows:

"That the said defendants contriving and maliciously intending to injure the said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to cause the said plaintiff to be imprisoned for a long space of time, and thereby to impoverish, oppress, and wholly ruin him, heretofore, to wit, on the 3d day of November, 1896, in the Western district of Virginia aforesaid, the said defendant J. Frank Gilmer appeared before J. W. Christmas, J. F. Burnley, and W. Irving, then and there being judges of election at an election then being held on that day, and then and there, before the said judges, falsely and maliciously, and without any reason or probable cause whatever, charged the said plaintiff with intimidating, coercing, hindering, and tampering with the voters at one of the precincts at which was then being held an election under the laws of the state of Virginia and of the United States, which precinct is known as the 'Second Ward Precinct of the City of Charlottesville,' after he had been ordered by a majority of the judges of election to desist, and had refused so to do,

and upon such charge, falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the said judges of election to make and grant, in accordance with the provisions of the act of the general assembly of Virginia approved March 5, 1890, entitled 'An act in relation to the preservation of order at the polls,' a certain paper, signed by the said judges, in the words and figures following, to wit:

"The Commonwealth of Virginia, City of Charlottesville, to wit:

"To Percy F. Payne, Special Constable of Said City: It appearing to the judges of election, or a majority of them, at 2d ward precinct in said city, that voters are being intimidated or coerced, and are being hindered and tampered with, so as to be prevented from casting a secret ballot, and that L. W. Cox are engaged in so intimidating, coercing, hindering, and tampering with the voters, and that they have been ordered by the said judges of election, or a majority of them, to desist, and have refused so to do: These are therefore, in the name of the commonwealth of Virginia, to command you forthwith to apprehend and bring before the said judges of election at the above precinct the said L. W. Cox, to be examined touching the above offense, and to be further dealt with according to law. Given under our hands this 3d day of November, A. D. 1896.

J. W. Christmas,

"J. F. Burnley,

"W. Irving,

"Judges of Election."

"For the apprehending and taking of the said plaintiff, and for bringing the said plaintiff before the said judges of election to be dealt with in accordance with said law; and the said defendant J. Frank Gilmer, under and by virtue of said warrant, afterwards, to wit, on the day and year aforesaid, wrongfully, unjustly, and without any reasonable cause whatever, caused the said plaintiff to be arrested by his body by the defendant Percy F. Payne, and to be carried in custody before the defendant J. Samuel McCue, styling himself mayor of the city of Charlottesville, in the said Western district of Virginia, to be examined before him touching the supposed crime; and the defendant J. Samuel McCue, as aforesaid, having heard and considered what the said defendant J. Frank Gilmer could say, allege, or prove against the said plaintiff touching the supposed offense, then and there, to wit, on the day and year last aforesaid, in the district aforesaid, adjudged and determined that the said plaintiff should be conveyed and delivered to the custody of the keeper of the jail of the said city of Charlottesville; the mittimus signed by the said J. Samuel McCue being in the words and figures following, to wit:

"Mittimus.

"City of Charlottesville: To the Chief of Police of the City of Charlottesville, and to the Keeper of the Jail of said City: These are to command you, the said chief of police, in the name of the commonwealth of Virginia forthwith to convey and deliver into the custody of the keeper of the jail, together with this warrant, the body of L. W. Cox, charged before me, J. Samuel McCue, mayor of Charlottesville, Virginia, on the oath of J. W. Christmas, with a misdemeanor by him committed, in this, that the said L. W. Cox on the third day of November 1896 in said city did engage in so intimidating, coercing, hindering, and tampering with the electors, the said L. W. Cox was found guilty as charged and adjudged to pay a fine and costs amounting to \$——, is sent to jail, in this payment the accused has defaulted, and you, the keeper of the said jail, are hereby required to receive the said L. W. Cox into your jail and custody and there safely keep him until he shall thence be delivered in due course of law. Given under my hand and seal this 3 day of November 1896.

J. Samuel McCue,

"Mayor of Charlottesville. [Seal.]"

"And the said J. Samuel McCue refused to hear the cause upon the merits, or to allow the plaintiff to give bail to appear and defend the said charge when the same should be called against him; and thereupon the said defendant Percy F. Payne, calling himself a special constable under the laws of the state of Virginia, delivered the said plaintiff to the keeper of the said jail, by whom, under the said mittimus, he was kept and detained in prison

for a long space of time, to wit, for the space of 30 hours, then next following, at the expiration of which time the said plaintiff was fully acquitted and duly discharged for said offense. That the said defendants committed the trespass against the said plaintiff hereinbefore complained of under color of the authority of the act of the general assembly of Virginia, approved March 5, 1890, which is in the words and figures following, to wit: 'Be it enacted by the general assembly of Virginia, that the judges of election, if it shall appear that the voters are being intimidated or coerced from any source in the exercise of their suffrage by bystanders about the polling place, or that voters are being hindered or tampered with in any way so as to prevent the casting of a secret ballot, may order such person, or persons, so engaged in intimidating, coercing, or tampering with voters, to cease such action, and if such person, or persons, so engaged do not forthwith desist, the judges of election, or a majority of them, may order the arrest of such person, or persons, by a constable, or any other person authorized by law to make such arrest, and confine him, or them, in the county, or city, jail, as the case may be, not exceeding 24 hours, and such person, or persons, may be summoned by due process of law before the next term of the county, or corporation, court having jurisdiction, as the case may be, and upon the production of evidence proving his, or her, guilt, shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars,'—which act is repugnant to the constitution of the United States and invalid for the following reasons, to wit: In that it deprives a person of his liberty without due process of law; punishes a citizen without a trial, without a proper warrant for his arrest, and without a trial by jury. By means of which said several premises the said plaintiff has been and is greatly injured in his said credit and reputation, and brought into public scandal, infamy, and disgrace with and among all his neighbors and all other good and worthy citizens of this United States, and divers of these neighbors and citizens, to whom his innocence in the premises was unknown, have by reason of the premises suspected and believed, and still do suspect and believe, that the said plaintiff hath been and is guilty of a heinous offense against the laws of the land; and also by reason of the premises the said plaintiff hath suffered great anxiety and pain of body and mind, and hath been obliged to lay out and expend divers sums of money, in the whole amounting to a large sum, to wit, the sum of \$100, in and about the procuring of his discharge from said imprisonment, and in defending himself in the premises, and the manifestation of his innocence in that behalf, and hath been greatly hindered by reason of the premises from following and transacting his lawful and necessary affairs and business for a long time, to wit, for the space of —, and also by reason and means of the said premises hath been and is greatly injured and damaged in his credit and circumstances, to the damage of the said plaintiff five thousand dollars; and therefore he brings his suit."

The defendants demur to the declaration, and move the court to dismiss the case on the ground that this court has no jurisdiction of the same; the plaintiff and the defendants being citizens of the same state. The plaintiff contends that, though the parties are all citizens of Virginia, yet this court has jurisdiction of this action, because a federal question is involved. The federal question, as alleged in the declaration, is that the Virginia statute under color of which the defendants acted in securing the arrest and imprisonment of the plaintiff is in violation of the fourteenth amendment to the constitution of the United States. The clause of the fourteenth amendment which it is alleged the Virginia statute of March 5, 1890, violates, is the second clause of section 1, which is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The declaration, after stating at length the plaintiff's cause of action, which is an action for false and illegal imprisonment, alleges "that the said defendants committed the trespass against the said plaintiff hereinbefore complained of under color of the authority of an act of the general assembly of Virginia approved March 5, 1890," and recites the same. The declaration continues:

"Which act is repugnant to the constitution of the United States and invalid for the following reasons, to wit: In that it deprives a person of his liberty without due process of law, punishes a citizen without a trial, without a proper warrant for his arrest, and without a trial by jury."

The first ground of demurrer urged by the defendants is that the plaintiff, after stating his cause of action, goes further, and anticipates the defense that will be relied on by the defendants,—that is, that they were proceeding under the act of the general assembly of Virginia of March 5, 1890; that the plaintiff thus attempts to confer jurisdiction on this court by alleging that the defense which will be relied on involves a federal question. Counsel for defendants, in support of this position, cite, as a leading case, *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654. This was a suit brought by the state of Tennessee against the Union & Planters' Bank to recover taxes assessed by the state on the capital stock of the bank, and on shares of stock held by the stockholders of said bank; and in the bill it was alleged that the bank claimed exemption from such taxation under its charter, and that the act assessing it with taxes was in violation of the constitution of the United States, in that it impaired the obligation of a contract,—the charter of the bank exempting it from the payment of the taxes so assessed. In that case the supreme court held, as it had previously done in *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173:

"Where, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear in that class of cases that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleadings, must dismiss the suit, just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature, upon which the right of recovery will finally depend; and, if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind."

The same doctrine is held in *Mining Co. v. Turck*, 150 U. S. 138, 14 Sup. Ct. 35.

In *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, the supreme court held that:

"Under the acts of March 3, 1887, c. 373 (24 Stat. 552), and August 13, 1888, c. 866 (25 Stat. 433), a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the circuit court of the United States, as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and that, if it does not so appear, the want

cannot be supplied by any statement in the petition for removal or in the subsequent pleadings."

In accordance with this decision are the cases of *Land Co. v. Brown*, 155 U. S. 488, 15 Sup. Ct. 357; *Postal Tel. Cable Co. v. State of Alabama*, 155 U. S. 482, 15 Sup. Ct. 192; *Railroad Co. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869; *Kansas v. Atchison, T. & S. F. Ry. Co.*, 77 Fed. 339.

But it is contended for the plaintiff that the statement of his cause of action does not bring his case within the doctrine established by these decisions; that in the statement of his case he does not anticipate the defense that will be relied on by the defendants for the purpose of raising a federal question, so as to give this court jurisdiction. Counsel for the plaintiff insist that this case is covered by the decision of the supreme court in *White v. Greenhow*, 114 U. S. 307, 5 Sup. Ct. 923, 962. In that case both the plaintiff and the defendant were citizens of the state of Virginia. It was an action brought in the circuit court for the Eastern district of Virginia by a tax payer who had tendered to the tax collector, in payment of his taxes, coupons cut from the bonds of the state, which coupons were by an act of the general assembly of Virginia of March 30, 1871, receivable in payment of taxes by virtue of a contract with the state of Virginia. The declaration alleged that the defendant refused to receive the said coupons, under color of the authority of the act of the general assembly of the state of Virginia passed January 26, 1882, which forbade him to receive the same; that the defendant, after refusal of said tender, forcibly and unlawfully entered on the premises of the plaintiff, and levied upon and seized and carried away the personal property of the plaintiff, in order to sell the same for the satisfaction of said taxes, which he claimed to be unpaid and delinquent; that the acts of the general assembly of Virginia specified in the pleadings, which require the tax collector to refuse to receive such coupons in payment of taxes, and to proceed with the collection of taxes for the payment of which they have been tendered, as if they were delinquent, impair the obligation of the said contract between the state of Virginia and the plaintiff. The declaration was demurred to, and the demurrer was sustained by the circuit court, but overruled by the supreme court, the supreme court saying:

"The present action, as shown on the face of the declaration, was a case arising under the constitution of the United States, and was one, therefore, of which the circuit court had rightful jurisdiction."

In that case the cause of action was the seizure of the plaintiff's property under color of an act of the general assembly of Virginia which impaired the obligation of a contract, and was in violation of the constitution of the United States. In the case at bar the cause of action alleged is the arrest and imprisonment of the plaintiff by the defendants under color of an act of the general assembly of Virginia, which it is asserted "is repugnant to the constitution of the United States and invalid, in this, to wit: that it deprives a person of his liberty without due process of law, punishes a citizen with

out a trial, without a proper warrant for his arrest, and without a trial by jury." The court is unable to draw any distinction between the averments in the declaration in *White v. Greenhow*, supra, and the averments in the declaration in the case we are now considering. In each case the injuries complained of are alleged to be the direct result of the operation of a legislative act that is repugnant to the constitution of the United States. The plaintiff in this case does not, as contended by counsel for the defendants, allege or suggest that the defendants will set up by way of defense a claim that they acted under the constitution or laws of the United States, in order to raise a federal question, of which this court would have jurisdiction. The doctrine established by the decisions in *Tennessee v. Union & Planters' Bank*, and in the other cases cited supra, is not applicable here. If the act of the general assembly of Virginia approved March 5, 1890, is in violation of the constitution of the United States, the cause of action is properly stated by the averments in the declaration, and these would be sufficient to give this court jurisdiction.

This conclusion requires an examination of the question whether the act of the general assembly of Virginia approved March 5, 1890, is antagonistic to the constitution of the United States. The particulars wherein it is alleged in the declaration that the act in question is repugnant to the constitution of the United States are, "It deprives a person of his liberty without due process of law; punishes a citizen without a trial, without a proper warrant for his arrest, and without a trial by jury." The court, in discussing this act of the Virginia legislature, will necessarily confine itself to the question of its constitutionality. It has no concern with the facts connected with the arrest and imprisonment of the plaintiff. The power conferred by the statute may or may not have been abused in this instance by the officials acting under it. They may have exceeded the power conferred by the statute, and applied it to acts of the plaintiff which were not comprehended by its provisions. Wrongful acts by an official cannot affect the validity of the law under which the proceedings are taken.

The clause of the fourteenth amendment which counsel for the plaintiff insist is violated by the act in question, and to which the argument for the plaintiff is confined, is as follows:

"Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In *Walker v. Sauvinet*, 92 U. S. 90, the supreme court says:

"Due process of law is process due according to the law of the land. This process, in the states, is regulated by the law of the states. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the constitution, and laws of the United States made in pursuance thereof, or with any treaty made under authority of the United States. Article 6, Const."

The fifth amendment to the constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." In *Hurtado v. People of California*, 110 U. S. 516, 4 Sup.

Ot. 111, 292, Mr. Justice Matthews, referring to the provision of the fifth amendment, says:

"'Due process of law,' in the latter [fifth amendment], refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land, in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."

In accordance with the doctrine stated in the foregoing cases, it was held in *Hurtado v. California*, *supra* (syllabus):

"That a conviction upon such an information for murder in the first degree, and a sentence of death thereon, are not illegal by virtue of that clause of the fourteenth amendment to the constitution of the United States which prohibits the states from depriving any person of life, liberty, or property without due process of law."

In *Walker v. Sauvinet*, *supra*, it was held that a state statute dispensing with a trial by jury in a case at common law is not in violation of the fourteenth amendment to the constitution; and this notwithstanding that by article 7 of the amendments it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In *Miller v. State of Texas*, 153 U. S. 535, 14 Sup. Ct. 874, which was a case brought up on a writ of error from the criminal court of appeals for the state of Texas, the supreme court used this language:

"In his motion for a rehearing, however, defendant claimed that the law of the state of Texas forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the second and fourth amendments to the constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions; and, even if he were, it is well settled that the restrictions of these amendments operate only upon the federal power, and have no reference whatever to proceedings in state courts;" citing *Barron v. Mayor, etc., of Baltimore*, 7 Pet. 243 (a leading case), and other decisions.

"Officers who, by virtue of their offices, are conservators of the peace, have, at common law, the right to arrest without warrant all persons who are guilty of a breach of the peace, or other violation of criminal law, in their presence." *Davis', Cr. Law*, 402; *Muscoe v. Com.*, 86 Va. 443, 10 S. E. 534; 2 Am. & Eng. Enc. Law (2d Ed.) 881; *Carico v. Wilmore*, 51 Fed. 196. The judges of election in Virginia are by the act of 5th March, 1890, made conservators of the peace for the purpose of preserving order at elections, as they were, and still are, by the provisions of section 144 of the Code of 1887. The act complained of is a general law, applicable alike to all citizens of the commonwealth. The particulars wherein it is claimed that it deprives a person of his liberty without due process of law are:

1. That it punishes a citizen without a trial. The act does not confer upon the judges of election the power to inflict punishment. It confers upon the judges of election the authority, where a person is, in their judgment, violating the provisions of the statute, after he has been ordered to cease such action, and he refuses to desist, to order his arrest, and to commit him for a time not exceeding 24 hours. The act further provides that such person may, by due process of law, be summoned before the next term of the county or corporation court having jurisdiction, and on proof of his guilt he may be fined as the act provides. This is the trial provided by the act, and the constitution of the state of Virginia guaranties him a trial by jury.

2. As to the objection to the statute that it deprives a person of his liberty without a proper warrant for his arrest, we have seen, from the case of *Miller v. State of Texas*, supra, that a state statute which provides that a person may be arrested on a criminal charge without a warrant is not antagonistic to the constitution of the United States. The act of March 5, 1890, passed by the Virginia legislature, contains no such provision. As a matter of fact, a warrant of arrest was issued in this case. The act of the Virginia legislature of March 5, 1890, empowers the judges of election, under certain conditions, to order an arrest; and, whether we construe the statute as authorizing the arrest with or without a warrant, it does not, in view of the authorities cited, present a federal question which confers jurisdiction on this court. This disposes of all the grounds upon which its jurisdiction is invoked. None of them are tenable. The demurrer will be sustained.

TAYLOR et al. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

No. 599.

1. FEDERAL COURTS—JURISDICTION—SUIT AGAINST STATE OFFICERS.

A suit against state officers to enjoin them from certifying a tax, which they claimed to do by authority of the state, but which complainant avers to be without lawful authority, is not a suit against the state, within the meaning of the eleventh amendment.

2. SAME—INJUNCTION AGAINST TAXATION—STATE STATUTES.

That a state statute forbids the courts to enjoin collection of alleged illegal taxes, and restricts the remedy to an action to recover them back, does not affect the jurisdiction of a federal court, in cases of diverse citizenship, to entertain a suit to enjoin the state officers from certifying or collecting illegal taxes.

3. ENJOINING COLLECTION OF TAXES—EQUITY JURISDICTION.

A suit to enjoin the collection of a tax will not be entertained (at least, in the federal courts) when the sole ground relied on is that the tax is illegal or excessive. It must appear in addition that the circumstances make the wrong about to be inflicted of such a peculiar character that the remedies at law are inadequate, and so bring the case under some recognized head of equity jurisdiction.

4. SAME—REMEDY BY CERTIORARI.

It would seem that the fact that there is a remedy by certiorari in the state courts, which would prevent a multiplicity of suits in a case of ille-

gal taxation, does not affect the jurisdiction of a federal court in equity to enjoin the enforcement of the tax in cases of diverse citizenship, as the remedy by certiorari is not available in the federal courts, whose powers to issue the writ are limited to cases in which it is necessary for the exercise of their jurisdiction.

5. SAME.

In any event, certiorari is not an adequate remedy where the fact upon which the claim for relief is based can only be made to appear de hors the record.

6. TAXATION—RAILROADS, TELEGRAPHS, AND TELEPHONES—TENNESSEE STATUTES.

Act Tenn. April 5, 1897, in relation to the taxation of railroad, telephone, and telegraph property, which required the board of assessors therein provided for to complete their assessment on or before September 1st of that year, annulled by implication, and superseded, the assessment previously made for the same year by the old board of assessors under the act of 1895.

7. SAME—RELEVANCY OF EVIDENCE—MARKET VALUE OF STOCK AND BONDS.

In valuing railroad property for purposes of taxation, the market value of the bonds and stock of the corporation owning it may properly be considered, even if, under the statute, each line of road is to be valued by itself, and not as part of a system.

8. SAME—EQUALIZATION OF ASSESSMENT.

Under the Tennessee railroad assessment act of 1897, neither the board of tax assessors nor the board of equalization are charged with the duty of equalizing the taxable value of real estate with that of railroad property.

9. SAME—CONSTITUTIONAL LAW—EQUALITY OF TAXATION.

Under the Tennessee constitution of 1870 (article 2, § 28), declaring that all property shall be taxed "according to its value," to be ascertained as the legislature shall direct, "so that taxes shall be equal and uniform throughout the state," when it is the uniform practice in the various counties of the state to assess real property at not exceeding 75 per cent. of its true value, an assessment upon railroad property at its full value violates the uniformity of taxation which is the main purpose of the constitutional provision, and will be enjoined, although this involves a violation of the letter of the state statute passed pursuant to the constitution, which requires all property to be assessed at its full value.

10. SAME.

Equity will not enjoin an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of undervaluation create the unjust burden, intentionally and habitually violate the law by assessing property at less than its true value; but it need not affirmatively appear that they did so with intent to injure complainant and his class of taxpayers.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

The Louisville & Nashville Railroad Company—a corporation organized and existing under the laws of the state of Kentucky, and a citizen of that state—owns 519 miles of railroad in Tennessee. It filed its bill in equity in the circuit court of the United States for the Middle district of Tennessee against R. L. Taylor, W. S. Morgan, and E. B. Craig, citizens of Tennessee, who constitute a board of equalization of the state of Tennessee, to enjoin them from certifying, in accordance with the act of the legislature of Tennessee, passed April 5, 1897, a tax valuation upon complainant's railroad in Tennessee, to be apportioned by the state comptroller to the 35 counties, cities, and towns in which the road lies. Under the act of 1897, railroad, telephone, and telegraph property is assessed biennially by three members, known as "State Tax Assessors," whose assessment must be revised upon the record by another board, called the "Board of Equalization," composed of the governor, secretary of state, and treasurer. The appellate board is given the

power to examine each assessment, and increase or diminish the valuation upon any one or more of the properties assessed, so as to fix the proper value; and, until this board has acted upon the assessments, they are not deemed complete. The valuations fixed by the appellate board are certified to the comptroller, and he, in turn, certifies to the various counties and municipalities the valuation upon which taxes are to be collected by the respective counties and municipalities, the apportionment being graduated according to the mileage or value of the property assessed in each county and municipality. Under other laws of Tennessee, real and personal property of all persons, except railroad, telephone, and telegraph companies, is assessed by the taxing officers of each county. In counties having a population of 60,000 and over, one assessor for the county is elected, whose duty it is to assess all property in the county. In counties having a less population, each civil district has one assessor. Each assessor, before entering upon his duties, is required to enter into a bond in the sum of \$5,000, conditioned that he shall faithfully and honestly discharge the duties of his office, and to take and subscribe an oath that he will assess property at its fair cash valuation, without fear or favor. A board of equalization is provided for each county, composed of the judge or chairman of the county court, and four freeholders, not members of the county court, and not holding any other office,—state, county, or federal. These various boards meet in their respective counties, and compare and equalize the assessments of property made in and for the particular county. If the board desires to raise the value of any taxpayer's property, it can be done, upon notice to the taxpayer. Assessments of real estate made in 1896 were made for the biennial period of 1896 and 1897. Beginning with 1898, the assessments of realty are to be made every fourth year. Personal property is assessed annually. Until 1895 no attempt had ever been made to equalize the assessments of real estate or personality, as between the different counties; but at its session in that year the general assembly created a state board of equalizers, for the purpose of equalizing the values of real estate in the various counties. The same board was given power to assess and apportion the value of railroads throughout the state. In 1896 the board of equalizers assessed the complainant's railroad for the taxes of 1896 and 1897 as follows: The main line, at the rate of \$31,000 a mile; the Nashville & Decatur division, at the rate of \$21,000 a mile; the Henderson division, at the rate of \$20,000 a mile; the Memphis division, at \$13,500 a mile; the Cumberland Valley division, at the rate of \$15,000 a mile; the Clarksville & Princeton division, at the rate of \$4,000 a mile. By the act of April, 1897, the board of equalizers was abolished, and the duty of assessing railroads was imposed on a state board of tax assessors and a revisory board called the "Board of Equalization," but no power was given to the new board to equalize real estate. The board of state tax assessors made an assessment of railroads for 1897 and 1896, treating the assessment by the board of equalizers as annulled by the new law. Their valuation of complainant's main line was \$65,000 per mile; of the Nashville & Decatur division was \$47,000 per mile; of the Henderson division, \$62,000 per mile; of the Memphis division, \$27,000 per mile; of the Cumberland Valley division, \$23,500 per mile; of the Clarksville & Princeton division, \$5,000 per mile; and of the Clarksville & Mineral division, \$7,000 per mile. The appellate board of equalization on appeal reduced the assessment on the main line from \$65,000 to \$60,000; on the Henderson division, from \$62,000 to \$55,000; on the Nashville & Decatur division, from \$47,000 to \$40,000 per mile,—but in other respects affirmed the action of board of assessors.

Among other grounds set forth in the bill for equitable relief against this increase in the assessment is the following averment with reference to the evidence brought out before the state tax assessors: "That the complainant also filed in its behalf before said assessors a large number of affidavits (about 155 in number) made by tax assessors, trustees, other officials, and real-estate owners, which showed that in the counties through which plaintiff's said roads ran, and in the counties through which other railroad properties assessed at the same time by said assessors ran, real estate, generally and systematically, was assessed for taxation at from fifty to seventy per cent. of its value. These affidavits varied in form, but the general tenor and result

of them, and of depositions taken and filed as evidence by plaintiff, was to establish the fact that property generally in Tennessee, other than railroad property, by assessments generally and purposely made, does not bear a burden of taxation at a greater proportion than an average of sixty per cent. of its market value; and plaintiff alleges that such is the case, and that its said properties for said years, as finally fixed by said board of equalization, were assessed at more than their full value. Recognizing the fact that throughout the state of Tennessee property had been systematically assessed, from time immemorial, at a valuation for the purpose of taxation greatly less than its actual value, and at a valuation ranging from fifty to about sixty-five per cent. thereof, the state of Tennessee, through its board of assessors and equalizers, during the years 1895 and 1896 endeavored to systematize the county assessments, and bring them up to a common standard or basis of valuation. Accordingly the said board established as the basis of assessment for taxation in all of the counties of the state seventy-five per cent. of the actual or true value of the lands or property to be assessed, and raised the assessment in the various counties of the state for both said years, where they were less than seventy-five per cent., to seventy-five per cent. Plaintiff further shows that the said board of assessors and equalizers was the first state board of equalizers in the state of Tennessee, and was a legislative recognition of the systematic usage and custom of valuation prevailing, and the legislative purpose to render it uniform throughout the state. Plaintiff further states that said board of assessors and equalizers was not only intrusted with the power of equalizing assessments throughout the state, but also with the duty of assessing railroad, telegraph, and telephone properties for taxation; and it avers and charges that the assessment made by said board, and the valuation fixed upon said properties, were made by them at the rates fixed for the purpose of equalizing the assessments of such properties with those of the lands of Tennessee. If said assessments [i. e. those against which an injunction is prayed] stand, plaintiff will be bearing, in comparison with other property assessed in the state of Tennessee, at least twenty-five per cent. more than its just proportion; and the burden of taxation thus imposed upon it will be unequal, and in contravention of the constitution of the state of Tennessee, which provides that all property shall be taxed according to its value, and so that taxes shall be equal and uniform throughout the state, and so that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value, and also in contravention of the constitution of the United States, which guarantees to plaintiff and its property the equal protection of the laws." The bill further avers: "In pursuance of said assessment act, said board of equalizers will, as they have informed plaintiff's counsel, unless prevented, certify at 12 m., November 30, 1897, to the comptroller, the valuations so fixed by them upon said property. The comptroller will proceed, after said assessment shall have been certified to him according to the course of law, to collect for the state the taxes so wrongfully assessed, and will certify to the several towns, cities, and counties through which said roads pass, the said assessments; and the said towns, cities, and counties will proceed, under said act, to collect the same. Under said act, said taxes so assessed in behalf of the state, counties, and cities will become a first lien upon the property from the 10th of January of the year for which they are assessed. If the said taxes are not paid as assessed, distress warrants will issue against petitioner; and, if it shall not pay the same, then the comptroller will, under said act, advertise said property, and sell the same for cash, free from the equity of redemption, and execute to the purchaser a deed or deeds. Said roads are assessed for, and taxes will be payable under said assessments to, the following counties and towns in the state of Tennessee: Counties: Sumner, Davidson, Montgomery, Houston, Benton, Fayette, Henry, Carroll, Gibson, Stewart, Crockett, Haywood, Tipton, Shelby, Robertson, Dickson, Claiborne, Campbell, Williamson, Maury, and Giles. Cities and towns: Gallatin, Nashville, Springfield, Franklin, Columbia, Pulaski, Brownsville, Memphis, Erin, McKenzie, Humboldt, Milan, Paris, Clarksville, and a number of others. If plaintiff should seek by separate suits to resist said state tax, and the several taxes for said counties and cities, it would cause a multiplicity of suits,

entailing great hardship and expense; and if it should pay said taxes, and sue to recover them, the same result would follow. Plaintiff charges and says that the action of said board of assessors and of said board of equalizers was arbitrary, oppressive, in violation of the law, and will, if carried into effect, impose upon plaintiff a burden unjust and unequal, as between itself and other property owners throughout the state of Tennessee." The prayer of the bill was for an injunction against the defendants to prevent their certifying and delivering in any way to the comptroller of Tennessee the said assessment of the plaintiff's property so made by them, and from certifying or delivering in any way to the said comptroller the result of their action in respect of the assessment of the said properties of plaintiff for the years 1897 and 1898, or either of them, and that upon final hearing said injunction be made final, and for such further and other relief as the nature of this case may require.

The defendants filed a joint and separate answer, in which the reply to the passage already quoted from the bill was as follows: "Further answering, defendants say that complainant filed in its behalf before said assessors a large number of affidavits made by county tax assessors, trustees, other officials, real-estate owners, and others, in thirty-five counties in Tennessee, tending to show the assessed value of real estate in said counties. Said affidavits show that there was no uniformity in assessed values of real estate in the counties mentioned, but they did not show that there was any preconcert or agreement among the assessors touching the standard of value fixed upon real estate for the purpose of assessment. The valuations were not uniform. In some instances they were higher than others, and there was great irregularity and lack of uniformity in valuations. Defendants deny that the general tenor and result of said depositions and affidavits taken and filed by complainant was to establish the fact that property generally in Tennessee, other than railroad property, by assessments generally and purposely made, does not bear a burden of taxation at a greater proportion than the average of sixty per cent. of its market value. Defendants deny the statement that such is the case, and they deny that there was, or ever has been, any custom, immemorial or otherwise, of valuing property throughout the state at less than its true value. There are ninety-six counties in the state, and there never has been, and in the nature of things could not be, any concerted, agreed, or uniform basis of valuation, different from that prescribed by law. There are seventy-nine counties in the state through which railroads run, and said affidavits are from only thirty-five counties. Defendants say the various railroad companies objecting to the assessments made by the state tax assessors actively and energetically made strenuous efforts to obtain affidavits from any possible source showing assessments have been made below cash value, but none have been produced from forty-four counties of the seventy-nine having railroads in same. It was the function and within the jurisdiction of the assessors, in the first instance, and these defendants, acting as the board of equalization, to judge of the sufficiency and probative force or value of said affidavits as evidence; and their judgment was final and conclusive, and cannot be questioned or reviewed. Defendants also deny the statement that complainant's said properties for said years, as finally fixed by said board of equalization, were assessed at more than full value. They submit that the valuation of said board, under the laws of Tennessee, as will be more fully hereinafter shown, is final and conclusive. Defendants deny that the creation of the board of equalizers of 1895 and 1896 was a legislative recognition of the systematic usage and custom of valuation prevailing, and the legislative purpose to render it uniform throughout the state; but, on the contrary, said board was created for the purpose of putting property inadequately assessed, through the favoritism or mistaken judgment of local tax authorities, upon an equality with the property fairly assessed at its cash value, as required by law, and seeing that all property within the jurisdiction of the equalizers should be assessed at a fair cash value. Defendants deny that the board of equalizers of 1895 and 1896, by any official action, record, or report, put property in Tennessee upon a basis of seventy-five per cent. of the actual cash value of the same. If such was the basis of purported equalization on the part of the members of said board, it was one by some sort of an under-

standing among said members, never put of record in any official action, and kept from record in its minutes or inclusion on its report, and, if done, was in violation of law, and unauthorized by the statute creating the board, and subversive to the main purposes for which it was created. Defendants deny that the assessments and valuations of railroad, telegraph, and telephone properties made by said board for 1895 and 1896 were made at the same rate fixed for the purpose of equalizing the assessment of such properties with those of the lands of Tennessee. Upon information given by one of the members of said board in his deposition before the state tax assessors, and which remains uncontradicted, defendants state that most of the railroad properties in the state of Tennessee were assessed and valued at less than seventy-five per cent. of their actual cash value. Defendants deny that, by the assessment made, complainant will be bearing, or is made to bear, in comparison with other property assessed in the state of Tennessee, at least twenty-five per cent. more than its just proportion. Defendants deny that said assessments violate any provision of the constitution of the state of Tennessee, or the constitution of the United States." The answer further avers that the complainant has an adequate, sufficient, and complete remedy at law furnished it by the act passed in 1873, which provides that in all cases in which an officer charged by law with the collection of revenue due the state shall institute any proceedings or take any steps for the collection of the same, and the person proceeded against shall claim the tax to be unjust or illegal, or against any clause of the statute or of the constitution of the state, he shall pay the same to the state under protest, and file a suit within thirty days thereafter for the recovery of the same against the officer, and, if he obtains judgment, then the comptroller of the state shall issue his warrant for the amount thereof. The act provides that no writ for the prevention of the collection of any revenue claimed shall in any wise issue, either in the form of an injunction or otherwise. The answer further avers that there is a remedy by certiorari for the correction of errors alleged to have been committed by the state tax assessors, and that said remedy is exclusive of all others.

A temporary restraining order ex parte was issued on the filing of the bill, and then the cause came on for hearing on motion for preliminary injunction, at which a large amount of evidence was introduced, and the case was fully argued. The district judge (Clark) presiding filed an elaborate opinion, discussing the issues presented on the bill. It is reported in 86 Fed. 168. The circuit court made the following order: "Ordered and adjudged that the writ of injunction issue in this case, restraining and enjoining the defendants, Robert L. Taylor (governor), E. B. Craig (treasurer), and W. S. Morgan (secretary of state), ex officio the board of equalization for the state of Tennessee, from certifying and delivering to the comptroller of the treasury of Tennessee the valuation fixed by them upon the property of the complainant in Tennessee for taxation for the years 1897 and 1898, as set forth and shown in the bill, and restraining and enjoining them from certifying and delivering the said assessment or any record thereof, to the said comptroller: provided, however, that the complainant shall pay to the proper officers such sum or sums of money as shall be equal to the amount or amounts of the taxes assessed against and due from said company on its said property under and according to the assessment made in 1896 for the year 1897, and shall pay the same as, and it shall be a credit on, the taxes due from the complainant on its said property for the year 1897, to go as a credit on the assessment made in 1897 for 1897, if sustained on the final hearing; otherwise to be credited as may hereafter be decreed. And it shall be paid and received without prejudice to any right of either of the parties, or the state, counties, and municipalities of this state. Such payment must be made on or before the date at which the tax for 1897 must be paid, viz. February 1, 1898; and, if not then paid, the defendants may, upon notice of such failure, apply for and obtain a dissolution of the said injunction."

Geo. W. Pickle, Atty. Gen. (James C. Bradford and Granbery Marks, of counsel), for appellants.

Dickinson & Waller and Vertrees & Vertrees, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts, as above). The complainant below is a citizen of the state of Kentucky. The defendants are citizens of the state of Tennessee. The amount involved in the suit exceeds \$2,000. The constitution and the laws of the United States confer upon circuit courts of the United States jurisdiction to hear and determine controversies in law and equity between citizens of different states in which is involved more than \$2,000. There is no doubt, therefore, of the jurisdiction of the court below to hear and decide this case, unless the fact that the defendants were officers of the state of Tennessee, and were claiming to proceed under the authority of the state in the acts threatened and now enjoined, makes this a suit against the state of Tennessee. If so, then it is within the eleventh amendment of the federal constitution, which declares that the judicial power of the United States shall not extend to suits against a state. The complaint of the taxpayer in this case is that the defendants are about to execute a taxing law of the state against complainant in such a manner that, in view of the mode in which other taxing laws are executed against a large part of the taxable property of the state, the defendants will impose upon complainant an illegal burden, in violation of its right under the state constitution to pay only an equal share of the taxes in proportion to the value of its property. This is not a suit against the state. It is a suit against individuals, seeking to enjoin them from doing certain acts which they assert to be by the authority of the state, but which the complainant avers to be without lawful authority. The point has been so often decided by the supreme court of the United States that it is sufficient to refer to a few of the cases. *Smyth v. Ames*, 169 U. S. 518, 18 Sup. Ct. 423; *Reagan v. Trust Co.*, 154 U. S. 362, 390, 391, 14 Sup. Ct. 1047; *Pennyroy v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962. In *Cummings v. Bank*, 101 U. S. 153, a decree of injunction entered by a circuit court of the United States against state officers to prevent the enforcement of a state tax law in a manner violating the constitution of the state was affirmed by the supreme court of the United States, and it was then so well settled that such a suit was not within the eleventh amendment that the court did not deem it necessary to discuss the point.

The power to tax property is the power to take from the owner that which is his, to defray the expense of the benefit and protection which he receives from the government. If the power is illegally exercised, either by the legislature or the executive, it is an invasion of private right; and, unless there is some specific limitation upon the remedy imposed by law, the injured taxpayer may resort to the courts to vindicate his right against those officers who attempt such an invasion, by any form of action which he could use against any other wrongdoers in respect of the same class of wrongs. The state may limit the remedies of the taxpayer to redress wrongs done him by the erroneous statutory construction or the unwarranted finding of fact

by administrative officers to a hearing before administrative tribunals. In tax questions, such a hearing is due process of law. *Murray v. Improvement Co.*, 18 How. 272; *Ferry v. U. S.*, 85 Fed. 550.¹ The state may further curtail the jurisdiction of its courts of equity to interfere by injunction with the collection of taxes alleged to be illegal by providing that no injunction shall issue in such case. The government of the United States has made such a specific limitation, and no injunction can issue to prevent the collection of taxes levied by it. Rev. St. U. S. § 3224. The only remedy of the taxpayer is to pay the money, and sue to recover it back. The state of Tennessee has made a similar provision with respect to taxes collected for its use, but not as to taxes collected for its counties and cities. *City of Nashville v. Smith*, 86 Tenn. 217, 6 S. W. 273. The law of the United States forbidding injunctions in federal revenue cases prevents the issuing of an injunction by any court, whether federal or state, because the constitution and laws of the United States passed in pursuance thereof are the supreme law of the land. The law of Tennessee, however, affects only the jurisdiction of its own courts of equity. It does not restrict or diminish the power or jurisdiction of federal courts of equity, because only an act of congress can do that. In *re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785; *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75; *Kirby v. Railway Co.*, 120 U. S. 130, 7 Sup. Ct. 430; *Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936. Hence it follows that if the controversy at bar is one over which the circuit court of the United States, sitting in equity, from which this appeal has been taken, has jurisdiction by virtue of the constitution and laws of the United States, and according to the general principles governing equity jurisdiction, its power to issue an injunction against state officers is not restricted by a state statute which only applies, and can only apply, to injunctions issued out of state courts.

We have seen that the circuit court has jurisdiction over the cause, because it is a suit between citizens of different states. It only remains to inquire whether any ground exists for invoking the action of a court of equity. It is well settled that a suit to enjoin the collection of a tax will not be entertained in courts of equity,—at least, in those of the United States,—in which the sole ground set forth in the bill is that the tax is illegal or excessive. It must appear in addition that the circumstances makes the wrong about to be inflicted of such a peculiar character that the remedies in a court of law are inadequate, and so bring the case under some recognized head of equity jurisdiction. *Ogden City v. Armstrong*, 168 U. S. 224, 236, 18 Sup. Ct. 98; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250; *Allen v. Car Co.*, 139 U. S. 658, 661, 11 Sup. Ct. 682; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646; *Railway Co. v. Cheyenne*, 113 U. S. 516, 525, 5 Sup. Ct. 601; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Dows v. City of Chicago*, 11 Wall. 108. It appears from the bill that, if the assessment made by the defendants in this case is allowed to be certified down to the various counties and cities who are to collect the tax, the complainant, in order to vindicate its rights in a suit at law, will have to bring at least 35 different suits at law. Courts of equity frequently interfere to prevent a multiplicity of suits at law. It is a

¹ 29 C. C. A. 845.

well-recognized head of equity jurisdiction. In *Sanford v. Poe*, 37 U. S. App. 378, 16 C. C. A. 305, and 69 Fed. 546, this court sustained the equity jurisdiction of the circuit court to enjoin a state board for the assessment of telegraph and express companies from certifying the assessment to a large number of counties, on the ground that by the exercise of such jurisdiction a multiplicity of suits at law would be prevented, and the questions at issue could all be settled in one suit. In many cases in which the question of the equitable jurisdiction to enjoin a tax is considered by the supreme court of the United States, the prevention of a multiplicity of suits is specifically mentioned as a sufficient reason for its exercise. *Dows v. City of Chicago*, 11 Wall. 108; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250.

Another ground for equitable relief is that the excessive tax, if not paid, will be a cloud upon the title of the complainant, for the taxes assessed are a lien upon its property in Tennessee. The tax is not void, and the alleged illegal excess does not appear upon the record. It creates such an apparently valid incumbrance that a court of equity will interfere to remove it as a cloud, if in fact it is illegal. *Ogden City v. Armstrong*, 168 U. S. 224, 238, 18 Sup. Ct. 98.

It is argued on behalf of the defendants that there is an adequate remedy at law, which will prevent a multiplicity of suits, and that is by certiorari in the state courts. Such a proceeding is in its nature supervisory and appellate. Circuit courts of the United States are limited in their use of the writ of certiorari to those cases in which it is necessary for the exercise of their jurisdiction. Rev. St. U. S. § 716. *Ex parte Vallandigham*, 1 Wall. 243. In other words, the writ can only be used as ancillary to some other jurisdiction conferred by law; and, as no supervisory or appellate jurisdiction has been conferred upon circuit courts of the United States to revise the proceedings of special tax tribunals, it would seem clear that the circuit court below could not, on its law side, have furnished a remedy by certiorari to modify the assessments made by the defendants. The ordinary rule is that statutory remedies at law furnished by a state in its own courts will not oust the equitable jurisdiction of the federal courts of equity. This has been laid down with emphatic clearness by Mr. Justice Harlan, speaking for the supreme court, in *Smyth v. Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418. In that case it was argued that equitable jurisdiction to enjoin the action of a state railroad commission from putting into force an order fixing confiscatory railroad freight rates was prevented by the circumstance that the state had furnished a special remedy at law in the state supreme court for the revision of any unreasonable action by the commission. The argument was not successful. Mr. Justice Harlan said:

"One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

In *Payne v. Hook*, 7 Wall. 425, 430, it was objected to the federal jurisdiction in equity that there was an adequate remedy at law, by a special proceeding in the probate court, but it was held that this was insufficient. We should have no doubt upon this point, were it not for the decision of the supreme court in *Ewing v. City of St. Louis*, 5 Wall. 418, in which it appears to have been held that a remedy by certiorari in a state court for the review of special state tribunals was ground for holding that the circuit court of the United States had no equitable jurisdiction to enjoin the action of the state tribunal—

“Unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. * * * The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former.”

It is difficult to reconcile the case, on its facts with *Payne v. Hook* and *Smyth v. Ames*, and the statement in the last sentence quoted is certainly not in accordance with the views expressed by the supreme court in many later cases. See *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785; *McConihay v. Wright*, 121 U. S. 201, 7 Sup. Ct. 940. The language of *Ewing v. City of St. Louis* has, however, never been cited or commented on, or expressly overruled, by the supreme court. We prefer, therefore, to base the equitable jurisdiction in this case on another ground. It seems clear that the question which is mooted before us could not have been adequately raised upon a proceeding by certiorari. The complaint here made is that the board of equalization did not consider the fact that real and personal property, other than that of railroad companies, was habitually and intentionally assessed at 25 per cent. less than its real value, as a reason for reducing the assessment of railroad property to the same percentage. There was nothing on the record made up by the board to show that the defendants did not exercise this power of equalization, and did not exercise their best judgment to fix the assessment of railroads at 25 per cent. less than their real value. If they ought to have done so, and if there was no direct evidence that they did not, the reviewing court, upon certiorari, would have been bound to presume that they did so, and no extrinsic evidence would have been permissible to rebut this presumption. *Shelby Co. v. Railroad Co.*, 16 Lea, 401, 413, 1 S. W. 32; *Ogden City v. Armstrong*, 168 U. S. 224, 237, 18 Sup. Ct. 98; 2 Spell. Extr. Rem. § 2030.

Coming now to the merits of the bill, and issues raised by it, we pass without discussion the averment that the railroad assessment law is unconstitutional, because counsel for appellees have expressly declined to argue the point at this hearing.

Another objection to the validity of defendants' action is that they have made an assessment for the year 1897 without lawful authority. The state board of equalizers and tax assessors created by the act of 1895 had made an assessment of the valuation of railroads for the year 1897, and it is contended that this is the valid assess-

ment. The act of 1897 does not expressly annul the assessment of the old board, but we think that such annulment is necessarily implied. By the first section of the act of 1897, the new board of tax assessors was required to meet in May, 1897. By the second section, the railroad, telegraph, and telephone companies were required to file with the comptroller of the state on or before the 1st of May, 1897, and biennially thereafter, schedules and descriptions of their property. Section 4 directs that the state tax assessors shall receive the schedules from the comptroller immediately upon their organization, and "they shall immediately proceed to ascertain the value of said property for taxation." The assessment is required to be completed by the assessors, and filed with the comptroller, on or before September 1st, and by him, within three days, delivered to the board of equalization, consisting of the governor, the treasurer, and the secretary of state, who are required to examine the assessment and records made by the assessors, and complete the same, by affirming or modifying it, before the 3d day of October. The comptroller is then at once to distribute the assessment to the various counties of the state. Section 15 provides that the taxes so assessed shall be a first lien upon the property from the 10th of January of the year for which the taxes are assessed. Section 18 provides that the assessments shall "be made biennially, beginning with the year 1897." It is impossible to escape the conclusion, from these provisions, that the legislature intended that the new system should go into operation at once, and that the new boards should make an assessment for the current year of 1897. Such an intention cannot be reconciled with a continuance in force of the assessment of the old board for that year. Of course, the assessment of real property by the old board still remained valid, though the board was abolished; but as to railroad, telegraph, and telephone property, the act of 1897 was an annulment pro tanto.

The complainant makes a series of objections to the validity of the assessment of defendants, based on the data upon which the assessments were made, and the refusal of the assessors and the defendants to consider certain evidence tendered by the complainant. We do not propose to discuss the objections seriatim. It is sufficient to say that we find nothing in the evidence that was before the two boards which they might not properly consider, under the laws of Tennessee, as circumstances to aid them in reaching a conclusion as to the value of that part of the railroad of complainant lying in Tennessee. Nor do we discover anything in the record to indicate that such evidence was wrongly applied. We do not find anything in the record or affidavits affirmatively showing that the boards have included in their assessments property of the complainant not in Tennessee, and the defendants, in their report of the assessment and in their answer, expressly deny that any such property was included. The exclusion of certain expert evidence to show how unreliable a standard of value are market reports of stocks and bonds we do not regard as material. Even if this were a direct proceeding to review the action of the defendants, as upon error (which it is not), the ruling could hardly be the subject of criticism; for the mat-

ters touched upon in the affidavits were matters of general knowledge, which the defendants and the assessors might be presumed to know. The relevancy of such items of evidence as the market values of bonds and stocks, and the amount of gross earnings and the net earnings, in reaching a conclusion as to the value of a railroad or a telegraph line, has been so often recognized by the supreme court of the United States that we need not discuss it. *Railroad Co. v. Backus*, 154 U. S. 424, 14 Sup. Ct. 1114; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305; *Id.*, 166 U. S. 185, 17 Sup. Ct. 604. It is contended that the law of Tennessee, as declared by its supreme court, is that each line of railroad must be valued by itself, and not as part of a system, and therefore that the unit theory, upon which the foregoing decisions were based, has no application to Tennessee. If this be true, it only reduces the size of the unit, but it does not destroy the evidential bearing of stock and bond values upon the value of railroad property; and we must presume, in a collateral attack upon the action of the board, such as this is, in the absence of any showing to the contrary, that, within the limits of the reasonable discretion and judgment vested in the defendants, they gave proper consideration to the Tennessee rule, if it differs from the general rule, in weighing and applying the evidence of stock and bond values to the issue before them.

The next objection to the assessment of the defendants, and the most serious, is that they have assessed the railroad property of the state, including that of complainant, at its real value, whereas all other property of the state is habitually and intentionally assessed by the assessing officers, who are not the defendants, at not exceeding 75 per cent. of its real or correct value. We think it clear, from the provisions of the railroad assessment act of 1897, that neither board thereby created is charged with any duty to equalize the taxable value of real estate with that of railroad property. The board of equalization under the act of 1897 is made up of the same state officers who composed the state board of examiners under the prior act, and they were charged with the duty of revising the assessment of railroads made by the board of assessors and equalizers created by the act of 1895; but they had no revisory duty connected with that board's equalization of real estate throughout the state. Hence when, in 1897, the board of assessors and equalizers was abolished, the equalization of real estate values was abolished. The continuation of the state board of examiners under the new name of the "Board of Equalization" could have no effect to continue in force provisions of law as to state equalization of values of real estate, because that board never had any duty connected with the assessment of real estate at all. It is also clear that the act of 1897 commands the two boards created, by its terms, to fix the correct value of the railroad and other property which they assess. This means the real value of the property, and it is conceded that the laws for the assessment of real and personal property impose on the assessing officers the duty of assessing it at the same value.

The contention for the complainant is that the undervaluation of real and personal property is intentional and systematic throughout the state, and is in accordance with an immemorial and well-recognized custom; that, combined with the assessment at full value of all railroad property, the undervaluation of all other property makes a system of taxation operating to impose upon complainant, and all others holding the same class of property, a grossly unjust share of the cost of the state, county, and city governments; that this is in violation of the constitution of the state of Tennessee, which enjoins uniformity of taxation, according to value, on all property, and expressly forbids that one species of property shall be taxed higher than any other; and that a court of equity, because it is unable to remedy the glaring injustice done to complainants and others of the same class, by compelling the assessment on other property to be raised to its real value, may accomplish the same result by enjoining the defendants from assessing railroad property at any higher percentage than that at which other property in the state is assessed, although this is a departure from the rule of action prescribed for them in the statute creating them a taxing board. In considering the soundness of this contention, we come first to the facts. We find from the evidence, which is uncontradicted, that generally, in the state of Tennessee, for a number of years, the assessors and the board of equalization of each county have intended to assess, and have assessed, real and personal property at a uniform percentage less than its real value; that this percentage is not uniform between the counties, but that it is not substantially less than 25 per cent. in any of them. We base our conclusion on 150 affidavits contained in the record. They do not cover specifically more than 35 counties out of the 96 counties in the state; but when they are supplemented by the evidence of the members of the state board of equalizers, who officially investigated the manner of making assessments in each county in the state by actual visits and by correspondence, by examining the assessing officers, and by a comparison of tax values with actual sales, we have no difficulty in finding the fact to be as above stated. The affidavits from different counties are many of them the sworn statements of the assessors and county equalizers themselves, who made the assessments, and leave not the slightest doubt that in each county the undervaluation was systematic, was according to a uniform and well-understood rule of reduction, and was for the purpose of reducing the proportionate burden of the expenses of the state government which the particular county would have to bear. These expenses are, in effect, apportioned to each county in the proportion which its total tax valuation bears to the total tax valuation of all the property in the state. The motive for undervaluation is manifest, and the variation in the percentage, as between the counties, is dependent only on the varying extremes to which taxing officers of different counties are willing to go in departing from the statutory rule to reduce the state burden on their respective counties. We further find that in the year 1897, which is one of the years in respect to which relief is asked in the bill, the assessment of real estate which was not affected by the repeal of the act of 1895 was

equalized by the state board of assessors and equalizers, under that act, at a basis of 75 per cent. of its real value; that this was done intentionally, and was adopted as a rule of action by that board. This is established by the evidence of two of the three members of the board, and of the secretary of the board; and although there is a discrepancy in their statements, as to whether the basis fixed was 70 or 75 per cent. (two of them saying that it was 70, and the other 75), the fact that they deliberately fixed a percentage of real value as their basis of assessment is admitted by all of them. We are relieved from considering the weight of the evidence as to the exact basis by the averment of the bill, which fixes it at 75 per cent. The assessed value of real and personal property, except railroads and telegraph lines, in Tennessee, for the year 1897, was, in round numbers, \$312,000,000. The value of railroads and telegraph lines, as assessed by defendants, was \$63,000,000,—an increase of the assessed value of the year before of \$25,000,000. This makes a total tax value of \$375,000,000, and imposes on the railroads ^{63/275}, or about $\frac{1}{5}$ of the entire burden of the state, county, and municipal governments. If the assessment of the real and personal property were increased to actual value, it would be \$416,000,000, and the share of the railroad in paying governmental expenses would be a little less than $\frac{1}{5}$ of the whole. The existence of this glaring inequality no evidence has been introduced to contradict. The defendants have been content to deny it in a general way in their answer, and have adduced no testimony upon the point from any one professing to have specific knowledge on the subject.

The constitution of Tennessee adopted in 1870 (article 2, § 28) provides that:

"All property—real, personal and mixed—shall be taxed. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value."

The constitution of 1834, in article 2, § 28, provided that:

"All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the state. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of the same value."

The constitution of 1796 provided that:

"All lands liable to taxation in this state, held by deed, grant, or entry, shall be taxed equally and uniform, in such manner that no 100 acres shall be taxed higher than another, except town lots, which shall not be taxed higher than 200 acres of land each; no freeman shall be taxed higher than 100 acres, and no slave higher than 200 acres on each poll."

In *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 161, 36 S. W. 1041, 1043, the supreme court of Tennessee, referring to these provisions, said:

"In every instance the requirement that all property (except that mentioned for exemption) shall be taxed prohibits the legislature from making additional exemptions. * * * And likewise the requirement that all prop-

erty shall be taxed according to its value prohibits the legislature from laying a tax on any property in specie, or by the acre. Under the constitution of 1796, lands were taxed by the hundred acres; but the constitution of 1834, like that of 1870, contained the provision that 'all property shall be taxed according to its value.' This means that every property tax shall be graduated by the value of the property on which it is laid."

There has been much discussion at the bar upon the point whether the constitution of 1870 requires that all property shall be assessed at its full value, or whether it would satisfy the constitution if the taxing laws required all property to be assessed for taxation at a uniform percentage,—say 75 per cent. of its real value. Language has been quoted from the opinions of judges of the supreme court of Tennessee supporting the former view, but they were obiter, and wholly unnecessary to the decision of the cases before the court. Mayor, etc., of Chattanooga v. Nashville, C. & St. L. R. Co., 7 Lea, 569; Brown v. Greer, 3 Head, 696. Speaking for Judge LURTON and myself, we should be inclined to hold that any legislative system of tax assessment of property based on a uniform percentage of its value would be "according to its value," and would be a compliance with the constitutional mandate. This is, we think, in accordance with the latest expression from the supreme court of Tennessee in the Reelfoot Lake Levee District Case, already quoted. Judge SEVERENS doubts, and the difference is not material, for we are unanimously of opinion that the question is not controlling in this case. The constitution expressly gives the legislature the power to prescribe that all property shall be assessed at its true value, and the legislature has done so. Such a legislative command is as binding on those whom it affects as if it were in the constitution, because passed in pursuance of the fundamental law; and counsel for complainant do not avoid the difficulty which confronts them in the case, to wit, that they are seeking to enjoin defendants from doing that which the letter of the law requires the defendants to do, by showing that the requirement is in a constitutionally enacted statute, rather than in the constitution itself.

The sole and manifest purpose of the constitution was to secure uniformity and equality of burden upon all the property in the state. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. This is a flagrant violation of the clause of the constitution forbidding discrimination in taxation between different species of property. That clause is self-executing. Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 160, 36 S. W. 1043. How is it to be remedied? It is said on behalf of the defendants that the

only method consistent with the constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we cannot regard the suggestion as a serious one) that the railroad companies of the state should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the state from \$312,000,000 to \$416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment. The question presented is, then, whether, when the sole object of an article of the constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the constitution and the law for attaining its sole object. We say "apparent" departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent., and a smaller part at 100 per cent. The method of assessing one species of property cannot be truly said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity cannot be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise is to make the restrictions of the constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident. The same dilemma has been presented to other courts. They have not always taken the same horn. There is a conflict of authority, but we are glad to say that the adjudications of that court whose decision we must follow support the views we have above expressed. Before examining the cases in the supreme court of the United States, let us refer to the decisions of some of the state courts upon the question:

In *Randell v. City of Bridgeport*, 63 Conn. 321, 28 Atl. 523, the case came into court on a direct appeal from the action of a board of equalization, called the "Board of Relief of the City of Bridgeport." The superior court found as a fact that it had been the uniform rule of the board of assessors and the board of relief of that city to value all property, for the purpose of taxation, at one-half of its fair market value. The court found that the plaintiff's prop-

erty was assessed at its full market value as the statute required. The supreme court held that the complainant was entitled to an assessment of one-half the real value of his property, and this in the face of a mandatory provision of the statute that all property should be assessed at its true value. The court said:

"There are two ways in which a taxpayer may be wronged in levying taxes: An assessment may conform to the statute generally, and the individual may be assessed in excess of the statutory requirement. A wrong of that description is easily redressed. But when the town disregards the statute, and establishes a rule of its own, assessing the property at one-half of its actual value, and then assesses an individual at the full value of the property, while the injury is the same, the application of the remedy becomes more complicated. Practically, the only way to redress the wrong is to reduce the assessment, and that makes the court seem to disregard the statute, while, if the wrong is not redressed, there is a denial of justice, and the court practically ignores the statute giving an aggrieved party an appeal, and practically ignores the statute which provides that 'said court shall have power to grant such relief as shall to justice and equity appertain.' Thus we are in a dilemma. If we choose one horn of it, a public statute is violated, not so much by the court as by the town, but by an apparent approval of the court as to one individual, and that by an express command of another statute, and by the dictates of justice. If we take the other horn, the court itself violates a remedial statute, and becomes in a measure a party to the wrongdoing. Under the circumstances, we do not hesitate to choose the former, and to redress the wrong."

This, it is true, was a direct review of the action of the board of equalizers; but the court, in reaching its conclusion, expressly proceeded under the power given it by statute to grant such relief as to justice and equity should appertain. This court is entitled to grant to the complainant exactly the same character of relief. As already pointed out, the fact that the injunction to assess property at its true value is found in the statute, and not in the constitution, cannot create any distinction in respect to the point we are now discussing, for either is equally binding on the taxing officers and the courts. Courts have no more right to set aside a lawfully enacted statute than they have to defeat the operation of the constitution. The point of this case, and those about to be cited, is that where either the uniformity required by law, or the prescribed means of attaining it, must be departed from, the court will choose the lesser evil.

In *Cocheco Co. v. Strafford*, 51 N. H. 455, the law provided that the selectmen should appraise all taxable property at its full and true value in money. The statute further provided that the court should make such order thereon as justice required. Mr. Justice Doe, upon this point, in a concurring opinion, said:

"Justice requires an equal rate of taxation of Strafford real estate. If the Strafford real estate of others was appraised in 1870 at a less rate than its full value, the real estate of the plaintiffs should be appraised by the commissioners at the same rate, so that the plaintiffs shall pay their proportion of tax and no more. The usual rate in farming towns is well understood, and the practice of undervaluation is so universal as to raise a presumption of fact that it prevails in Strafford. When the commissioners have ascertained the fact of the full value of the plaintiffs' Strafford real estate on the 1st day of April, 1870, they should proceed further, and appraise it at its value as compared with the value at which other Strafford real estate was appraised by the selectmen in 1870. This comparative value is the only question which the commissioners are appointed to decide, and is a pure question of fact."

This language was approved in *Manchester Mills v. Manchester*, 58 N. H. 38, on a petition for the abatement of the real-estate tax, in which the court appointed a committee to find and report—First, the true value of the plaintiff's estate; and, second, the true value of real estate of Manchester, other than plaintiff's, compared with its assessed value. The question whether the second point was a proper subject for inquiry came before the court, and it was held that it was a proper subject of inquiry, and that the abatement should proceed on the findings made upon such inquiry.

In *Ex parte Ft. Smith & Van Buren Bridge Co.*, 62 Ark. 461, 36 S. W. 1060, the case arose on an appeal from the refusal of the county board of equalization to reduce the taxation of assessment upon the petitioner's bridge. The assessor had assessed one-half of the bridge in Crawford county at \$150,000, and the county board of equalization had reduced this assessment to \$125,000. At the trial in the circuit court it appeared that \$250,000 was a fair market price for the entire bridge, and that \$125,000, therefore, was the full value of one-half of the bridge. It further appeared that all the real estate in Crawford county was assessed at 50 per cent. of its actual value. The appellate court contended that, under the circumstances, the assessment of one-half the bridge should be reduced according to its request to \$75,000. The constitution of the state was exactly in the words of the Tennessee constitution, to wit:

"That all property subject to taxation shall be taxed according to its value, to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state, and provided further that no one species of property, upon which taxes shall be levied, shall be taxed higher than another species of property of equal value."

The law passed in pursuance of this section of the constitution required the assessors of the counties in the state to assess the real estate at its true market value in money. The court, in construing this question, said:

"It may be said that, inasmuch as its property was not assessed above its true value, it had no right to complain. But this is not true. It had the right to demand that no unequal burden be imposed upon it by taxation. The duty to contribute to the support of the state government by the payment of taxes is imposed upon all persons owning property subject to taxation. The constitution provides that this burden shall be apportioned among them according to the value of their property, to be ascertained as directed by law. When, therefore, the property of a few is taxed according to its value, and of all others at one-half its value, then the few are required to contribute double their portion of the burden. This is manifestly a wrong, and justice demands that it be redressed whenever it can be done conformably to the laws. * * * In this case the county court acquired jurisdiction, by the appeal of the bridge company, to grant relief from the illegal, erroneous, or unequal assessment of appellant's property, but did not acquire the right or authority to make the valuation of all real property in the county for the purposes of taxation, in all cases in which it had not been done, the true value, by raising it, or to change the valuation of any property except the bridge. The assessment of no property can be increased without notice first given to the owner by the board of equalization. How, then, was the county court to afford relief to appellant? The only relief it could have afforded was to reduce the valuation so as to make it conform to the standard adopted in the valuation of the other real property in the county, or the average valuation of such property. Why should not this relief be granted? The valuation of property is only

a constitutional means adopted for the purpose of making the burdens of government bear upon each taxpayer in proportion to the value of his property. The relief suggested accomplishes that end in this case. By granting it, a constitutional right will be enforced, and by denying it, will be withheld, because the means devised for its enforcement were not adopted. By pursuing the latter course, the constitution will be made the means of defeating itself, by the imposition of unequal burdens. To avoid this result, the relief should be granted."

In the case of Board of Sup'rs of Bureau Co. v. Chicago, B. & Q. R. Co., 44 Ill. 229, the appeal was a direct appeal from the board of supervisors, which assessed the value of the property of the railroad company. It appeared that the valuation of property of individuals, except that of the railroad company ranged from one-fifth to one-third, while that of the railroad company ranged from one-third to one-half; and the appellate court decided that the assessment of the railroad property must be at the same percentage of the real value as that of individuals. The constitution of Illinois required the general assembly to provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise. The act to carry out this section provided that each separate parcel should be valued at its true value in money. The court held that it was the duty of the supervisors to impose the same percentage of assessment upon the railroad company as had been assessed by the assessors upon the property of individuals. The court said:

"It is no argument to urge that the fault is with the assessors in the case of individuals, and with railroad companies in making out their schedules for the county clerk. If the assessors violate their duty, are railroad companies to be the sufferers? If they neglect to act fully up to all the requirements of the law, is that any reason why A. should pay forty per cent. more taxes, in proportion to value, than B.? The rule adopted by the assessors in this state has grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. * * * Would not the sense of justice of every man in this community be outraged by allowing this or any other depreciation to one class of people, and demanding of another a higher tax on a similar article of the same actual value? The proposition cannot commend itself to the favor of any just man, and can receive no countenance in a court of justice. It is an admitted fact on both sides to this controversy that the property of no one owner in the county of Bureau has been taxed on its real value, and that the per cent. added by the board of supervisors to the valuation of the property of appellees imposes on them a greater proportionate burden than the law requires them to bear. We are of this opinion, and therefore consider the action of the board unfounded in justice, and in direct opposition to the constitution. The great and attractive feature of uniformity has been disregarded by the board, and appellees victimized. It may be very desirable that the greatest share of the public burdens shall be borne by these corporations, but, until there be a radical change in our fundamental law, it cannot be done. They stand on the platform of equality before the law, and no greater burden for the support of government can be imposed upon them than can be placed on the individual taxpayer."

In the case of Chicago, B. & Q. R. Co. v. Board of Com'rs of Atchison Co., 54 Kan. 781, 39 Pac. 1039, the railroad company filed a bill in equity to enjoin the collection of 75 per cent. of its taxes

levied against it in Atchison county. The railroad was assessed by a state board of railroad assessors, who assessed the road at its true and actual value. In the county of Atchison all the city and township assessors, for the purpose of carrying on an equal basis the assessment, agreed among themselves to assess all property 25 per cent. of the true value of the same. The railroad property was thereupon assessed at the true value, while the property of individuals and other corporations in Atchison county was assessed at 25 per cent. of its real value. The constitution of the state required that the legislature should provide for a uniform and equal rate of assessment and taxation. The legislature provided that all property should be assessed at its true value. The court said:

"This unequal valuation was not the result of an accidental omission of property from the assessment list, or an accidental valuation of property at more or less than its true value. The state board of railroad assessors valued the railroad property in Atchison county, for taxation, at its true value; but the city and township assessors of that county, by an agreement between themselves, assessed all the other property of the county at 25 per cent. of its true value. Thus, by concerted action, the statute of the state was flagrantly disregarded. * * * There has been gross discrimination in the taxation of the railroad property. The law has not been observed. The taxes complained of are not equal and uniform. While exact equality and uniformity cannot be had, and while mistakes and omissions by assessors may not in all cases be the subject of adequate remedy in the courts, yet for the gross injustice and violation of the law complained of there ought to be some remedy. The plaintiff below, having tendered all of the state taxes, and also its just share of the county and other taxes, is entitled to have enjoined the collection of the illegal excess."

As has already been said, there are cases in which the other horn of the dilemma has been taken, the injustice to the complaining class of taxpayers has been allowed to continue, and the violation of constitutional or statutory uniformity and equality has gone on unhindered, in order that the letter of the law may be preserved while its spirit is flagrantly broken. *Wagoner v. Loomis*, 37 Ohio St. 571; *Central R. Co. v. State Board of Assessors*, 48 N. J. Law, 1, 2 Atl. 789. See, also, *City of Lowell v. County Com'rs*, 152 Mass. 372, 25 N. E. 469.

We are relieved from a further discussion of the question by the decision of the supreme court of the United States in the case of *Cummings v. Bank*, 101 U. S. 153. In that case the assessors of real property, the assessors of personal property, and the county auditor (who was the assessing officer of the first instance for bank shares) of the county where the complainant bank was situated agreed to assess real and personal property at one-third its value, and money or invested capital at six-tenths its value. This agreement was in violation of the statutes under which they were acting, which required assessments to be at the true value in money. The state board of equalization for banks increased the assessment of complainant's bank shares to their full market value. The state board had no power to equalize bank shares with real or personal property, and, in assessing these bank shares at their full value, it was following the exact course prescribed by statute, and the statute was passed in accordance with the constitution of Ohio, which requires

the legislature to pass laws taxing all property "by uniform rule at its true value in money." This action was brought by the complainant bank to enjoin the county treasurer from collecting the tax on the assessment against its shares which had been certified down by the state board of assessors. The circuit court of the United States enjoined the treasurer from collecting tax on a valuation greater than one-third of the real value of the shares. The effect of this order was to annul an assessment by the state board of equalization which was strictly in accordance with the letter of the statute governing it in the discharge of its duties, and which was equally in accord with the standard of value for assessment fixed by the constitution of the state. The decree of the circuit court was affirmed by the supreme court on the principle stated by the court as follows:

"When a rule or system of valuation is adopted, by those whose duty it is to make the assessment, which is designed to operate unequally, and to violate a fundamental principle of the constitution, and when the rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

It should be noted that, although the complainant was a national bank, the case did not arise under the act of congress, but was expressly based on the right of the complainant, under the state constitution, to uniformity of taxation according to value. The taxing laws of Ohio did not provide one tribunal of appeal for equalizing values of all classes of property, and it was objected on behalf of the bank that, in view of the constitutional injunction upon the legislature to pass laws taxing all property by uniform rule at its true value in money, a system in which different classes of property were assessed by independent tribunals, with no common revisory authority, must be invalid, because so poorly adapted to secure uniformity. The court did not yield to this argument, however. Mr. Justice Miller, delivering the opinion of the court, gave its reasons for not doing so as follows:

"But there are two reasons why we cannot so hold: First, it might be that in every instance the result would be the valuation of bank shares at a lower ratio in proportion to their real value than that of any other property, and therefore plaintiff would have no ground of complaint. And, secondly, what is more important, if these original valuations and equalizations are based always, as the constitution requires, on the actual money value of the property assessed, the result, except as it might be affected by honest mistakes of judgment, would necessarily be equality and uniformity, so far as it is attainable. So that while it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law, and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because, while its just interpretation is consistent with the constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful, while the statute is valid. The evidence, we are compelled to say, shows this to be true of the case before us."

The justice then discussed the facts, to show that the laws had been unfaithfully administered by those charged with their execu-

tion, and that as the only method provided in the system by which constitutional uniformity was to be secured, namely, by taxing all property at its true value in money, though required by statute, had been departed from by the administrators of the law in assessing other classes of property than that held by the complainant, equity might relieve complainant from his unequal burden thus placed on him by enjoining taxation on more than one-third of the assessment against him, though his property had been only taxed at its true value. After commenting on the widespread custom or rule in many states to undervalue real estate, growing out of the effort of the landowner to produce something like equality of burden with personal property which escapes taxation by being hidden, the justice concluded:

"But, whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property, around which the constitution of the state has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied, so far as the judicial power can give remedy."

The case before us cannot in any material respect be distinguished from the *Cummings Case*. In this case, as in that, the injunction sought is against the enforcement of an assessment upon complainant's property which was made at the true value of the property, in accordance with the mandate of the constitution and statute, by assessing officers who had not themselves discriminated against complainant's property by undervaluing other species of property, and who were not themselves guilty of any fraud. In this case, as in that, the unjust operation of the assessment grows out of the systematic and intentional undervaluation of other species of property by assessors who are not responsible for the assessment complained of. In this case, as in that, the effect of the injunction is to compel certain assessors of the state to reduce their assessment to the illegal standard of valuation adopted by different and unfaithful assessors of other species of property, and is justified by the result that in this way is secured something like the uniformity which is the sole purpose of the constitution. It has been pressed upon us that no such preconcert of action by the assessing officers, and no such uniform rule of undervaluation, have been shown in this case as appeared in the *Cummings Case*, and that upon these circumstances the *Cummings Case* turned. We have already found, from the evidence, that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the assessors and county boards of equalization, who have a common motive for the reduction. More than this, it is clearly shown that the state board of assessors and equalizers in 1896 intentionally equalized all real estate in the state at 75 per cent. of its true value for the taxation of the year 1897. Could preconcert be clearer than this? It is further said that, before the remedy pursued in the *Cummings Case* can become applicable, it must appear that the undervaluation of one species of property was adopted as a rule of action by the assessors for the fraudulent purpose of discriminating

against the complaining taxpayer and his class, and that no such case is presented to this court. Now, it is true that, before equity will relieve in such a case, it must appear that the assessing officers whose acts of undervaluation create the unjust burden must intentionally and habitually violate the law, by assessing property at a less valuation than that which they know to be its true value; but it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing. It is true that in the *Cummings Case* the unfaithful assessors, or some of them, did undervalue both real and personal property, and money capital, in which were included bank shares, at different percentages of their true value; but the assessment of which complaint was made was not the work of these assessors at all, but, as here, of a state board of equalization. An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and board of equalization of each county have been actuated in their violations of the law by the desire to reduce, as far as may be, their county's share of the state burdens. Their undervaluations of property have been uniform as to all property in their county but railroads. They could not but know that such undervaluation must work an injustice against the property of railroads, if assessed at its true value by a state board, and taxed for county and state purposes on that basis. In this sense, the rule of undervaluations adopted in each county is necessarily "designed to operate unequally," within the meaning of Mr. Justice Miller in the *Cummings Case*. The ratio decidendi of that case is to be gathered from the facts, and the language of the opinion is to be interpreted in the view of the facts. The case has been commented on by the supreme court in a number of subsequent cases, but it has never been modified or overruled.

Bank v. Kimball, 103 U. S. 732, was a bill to enjoin the collection of taxes. The bill was dismissed on demurrer. The bill averred, in effect, that complainant's bank shares were assessed at less than their value, by 50 per cent., but that other property was assessed at less even than this, and that for this reason no tax should be paid on the bank shares. Referring to the *Cummings* and other cases, Mr. Justice Miller, who spoke for the court, said:

"It is held in these cases that, when the inequality of valuation is the result of a statute of the state designed to discriminate injuriously against any class of persons or any species of property, a court of equity will give appropriate relief, and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together, and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations, which establish no rule on the subject."

In *Supervisors v. Stanley*, 105 U. S. 305, the averment of the petition of a national bank seeking to recover taxes claimed to have

been illegally paid was that the assessment of its shares was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state of New York. In granting a right to amend and have a new trial, Mr. Justice Miller, speaking for the court, said:

"If by this it is supposed that a few individual instances may be shown of partial assessments favoring citizens, as compared with the national banks, we think it is erroneous. But if it is intended to allege that, apart from the question of the right of the shareholder to deduct for his debts,—a question which in this case was disposed of, and was in issue,—it can be proved that the assessors habitually and intentionally, or by some rule prescribed by themselves or by some one whom they were bound to obey, assessed the shares of the national banks higher, in proportion to their actual value, than other moneyed capital generally, then there is ground for recovery, and a hearing as to that should be granted."

In *Stanley v. Supervisors*, 121 U. S. 550, 7 Sup. Ct. 1239, Mr. Justice Field said:

"When the overvaluation of property has arisen from the adoption of a rule of appraisalment which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in *Cummings v. Bank*, 101 U. S. 153."

In *Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, the law of New Mexico required property to be assessed at its cash value. The plaintiff's property was originally assessed at its full value, while the other property was assessed at 70 per cent. It appealed to the board of equalization, which reduced the assessment to 85 per cent. Mr. Justice Brewer said:

"Surely, upon the mere fact that other property happened to be assessed at thirty per cent. below the value, when this did not come from any design or systematic effort on the part of the county officials, and when the plaintiff has had a hearing as to the correct valuation on appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction, or have that decision of the board of equalization reviewed in this collateral way."

We find nothing in these cases which should change our view, already expressed, of the effect of the *Cummings Case*. They merely emphasize the point that equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained; that, in other words, what may be called "sporadic cases of discrimination" cannot be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluations for taxation by the taxing officers, which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner. The reason for the distinction is obvious. The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the

result of an illegal purpose on the part of any one. If equitable interference in such cases could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal; and it cannot be justified except on the ground of an obvious violation of law, or something equivalent to fraud. It does not lie where the injury complained of arises only from the erroneous, but honest, judgment of the lawfully constituted tax tribunal. The interference by the chancellor in the case at bar and in the Cummings Case rests on something equivalent to fraud in the tribunal imposing the tax. The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination. Therefore the injunction might issue against the assessment upon the fully-assessed property, as void altogether, until a new and uniform assessment upon all property according to law could be made. And such is the rule in some courts. *Weeks v. Milwaukee*, 10 Wis. 263; *Hersey v. Board*, 16 Wis. 192; *Smith v. Smith*, 19 Wis. 619. The inequity of allowing the taxpayer to escape altogether, and the intolerable inconvenience to the public in the delay incident to such a course, however, lead a court of equity to shape its order so as to allow only so much of the fraudulent judgment to be enforced against the complainant as may be done without imposing on him any inequality of tax burden. We reach the conclusion, therefore, that the circuit court was right in enjoining the unjust, unequal, and (in the sense already explained) fraudulent assessment against the complainant; but we think the order should have required, as a condition of the issuing of the injunction, that the complainant should pay to the proper officers a tax upon the 75 per cent. of the assessment made by defendants. The evidence, taken with the averments of the bill, does not establish that the discrimination against the complainant's property really exceeds this. The condition imposed by the circuit court was the payment of the taxes on the assessment for 1897 by the state board of assessors and equalizers. That assessment, as we have found, was annulled by the act of 1897. The order of the court is that the order of injunction be modified as above stated, and that, as thus modified, it be affirmed, at the costs of the appellants.

BEARD v. INDEPENDENT DIST. OF PELLA CITY.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1898.)

No. 1,052.

1. FEDERAL AND STATE COURTS—TRUST FUNDS IN INSOLVENT NATIONAL BANK—RULE OF PROPERTY.

The right to fasten a special trust upon funds held by the receiver of an insolvent bank in Iowa not having been created by any statute of that state, but depending upon the general principles of law and equity applicable to the circumstances, decisions of the supreme court of that state in relation thereto, if not in accord with the decisions of the supreme court of the United States or the decided weight of authority, do not constitute a rule of property binding on the federal courts.

2. INSOLVENT BANKS—FOLLOWING TRUST FUND.

In order that a trust fund may constitute a preferential claim against the funds of a national bank in the hands of a receiver, it must appear that these funds were actually augmented by the receipt of the trust fund. And if the trust fund was created merely by a check on the same bank drawn by a general depositor in favor of the trustee, the amount of which was then shifted to the latter's credit, there is no right to a preference.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

This was a proceeding in equity instituted by the independent district of Pella city against R. R. Beard, receiver of the First National Bank of Pella, for the purpose of compelling the receiver to recognize as a trust fund, and pay in full, the amount of a balance deposited by the treasurer of the district. There was a finding and decree in favor of complainant in the circuit court, and the receiver appeals.

A. B. Cummins, for appellant.

P. H. Bousquet, I. M. Earle, and S. F. Prouty, for appellee.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. From the record in this case it appears that for some years prior to June, 1895, the First National Bank of Pella, a corporation created under the provisions of the act of congress known as the "National Bank Act," carried on at Pella, Iowa, a banking business until about June 1, 1895, when it was declared to be insolvent, and R. R. Beard, the appellant, was duly appointed receiver thereof by the comptroller of the currency. It further appears that for years previous to the appointment of the receiver the treasurer of the independent school district of Pella city had been in the habit of depositing the funds of the school district in the named bank; the account on the books of the bank being headed, "Treasurer of Independent School District." The moneys thus deposited were not received by the bank as a special deposit, but were treated the same as the moneys paid in by other depositors; being intermingled with the general funds of the bank. When the bank failed, and was placed in the hands of a receiver, the account showed a balance due to the treasurer of the school district of \$4,676.25; and thereupon the independent district brought this proceeding in equity for the pur-

pose of compelling the receiver to recognize the amount as a trust fund belonging to the district, and to pay the same out of the moneys in his hands before paying any dividends to the creditors of the bank, —it appearing that the cash assets of the bank coming into his hands on June 1st amounted to \$8,729.93. Upon the hearing in the circuit court it was decreed that complainant was entitled to the relief sought, and that the receiver must pay the amount due the independent district before making a dividend to the other creditors; and the receiver now seeks a reversal of the decree thus entered. The grounds for the conclusion reached by the trial court are very fully and ably set out in the opinion handed down, and reported in 83 Fed. 5, in the course of which the leading cases upon the question of the right to follow and recover trust funds are cited and commented on; and the conclusion is reached that there exists a conflict between the rulings of the supreme court of Iowa and the current of authority in the courts of other states and of the United States, and that, if free to view the question on its merits, the ruling would be against the right to a preferential claim existing in the school district, but, in deference to the rulings of the supreme court of Iowa, the court would hold the right to a preference to be established.

The only provision of the statutes of Iowa which is involved in this case is section 1747 of the Code of Iowa of 1873, which enacts that:

"The treasurer shall hold all moneys belonging to the district and pay out the same on the order of the president, countersigned by the secretary, and shall keep a correct account of all expenses and receipts in a book provided for the purpose."

Construing this section, the supreme court of Iowa holds that under its provisions the treasurer of a school district holds the money of the district as a trustee; that he is not authorized to deposit the same in a bank, and by so doing the character of the fund is not changed, and the right exists in the district to follow this trust fund and assert title thereto. District Tp. v. Morton, 37 Iowa, 551; District Tp. v. Smith, 39 Iowa, 10; District Tp. v. Hardinbrook, 40 Iowa, 130; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908. The statute does not deal with the question when, and under what circumstances, a right to a trust fund can be successfully asserted against the rights of third parties. All that is established by the construction of the statute by the state supreme court is that under its provisions a district treasurer holds the school funds as a trustee, and that he has no legal right to deposit the funds in a bank; but the statute does not undertake to declare that if the money is thus deposited, and is intermingled with the general funds of the bank, the right of the school district to payment out of the general fund is paramount to the rights of all other creditors. If such right exists, it is not created by the statute, but is based upon the general principles of law and equity applicable to the circumstances; and the rulings of the supreme court of Iowa are not conclusive upon the latter question, nor can it be rightfully said that they constitute a rule of property which other courts are bound to follow; and while we concur with the trial court in the general views expressed, touching the desirability of avoiding conflicting decisions between the state and

federal courts, we cannot agree with the learned judge below in holding that this consideration requires a decision of the question involved in this case in accordance with the rulings of the supreme court of Iowa, if the same are not in accord with the rules laid down by the supreme court of the United States, or established by the decided weight of authority in the cases decided by the courts of other states. We must not lose sight of the character of this proceeding. The First National Bank of Pella was created under the laws of the United States; and its powers, rights, duties, and obligations, so far as they are dependent upon statutory enactment, are derived from the acts of congress, and not from the statutes of Iowa. Becoming insolvent, the bank was put into liquidation under the provisions of the act of congress, and the receiver was appointed by the comptroller of the currency; and, under the authority conferred on him by the statutes of the United States, he has taken possession of the assets of the bank, and in the distribution thereof he is controlled by the laws of the United States. The present bill was filed by the complainant against the receiver in his official capacity, and for the purpose of establishing a preferential claim on the assets of the bank in his hands, in favor of complainant; and the real question is whether the receiver is bound to obey the law as laid down by the supreme court of the United States, or by the supreme court of Iowa, upon the point at issue, assuming for the moment that these courts are at variance thereon. The argument in favor of uniformity of decision, upon which reliance was placed by the trial court, makes in favor of uniformity of ruling among the courts which may be called upon to direct the distribution of the assets of insolvent national banks, which can only be secured by following in all cases the rule laid down by the supreme court of the United States. The question for decision is, what rule should be followed by a receiver of a national bank in distributing the assets of the bank, which have come into his hands under the provisions of the laws of the United States, in cases wherein it appears that trust funds have been received by the bank in the course of its business? The general question of the right to follow trust funds was fully considered by Mr. Justice Bradley in *Frelinghuysen v. Nugent*, 36 Fed. 229, and the conclusion reached was stated as follows:

"Formerly the equitable right of following misapplied money or other property, in the hands of the party receiving it, depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it was held, as the better doctrine, that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over other creditors of the possessor."

Counsel for appellant and appellee concede that the foregoing extract from the opinion of Mr. Justice Bradley fairly states the rule recognized by the supreme court of the United States, which in *Peters v. Bane*, 133 U. S. 670, 10 Sup. Ct. 354, quoted the same approvingly;

and, without further citation of authorities, we may accept the same as a succinct statement of the rule now in force in the courts of the United States.

It is claimed that the supreme court of Iowa has extended the rule as above stated, by holding that where trust funds have been intermingled with the general assets of an insolvent estate, thereby increasing the amount thereof, the person to whom the trust funds belong has a preferential lien, not only upon the specific fund into which it is traced, but upon the general assets of the insolvent estate; and, in support of this claim, reliance is placed on the cases of *Independent Dist. v. King*, 80 Iowa, 498, 45 N. W. 908, and *Dist. Tp. of Eureka v. Farmers' Bank*, 88 Iowa, 194, 55 N. W. 342. It cannot be questioned that the general language found in the opinion in the former case gives support to the contention that it was intended to lay down the broad proposition that, as against the general creditors, the owner of a trust fund passing into the hands of another who becomes insolvent, will have a preferential lien upon the estate of the insolvent; but the decision in the subsequent case of *Dist. Tp. of Eureka v. Farmers' Bank*, *supra*, clearly shows that such is not the doctrine intended to be enunciated by that court. In the latter case one Taylor was carrying on a banking business under the name of the Farmers' Bank of Fontanelle. On the 10th day of December, 1890, the bank being insolvent, Taylor made a general assignment for the benefit of creditors. It appeared that the treasurer of the school district for some years had deposited the money of the district in Taylor's bank; there being to his credit, when the assignment was made, the sum of \$2,303. The school district brought suit in the district court of Adair county, asking that the amount be declared to be a trust fund, and be decreed to be a preferred claim against the property transferred to the assignee of the owner of the bank by the deed of assignment, and the district court entered a decree providing for the payment of the trust money out of any funds which should come into the hands of the assignee. Upon appeal the supreme court reversed the decree in this particular because it appeared that the deed of assignment conveyed to the assignee real property, to the acquisition of which the money of the school district had not contributed, and in the course of the opinion it is said:

"In *Independent Dist. v. King*, 80 Iowa, 498, 45 N. W. 908,—a case in many respects like this,—the identical money deposited was not shown to have been delivered to the assignee; and it was said that, if a trust for the amounts deposited were established, 'it must be on the ground that the deposits must be held to have increased the estate of the insolvents, and that the balance due is represented by an increase now in the hands of the assignee.' * * * It is insisted, however, that the trust fund has been traced into the estate of the insolvent, which is in the hands of the assignee. We do not think it is necessary to trace the deposit into any specific property in the hands of the assignee, in order to establish a trust, but it should be shown—presumptively, at least—that the estate in his hands has been augmented by the trust fund. The equities of plaintiff, as against property to which its money contributed nothing, directly or indirectly, are no greater than those of the general creditor."

Thus we have in this case a construction of the opinion given in the earlier case of *Independent Dist. v. King*; and it is made clear,

beyond question, that the supreme court of Iowa does not hold the rule that a trust fund may be declared to be a preferential lien upon the entire estate of an insolvent, into whose hands the trust fund may have come, but such preferential lien will be held to exist against any fund or property coming into the hands of an assignee, the amount or value of which has been augmented by reason of the trust fund coming into possession of the assignor. It is difficult to see wherein the rule thus enunciated and applied by the supreme court of Iowa differs from that recognized by Mr. Justice Bradley in *Frelinghuysen v. Nugent*, *supra*, and approved by the supreme court, to the effect that confusion with other like property, as by intermingling money in a common fund, does not destroy the equity, but converts it into a charge upon the entire mass with which the trust fund has been confused. The foundation of the right on part of the owner of a trust fund to a preference over general creditors in payment out of a fund or estate that has passed to the assignee or receiver of an insolvent person or corporation is, that the trust fund has been wrongfully confused or intermingled with the property of the insolvent, or has been used to increase the value of property, thereby increasing the amount or value of the funds or estate passing into possession of the assignee or receiver; that, if this intermingling had not taken place, the fund passing to the receiver would have been so much less; that the creditors have only the right to subject the property of the debtor to the payment of their claims, and therefore the creditors cannot complain if the total fund coming into the hands of the receiver is reduced by the amount necessary to make good to the owner of the trust fund the sum which was wrongfully used in augmenting the fund or property passing to the receiver. Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors, and this we understand to be the doctrine recognized by the supreme court of Iowa and the supreme court of the United States alike.

In the bill filed in this case it is averred that when the bank closed its doors it had on hand cash to the amount of \$8,000, which passed into possession of the receiver; it being further averred that the trust money belonging to the school district, and amounting to \$4,676, formed part of this cash fund. Upon this question of fact the rights of the complainant depend. If this fund, coming into possession of the receiver as part of the assets of the insolvent bank, includes the money belonging to the school district, then the district is entitled to a preference in payment therefrom over the creditors of the bank; but, unless it appears that this fund does include such trust fund, the right to a preference does not exist. The evidence shows that when the bank closed its doors, on June 1, 1895, all the money credited on account to the independent district had been drawn out, and the balance of \$4,676, claimed to be due, grows out of two credits entered on the account,—one for \$614, under date of May 6, 1895, and one for \$4,340, under date of May 13, 1895; and it is admitted that these entries do not represent cash then actually paid

into the bank, but represent checks given on the bank itself, the amount of each being charged on the books of the bank against the drawer of the check, and then entered to the credit of the treasurer of the school district. The check for \$4,340 was drawn by the treasurer of Marion county in favor of the treasurer of the school district, and represented taxes collected for school purposes for the benefit of the independent district of Pella. The account kept with the treasurer of the independent district, on the books of the bank, shows that money was drawn out of the bank from time to time for the use and benefit of the school district; and it further appears that were it not for the credit given by reason of the two checks drawn May 6th and May 13th, and aggregating \$4,954, the account would have been overdrawn, and the treasurer of the district would have been in debt to the bank in the sum of \$614. It thus appears that the balance of \$4,676 now claimed by the school district is not composed of money actually paid into the bank on May 6th and 13th, whereby the cash assets of the bank were increased to that extent, but this balance is made to appear to be due to the school district by entries upon the books which neither increased nor diminished the cash held by the bank. That this is true will appear from an examination of the daily balance book of the bank, which is in evidence. This shows that on the 11th of May the total cash held by the bank amounted to \$7,949, and the amount then to the credit of the school district was \$707. May 12, 1895, being Sunday, no entry appears for that day. On May 13th the cash balance was \$8,436, or an increase of \$487 over the amount on hand on Saturday, May 11th. The amount to the credit of the school district on the 13th was \$5,047, or an increase over the amount on Saturday, May 11th, of \$4,340,—just the amount of the check drawn by the treasurer of Marion county on the bank, and by it credited to the account of the school district; but the amount of cash held by the bank was not increased by this amount, but remained at just the figure it would have shown if this interchange of credits between the treasurer of Marion county and the treasurer of the school district had not taken place. Under these circumstances, can it be successfully maintained that the cash fund coming into the hands of the receiver has been augmented by the addition thereto of a trust fund belonging to the school district, which may be subtracted from the fund without infringing on the rights of the general creditors? The relation existing between the bank and the treasurer of Marion county was simply that of debtor and creditor. In order to pay the amount of taxes due to the school district, the treasurer of the county drew his check on the bank for the sum of \$4,340, and delivered it to the treasurer of the school district. The fund on which the check was drawn was not a trust fund, and the delivery of the check to the treasurer of the school district did not change the character of the account against which it was drawn. If, after the acceptance of the check by the treasurer of the school district, but before its presentation, the bank had failed and closed its doors, it could not be claimed that the bank held the sum in trust for any one. The only obligation resting on the bank was to pay the check on presentation, and, if not paid, the bank would be indebted

for the amount, not as a holder of a trust fund, but as an ordinary debtor. It is claimed in argument that the court must treat the case just as though the treasurer of the school district had presented the check, had obtained the money thereon, and had then deposited the money in the bank as the money of the school district, but this was not in fact done; and as against the creditors, whose money in fact created the cash amount coming into the hands of the receiver, why should fiction be resorted to in order to sustain a preference on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?

The object of the bill filed in this case is to obtain a preferential payment of the sum of \$4,976 out of the cash fund coming into the hands of the receiver as part of the assets of the bank, and the foundation of the right to a preference is the claim that this fund had been augmented and increased by the addition thereto of a trust fund belonging to the school district. The evidence clearly shows that if the treasurer of the school district had never deposited a cent in the bank, or had closed his account therewith on the 5th day of May, 1895, the sum of money coming into the hands of the receiver on June 1st would have been just the same that did in fact come into his hands; and the evidence therefore does not prove that the cash fund in the hands of the receiver has been augmented or increased by the addition thereto of a trust fund belonging to the school district. If the evidence showed that there had been in the hands of the treasurer of the school district a sum of money which he in fact placed in the bank as an addition to the cash fund which subsequently passed into the hands of the receiver, the school district could make claim to this amount as a trust fund, without being required to prove the methods by which the money came into the hands of its treasurer; but, as the evidence in this case clearly shows that the cash fund coming into the receiver's hands does not include any cash actually paid into the bank by the treasurer of the school district, the complainant, in order to show that it has any claim against the bank, is compelled to avail itself of the action of its treasurer in accepting from the treasurer of Marion county a check drawn on the bank, and against an ordinary account, not containing trust funds, and in having the amount of the check credited to the treasurer of the district. If the treasurer of the district had presented the check to the bank for acceptance, and it had been accepted or certified as good by the bank, but before payment the bank had failed, certainly, if the school district desired to avail itself of a claim against the bank, it could only do so by assuming the position of its treasurer, which would be that of a creditor of the bank, holding an accepted or certified check. It certainly could not assert that the accepted check had become a trust fund, which must be paid in preference to the debts due other creditors. By accepting the check, the bank would bind itself for the payment of the amount thereof, and, in effect, that was all that was done in this case, in that when the check was drawn the amount thereof was credited up to the account of the treasurer of the school district, and by so doing the bank acknowledged the check to be good, and became bound to pay the amount thereof when called

for by the treasurer of the district. The school district can wholly ignore all these dealings between its treasurer and the bank, and, under the decisions of the supreme court of Iowa, can hold its treasurer and his sureties for the amount of school funds coming under his control; but when, as in this case, the school district endeavors to establish a claim against the bank, it ought not to be allowed to avail itself of the benefit of the transactions between its treasurers and the bank, but avoid their obligations. This case is not one wherein it is made to appear that the school treasurer and the bank were in collusion to commit a fraud upon the district, and the actual contest is between the school district and the general creditors of the bank. It is open to the school district to assume the position occupied by its treasurer, and, by acknowledging his acts, become a creditor of the bank for the balance shown to be due to the school treasurer; but when the district attempts to avoid the position of a creditor, and to assume that of the owner of a trust fund, and as such to assert a preferential right to payment in full out of the cash fund coming into the hands of the receiver, to the detriment of the general creditors, it ought to be held to satisfactory proof of the fact upon which the right to a preference rests, to wit, that the fund coming into the receiver's hands has been augmented and increased by the addition thereto of the trust money, not as a matter of inference, nor as a result of mere entries on books of account, but because the fund or property against which the preference is sought to be enforced has been in fact augmented or benefited by the addition thereto of the trust fund.

To illustrate the situation, let it be assumed that on the 13th day of May, when the check of the treasurer of Marion county was entered upon the books of the bank to the credit of the treasurer of the district, there was no cash then in the bank. Certainly the drawing of the check, and the entry thereof to the credit of the school treasurer, would not have placed in the hands of the bank any cash whatever; and, had the bank then closed its doors, it would be true that the school district could assert, as against the bank, that the amount due it was a trust fund, yet it would be but a barren claim, because there would be no fund in the hands of the receiver against which a preferential claim could be asserted. Assume, however, that, before the bank closed its doors, some third party had made a deposit of \$5,000 in cash, and this sum had passed to the receiver, as part of the assets of the bank; would a court of equity be justified in holding that under such circumstances the school district could assert a right to payment in full out of this fund, to the exclusion of the creditor of the bank who had created the fund by depositing it in the bank? In the supposed case it would appear, beyond question, that the trust funds belonging to the district had not aided in creating or augmenting the cash fund coming into the receiver's hands, and clearly it would be inequitable to give preference to the claim of the school district over that of the party whose money had in fact created the fund. In substance, that is the situation disclosed by the evidence in this case. As already stated, on the 5th day of May, 1895, the treasurer of the school district had no funds in the hands

of the bank, but, on the contrary, the account was overdrawn. On the 6th and 13th days of May, credits on the account were entered, of checks drawn on the bank, which did not add one dollar to the cash in hand or other assets of the bank. The cash fund which passed into the receiver's hands is the balance of the funds on hand on May 5th, of which no part belonged to the school fund, the treasurer's account being then overdrawn, and the cash paid in since May 5th, less the amount paid out; all of the cash paid in coming from sources other than from the treasurer of the school district. It is not sufficient for complainant to show that the account carried on the books of the bank under the heading, "Treasurer of the Independent School District," represented a trust fund, and that the amount shown to be due thereon from the bank was increased by crediting up the checks of the county treasurer. The point at issue is not between the school district and the bank, but it is between the school district and the creditors of the bank, represented by the receiver; and, to entitle the school district to enforce a prior equity or claim against the cash fund in the hands of the receiver, it must prove that this fund has been augmented by the addition thereto of trust funds belonging to the district, and, for the reasons stated, we hold that this has not been done; and therefore complainant is not entitled to a priority of payment out of the funds in the receiver's hands, nor to a prior lien upon the general assets of the bank. The decree appealed from is reversed, and the case is remanded to the circuit court with instructions to dismiss the bill on the merits.

BANK OF KENTUCKY v. STONE et al.
(Circuit Court, D. Kentucky. June 4, 1898.)

No. 6,555.

1. INJUNCTION AGAINST TAXATION—EQUITY JURISDICTION.

A suit in the federal court to enjoin the collection of a tax will not lie on the sole ground that it is illegal and void. It must appear from the special circumstances averred that there is no adequate remedy at law, and that there is some recognized ground of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury.

2. SAME—ACTION TO RECOVER BACK.

In Kentucky an action to recover taxes paid does not lie except when the payment has been made under duress of a distraint made by the collection officers.

3. SAME—ADEQUACY OF REMEDY AT LAW.

In a state where an action to recover taxes paid will only lie when they have been paid under duress of a distraint, such remedy is not an adequate one where the taxing officers, instead of distraining, may bring an action at law to collect the tax. A remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.

4. SAME—ACTION AT LAW BY TAXING OFFICERS.

The right to defend against an action at law to collect taxes on the ground of the invalidity of the statute under which they were assessed is not an adequate remedy when the statute, like the Kentucky revenue law of November 11, 1892, provides that the party failing to pay the tax within a specified time shall be subject to a penalty and to a fine for each day of delay, to be enforced by indictment or civil action.

5. SAME—DISTRRAINT AGAINST BANK.

In a state where payment of taxes is held to be voluntary unless made under duress of a distraint, it would seem that the right of action to recover back a tax levied against a bank is an inadequate remedy, in view of the interference with its business and the injury to its credit which would be caused by a distress upon its personal property.

6. SAME—MULTIPLICITY OF SUITS.

Where a party claims that its exemption from taxation under the particular statute in question has been established by prior adjudications of the highest court of the state, the fact that it is threatened with suits for future taxes under such statute, and also with the danger of harassing suits for fines and penalties, which the statute permits to be brought for each day's delay in paying the taxes, would seem to afford sufficient ground for equitable intervention.

7. RES JUDICATA—SUITS FOR COLLECTION OF TAXES.

A judgment in a suit for collection of taxes operates as an estoppel against the state or any agency of the state in a suit for taxes subsequently accruing. *City of New Orleans v. Citizens' Bank of Louisiana*, 17 Sup. Ct. 905, 167 U. S. 371, followed.

8. SAME—MATTERS CONCLUDED.

A judgment that a statutory provision exempting "such bank and its shares of stock * * * from all other taxation whatsoever" is an irrevocable contract, which prevents the imposition of a license tax, is conclusive, in a subsequent suit, that no direct tax on the bank's property, tangible and intangible, can be imposed.

9. SAME—PARTIES CONCLUDED.

A judgment enjoining a town and county from enforcing an illegal tax is conclusive in a subsequent suit to restrain the board of assessors of such county and town from certifying such a tax for collection. The members of the board, being but the agents of the real parties in interest, are, in respect to the former judgment, privy to the county and city.

10. SAME—WRIT OF PROHIBITION.

A writ of prohibition was brought to prevent the judge of a city court from proceeding in a criminal case to enforce collection of a tax. From the judgment entered, an appeal was taken, to which the city, being the real party in interest, became also a formal party, and the judgment was affirmed. *Held*, that this judgment was conclusive, in a subsequent proceeding, upon the city itself.

11. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTIONS.

In a suit to enjoin the collection of a tax, complainant alleged that it had a contract with the state in respect to taxation, the obligation of which defendants were attempting to impair by seeking to enforce a subsequent law of the state. The court held that a certain prior adjudication of the state court was conclusive on the parties that the law in question impaired the obligation of the contract, and therefore did not re-examine that question as an original one between the parties. *Held*, that this conclusion did not oust the court's jurisdiction, although based solely on the ground that it involved a question arising under the constitution or laws of the United States.

12. SAME—FEDERAL COURTS—FOLLOWING STATE DECISIONS—RES JUDICATA.

The rule that, in considering the question whether a state law impairs the obligation of a contract, the federal court will not accept as conclusive the construction which the supreme court of the state has put upon its constitution or laws in determining the existence of the contract and its violation, applies only where the judgment of the state court is under direct review, or where its opinion is merely cited as an authority, and not to a case in which a prior judgment of the state court between the same parties is set up as *res judicata*.

13. SAME—ENJOINING STATE COURTS.

The fact that a proceeding by mandamus is pending in a state court to compel a city and its board of valuation and assessment to certify the apportioned valuation of a bank for purposes of taxation does not render a

suit subsequently instituted by the bank, to restrain the city and the board of valuation from taking this action, a suit to enjoin the proceedings in a state court.

This is a bill in equity filed by the Bank of Kentucky, a corporation organized under the laws of Kentucky, to restrain the assessment and collection of certain taxes for the benefit of the defendants the city of Louisville, the county of Franklin, and the city of Frankfort. Samuel H. Stone is the auditor of public accounts for the state of Kentucky, Charles Finley is the secretary of state, and George W. Long is the state treasurer; and these three officers, also made defendants herein, constitute the state board of valuation and assessment. The bill avers that the complainant has an irrevocable contract with the state of Kentucky, by which taxes are limited to a certain amount per share upon its stock, and the usual local taxes on its real estate, but that the revenue act of the legislature of Kentucky passed November 11, 1892, impairs that contract, and is in violation of the constitution of the United States.

The case made by the bill is as follows:

The complainant was created a body politic and corporate by an act of the general assembly of Kentucky approved February 22, 1834. The term of its corporate existence was fixed at 30 years from the date of its incorporation. It was authorized to do a banking business and to issue bank notes. It was directed to keep its principal office of discount and deposit in the city of Louisville, and to locate a branch at Frankfort, the seat of the government, to aid and manage the fiscal affairs of the state. The state was given a voice in the control of the bank by a provision that the government of the commonwealth should appoint three of the bank's directors. By the fifteenth section of the original charter it was provided that the bank should pay to the treasurer of the commonwealth 25 cents on each \$100 of stock held and paid for in said bank, which should be in full of all tax and bonus, provided that the legislature might increase or diminish the same; but that at no time should the tax exceed 50 cents on each \$100 of stock paid for in said bank. By an act of February 12, 1836, the tax was increased to 50 cents a share. By the act of February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for 20 years from October 1, 1864; but this extension was declared to be granted on certain conditions. The extension was duly accepted by complainant. On May 17, 1886, an act called the "Hewitt Act" was passed, to make taxation equal and uniform. It provided that all state and national banks should pay into the state treasury 75 cents on each share of their capital stock, and should, in addition, pay into said treasury, on their surplus, undivided profit, and accumulations in excess of 10 per cent. of their capital stock, a tax at the same rate as that assessed on real property; and that the said taxation should be in full of all tax,—state, county, and municipal,—except that the real estate and buildings owned and used by the banks in conducting their business should not be exempted from taxation for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed. The fourth section of the second article of the act provided that each of the banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof, might give its consent to the levying of said tax, and agree to pay the same, and waive and release all right under the act of congress or under the charters of the state banks, to a different mode or a smaller rate of taxation, which consent and agreement to and with the state of Kentucky should be evidenced by writing, under the seal of said bank, and delivered to the governor of the commonwealth before the next meeting of the legislature; and said agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock should

be exempt from all other taxation whatsoever, so long as said taxation should be paid, during the corporate existence of the bank. On June 25, 1887, within the proper time, at a stockholders' meeting, by a vote of the stockholders, the complainants gave their consent to the levying of said tax, and to the waiver and release of all right under their charter to a different mode and a lower rate of taxation; and this consent was duly certified by the governor of the commonwealth. Since 1887 the complainants have paid this tax under the so-called "Hewitt Act." On November 11, 1892, the legislature of Kentucky, under a constitution adopted in 1891, passed an act dealing with the assessment of certain corporations; among others, banks. The act provided that every incorporated bank should, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, or taxing district where its franchise might be exercised. The auditor, treasurer, and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. The board is required to apportion the value of the franchise among the several taxing jurisdictions entitled to a share of such tax, and for such apportionment the auditor of state is required, at the expiration of 80 days, to certify to the county clerks of the counties where any portion of the corporate franchise of such banks shall be liable to local taxation the amount thereof liable for county or state taxes; and the county clerk is required to certify the same to the collecting officer of the county and city for collection. If a bank fails to pay its taxes, penalties, and interest after 30 days' notice. It is to be deemed guilty of a misdemeanor, and upon conviction is to be fined \$50 for each day during which the tax remains unpaid, to be recovered by indictment or by civil action, of which the Franklin circuit court shall have jurisdiction. The bill avers that the amount of tax which the complainant would have to pay to the board of valuation and assessment over and above what it has to pay under the Hewitt law would be more than \$20,000 per annum.

The complainant avers: That the defendants are conclusively estopped by previous litigation to contend in this suit that the complainant has not an irrevocable contract with the state limiting its taxes to those fixed in the Hewitt act. That on February 28, 1894, the complainant filed in the circuit court of Franklin county, that being a court of general jurisdiction, its petition against the county court of Franklin and R. D. Armstrong, sheriff of said county, setting forth the contracts between complainant and the state in regard to taxes under its original charter and under the Hewitt law, claiming that no taxes could be collected from the complainant except under the Hewitt law during its charter life, and, further, that the act of the legislature of November 11, 1892, was unconstitutional and void as impairing the obligation of its contracts aforesaid. That the prayer of the petition was that the court should establish the contracts, and should enjoin Franklin county and Armstrong, its sheriff, from attempting to collect any taxes contrary to said contracts. That a decree was entered upon this petition in the Franklin circuit court, adjudging that the act of November 11, 1892, did not violate any contract between the complainant and the state, and the petition for injunction was denied. That the complainant thereupon appealed from the decree to the court of appeals of Kentucky, which court reversed the judgment of the lower court, and remanded it to the circuit court of Franklin county for judgment in conformity to its opinion. That the circuit court entered the following judgment on January 21, 1896, which is still in full force and effect: "This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the act of the general assembly entitled 'An Act to amend the revenue laws of the commonwealth of Kentucky,' approved May 17, 1886 (Gen. St. c. 92, art. 2), and the acceptance of the provision thereof by the plaintiff, constituted a contract between the plaintiff and the commonwealth, which the latter cannot alter or change without the consent of the former, by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for state purposes in a different mode

or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this state and the act of November 11, 1892 (Acts 1891-93, c. 103, art. 3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property, or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the federal constitution, and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now, made perpetual, and the defendants Franklin county and R. D. Armstrong, sheriff of said county, be, and each of them are, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purposes of Franklin county upon the franchise or property of the plaintiff, except taxes upon its real estate in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended." That a similar suit was filed in the same court by the complainant against the board of councilmen of the city of Frankfort, to enjoin it from attempting to collect municipal taxes on the apportioned valuation of the franchise certified to the city by the board of valuation and assessment, setting forth exactly the same objection to the validity of the tax. That the court entered a decree for the defendants, and an appeal was taken to the court of appeals, which reversed the decree of the circuit court, and directed that a new decree be entered in conformity with the opinion transmitted. That thereupon the Franklin circuit court entered a judgment enjoining the city of Frankfort in exactly the same terms as that already set forth above in the case against the county court of Franklin. That in February, 1894, the city of Louisville, claiming to act under authority given it by an act of the Kentucky legislature affecting the government of cities of the first class, of which the city of Louisville was the only one, passed an ordinance requiring the banks of the city of Louisville to pay to the city an annual tax of 4 per cent. upon their annual gross earnings. That the complainant failed to pay the tax, and thereupon, under the act referred to, a warrant was sued out in a criminal prosecution against the complainant in the city court of Louisville. That the complainant then, in the manner provided by law, filed its petition in the Jefferson circuit court for a writ of prohibition against R. H. Thompson, judge of the police court of the city of Louisville, setting out in apt terms its incorporation, its original charter, the extensions thereof, the passage of the Hewitt law, the contract entered into in conformity therewith, and claiming the benefit of its said contractual relations with the state. That the petition alleged that the said ordinance of the city of Louisville was void because it impaired the obligation of the complainant's contract, and any authority given to the city of Louisville to pass such ordinance was likewise void for the same reason, and prayed that the judge might be prohibited from taking jurisdiction of the proceeding against the complainant for a violation of the ordinance. That issue was joined on this petition by the defendant, the judge of the police court of the city of Louisville. That the city of Louisville, though not a party in name in that court, was, in reality, the party defendant, and appeared by counsel. That the court found the issues in favor of the complainant, entered a judgment accordingly, and thereupon the defendant the city of Louisville caused an appeal to be taken in its name from the judgment to the court of appeals of Kentucky, in which court the cause was argued by counsel for the city of Louisville and for the commonwealth of Kentucky. That the court of appeals affirmed the judgment of the Jefferson county circuit court, and sent a mandate of affirmance to the court of original jurisdiction, where it was duly entered. That the averment of the petition in that case, upon which issue was joined, and which presented the only point for adjudication, was as follows: "The plaintiff states that the said act granting a charter to cities of

the first class, and the said ordinance passed in pursuance thereof, are both unconstitutional and void, in that they impair the obligation of the contract between the plaintiff and the commonwealth of Kentucky, as embodied in its charter as aforesaid, and as embodied in its agreement as aforesaid, made under the revenue law of May 17, 1886, and are a violation of the constitution of the United States, and especially the section thereof providing that no state shall pass any law impairing the obligation of a contract. [Article 1, § 10.] The plaintiff avers and submits that the said act chartering cities of the first class, and the said ordinance as aforesaid, are both unconstitutional and void, as above set forth; that the granting and acceptance of its charter, and the several acts extending and continuing the same, which were accepted and acted upon by said bank, constituted a contract between the state, on the one part, and the bank and its stockholders, on the other part, continuing during the legal existence of the corporation, and the state never had, and has not now, the right to repeal or annul said agreement or the rights conferred by said charter, limiting the right of the state to impose a tax on said bank without the consent of said bank. The plaintiff further states that it did give its consent to said act of May 17, 1886, and did, upon the considerations therein recited, waive and release its right under its charter to a different mode or a smaller rate of taxation than is therein provided. Said consent and waiver were made on the belief that the said act was intended to put in operation a permanent legislative policy governing the taxation of all banks then existing which would accept its provisions, to endure at least during the corporate existence of all said assenting banks. The plaintiff submits that such is the true construction of said act, and that said act and its acceptance constituted a contract which the state cannot annul or repeal, and which is binding on the state in all its departments." That the petition was demurred to, the demurrer was overruled, and judgment given for plaintiff, and the police judge was prohibited from proceeding with the criminal prosecution against complainant.

The suits of the Bank of Kentucky against the Franklin county court, against the board of councilmen of the city of Frankfort, and against the judge of the police court of the city of Louisville, were argued and heard at the same time by the court of appeals of Kentucky, and were decided by that court in one opinion, filed June 1, 1895, and reported as the Bank Tax Cases, 97 Ky. 590, 31 S. W. 1013. A majority of the court of appeals held that the complainants here had an irrevocable contract with the state and all its agencies, by virtue of its charter and the extensions thereof, and its due acceptance of the provisions of the Hewitt act, and that the act of 1892 impaired the obligation of that contract, in violation of the constitution of the United States, and was therefore null and void.

The nineteenth clause of the bill in the case at bar is as follows:

The complainant says that the defendants Samuel H. Stone, Charles Finley, and George W. Long are threatening, and, unless restrained by this honorable court, will proceed, to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896, and 1897, and certify such value to the county clerk of Jefferson county, to be by him certified to the collecting officer of the city of Louisville and to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort and the collecting officer of the county of Franklin; that such assessments will be illegal, in violation of the complainant's contract, as has been heretofore in causes between the complainant and the said several defendants adjudged, and will be unlawful and violative of complainant's contract, and will cast a cloud over complainant's franchise, cause a multiplicity of suits to be brought against complainant, and damage it in a way that cannot be repaired or estimated at the common law; and from these threatened wrongs the complainant has

no remedy at the common law, but its only remedy is by a bill in equity; and, unless restrained by this honorable court, the defendants the city of Louisville, the county of Franklin, and the board of councilmen of the city of Frankfort will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, and will subject the complainant to the embarrassment of many suits, and cast a cloud upon its franchises and property, and an effort will be made to enforce penalties against this complainant, as hereinbefore set out.

It further appears that after the decision in the Bank Tax Cases, 97 Ky. 590, 31 S. W. 1013, the personnel of the court of appeals changed somewhat; and when a new series of bank tax cases, presenting the same question, came to that court, a different conclusion was reached. A majority of the court overruled the prior decision, rendered in 1895, and held that the banks, by accepting the provisions of the Hewitt act, did not acquire any contract rights with the state with reference to the mode or right of taxation, and that the act of November 11, 1892, was valid. *Deposit Bank v. Daviess Co.*, 39 S. W. 1030.

The defendants the Franklin county court and the board of councilmen of the city of Frankfort have filed a general demurrer to the bill. The defendants Stone, Finley, and Long, and the city of Louisville have filed a demurrer—First, to the jurisdiction; and, second, for want of equity. By stipulation of counsel for the complainant, defendants were also permitted to file answers without waiving demurrer. The only averment of the answer that is material is as follows:

"These defendants allege that to grant the injunction prayed for would be, in effect, to enjoin the state of Kentucky, through her officers, from executing the state constitution and the present revenue law of the state, as construed by the court of last resort of the state. These defendants allege that to grant the injunction prayed for would be, in effect and in fact, to enjoin all proceedings in the state courts for collection of the taxes in controversy, contrary to section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the state. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant and others for mandamus to compel the state board of assessment to value and apportion complainant's franchise, and the auditor to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to secure collection of the taxes now in controversy herein between these defendants and the complainant."

The cause came on for hearing upon the demurrer to the bill, and upon a motion for a preliminary injunction.

Humphrey & Davie, for complainant.

W. S. Taylor, Atty. Gen., for Samuel H. Stone, Charles Finley, and G. W. Long, the board of valuation and assessment of the state of Kentucky.

Henry L. Stone, for city of Louisville.

James H. Polsgrove, for Franklin county.

Ira & W. H. Julian, for city of Frankfort.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts). The bill attacks the validity of the Kentucky revenue law of November, 1892, and seeks relief against its enforcement on the ground that, in its application to the complainant bank, it violates that clause of the federal constitution which forbids a state to pass a law impairing the obligation of a contract. The case is therefore one arising under the constitution of the United States, and, as it involves more than \$2,000, it is within the jurisdiction of this court. Do the facts stated in the bill bring it within the equity jurisdiction of the court? It is well settled that in the federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void, and independently of every other consideration. See *Rich v. Braxton*, 158 U. S. 375, 405, 15 Sup. Ct. 1006. It must appear from the special circumstances averred that there is no adequate remedy at law, and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury. *Ogden City v. Armstrong*, 168 U. S. 224, 236, 18 Sup. Ct. 98; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250; *Allen v. Car Co.*, 139 U. S. 658, 661, 11 Sup. Ct. 682; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646; *Railway Co. v. Cheyenne*, 113 U. S. 516, 525, 5 Sup. Ct. 601; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Dows v. City of Chicago*, 11 Wall. 108. What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may, under the duress of the threatened trespass, pay the taxes alleged to be illegal, and then sue the city of Louisville, the county of Franklin, and the city of Frankfort to recover them back. *Railroad Co. v. Commissioners*, 98 U. S. 541. It is to be observed, however, that no such action will lie except upon payment under duress. The bank could not simply pay under protest, and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy, as there was in Tennessee in the case of *Shelton v. Platt*. The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint; they may resort to a simple suit at law for them. In that case the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate; but, under the provisions of the revenue law of November, 1892, we do not think it is. By that law, the bank, on failing to pay the taxes assessed, according to its provisions, within 30 days after notice from the collecting officer, is subjected to a penalty of 10 per cent., and to a fine of \$50 a day for every day of the delinquency, to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay \$50 a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity, the bank may enjoin the assessment,

and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant, because, by the terms of the act, they do not begin to accrue until 30 days after notice to pay has been given by the collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk, which is absent in an action in equity. The remedy at law is therefore entirely inadequate. *Smyth v. Ames*, 169 U. S. 466, 518, 18 Sup. Ct. 418; *Express Co. v. Seibert*, 44 Fed. 315. It is no answer to say that the payment of the tax and the action to recover it back constitute an adequate remedy, because no such action will lie, as already explained, unless there is a distraint, actual or threatened, and the collecting officer, by not distraining, may wholly deprive the taxpayer of this remedy. Indeed, the counsel for the city of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet. 210, 215; *Sullivan v. Railroad Co.*, 94 U. S. 806, 811. And the application of the rule depends upon the circumstances of each case. *Watson v. Sutherland*, 5 Wall. 74, 79.

The practice of the state courts of Kentucky in issuing injunctions against the collection of taxes cannot, of course, be a controlling consideration in determining the limits of the equity jurisdiction in the federal courts in such cases; for it is settled that if a case, "in its essence, be one cognizable in equity, the plaintiff (the required value being in dispute) may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction." *Smyth v. Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418. But it is worthy of note that the court of appeals of Kentucky has held that, in the absence of a statute allowing an action to recover back from the state taxes illegally collected, the remedy by injunction is the only adequate one.

In *Gates v. Barnett*, 79 Ky. 295, 296, the court, in a suit to enjoin a distraint upon certain tobacco for the collection of taxes, said:

"The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this state that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be placed upon the ground of the inadequacy of the remedy at law. The officer, acting in good faith and under color of right, is justified by his process, and is not liable as a trespasser; and, as a suit would not lie against the state directly, the only complete remedy is by injunction."

It is by no means clear that distraints or threatened distraints against a bank, in view of the character of its business, may not

involve such serious detriment to its business, and incidentally to the public, as to justify equitable intervention.

In the case of *Lenawee Co. Sav. Bank v. City of Adrian*, 66 Mich. 273, 276, 33 N. W. 304, 306, a levy upon and seizure of the bank furniture and fixtures was in progress when an injunction was issued. Mr. Justice Campbell, speaking for the court, said:

"No point was made in the pleadings or on the argument against the jurisdiction of equity in this case. As the bank was not liable to taxation at all on its personal property, and the levy was made in such a way as to directly interfere with its business, the case comes within the analogies of the cases represented by *Osborn v. Bank*, 9 Wheat, 738, from which it cannot be readily distinguished. The court below does not appear to have doubted the jurisdiction, although deciding in favor of defendants on the merits."

In *Railway Co. v. Cheyenne*, 113 U. S. 516, 525, 5 Sup. Ct. 601, 605, Mr. Justice Bradley said:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have been frequently sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subject to vexatious litigation if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied."

The interference with the business of a bank and the injury to its credit caused by a distress against its personal property would seem to be a mischief equally hard to be remedied by a mere suit to recover the money back when thus collected.

If it were necessary, we do not think that it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the state. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privilege already decided to belong to it?

In *Osborn v. Bank*, 9 Wheat. 738, 842, Chief Justice Marshall said:

"The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege."

See, also, *Morris Canal & Banking Co. v. Mayor, etc., of Jersey City*, 12 N. J. Eq. 227; High, *Inj.* § 530.

In addition to the suits for future taxes, there is also danger of harassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of November, 1892, violates an exemption secured to it by contract, it may have equitable relief.

The second question in the case is that raised by the averment of former adjudication. The case of *City of New Orleans v. Citizens' Bank of Louisiana*, 167 U. S. 371, 17 Sup. Ct. 905, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' Bank, in New Orleans, was exempted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted, and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the district court of New Orleans to enjoin the collection of a tax against it, on the ground that it had, by legislative contract, exemption from the same. The district court sustained the claim, and enjoined the collection of the tax. A second suit, brought to enjoin another year's taxes, resulted in a similar judgment. Some years later, the city of New Orleans having attempted to collect a tax for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the circuit court of the United States for the Eastern district of Louisiana, to enjoin the officers of the state and the city from proceeding to collect the tax, and set forth the former adjudication as a conclusive estoppel upon the defendants as to the point of the previous litigation, namely, that there was a contract between the state and the bank forbidding such taxation. The causes of action were not the same in the case brought in the federal court and the cases adjudged in the state courts, because they involved taxes for different years; but the thing adjudged, to wit, the existence and binding effect of the contract for the exemption from the particular taxation, was the same. The supreme court of the United States in this case held that the city of New Orleans and the state taxing authorities were conclusively estopped by the judgments in the state courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation, and held that, the contract having been thus established, the bank was entitled to relief from a violation of that contract by any acts of the state officials acting under the authority of state legislation. It had theretofore been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a state or any agency of the state for the collection of taxes in a suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White, in delivering the judgment of the court, in a most elaborate opinion, said:

"The proposition that, because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text-books, and enforced by many decisions of this court. * * * It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged if, in the prior cases, the

question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the case before us there can be no question, from the statement of facts and an examination of the records in previous cases as set forth therein, that the question which was adjudged in them was the identical question presented in the same way and for the same purpose as in the case at bar, to wit, whether there was a contract between the bank and the state which forbade the imposition of higher taxes than those imposed under the Hewitt act. It was distinctly adjudged, in behalf of the complainant against Franklin county and the city of Frankfort, by the court of appeals, by the decision rendered in 1895, and by a mandate issued from that court to the Franklin circuit court, that such a contract in fact existed, and rendered null and void the provisions of the revenue act of November 11, 1892, under which the defendants now seek to impose taxes upon the complainant.

It is vigorously pressed upon us, however, that the judgment in the prohibition suit cannot be relied upon by the complainant bank to establish the existence of a contract of exemption between it and the city of Louisville, because there is nothing in the record to show that the issue made by the demurrer to the petition in that suit was the existence of such an exemption and its violation. Neither the mandate of the court of appeals nor the judgment of the Jefferson court states the ground for holding the ordinance void. It is said that some 30 days before the decision of the prohibition case by the court of appeals that court, in *Levi v. City of Louisville*, 97 Ky. 394, 30 S. W. 973, held that the city of Louisville had no power under the constitution to substitute a license tax for ad valorem tax on personal property, and that this ruling must have led to overruling the demurrer to the petition in the prohibition suit, because it necessarily rendered the license tax upon the banks void. The *Levi Case* was a suit by an owner of real estate to enjoin the collection of an ad valorem tax on his land, on the ground that the city had not imposed such a tax on personalty, but had substituted therefor a license tax upon it, and so had discriminated in favor of personal property and against realty. The court of appeals held that it was the duty of the city to impose an ad valorem tax on personalty, and that it could only impose a license tax on a business in addition to an ad valorem tax on property. We confess we cannot see how this decision would have determined the question at issue between the complainant bank and the city of Louisville, in the prohibition suit. There was nothing in the petition for prohibition to show that the license tax was a substitute for an ad valorem tax upon the personal property of the bank. There was nothing to show that the city of Louisville had not, under the revenue act of 1892, assessed an ad valorem tax on the bank's personalty. The license tax was graduated by a percentage, not of the bank's personal property, but of the bank's gross receipts, and did not therefore purport to be a taxation on its personal property. The petition was not therefore demurrable under the *Levi Case*. When we further consider that the sole ground stated in the petition for a prohibi

tion was that the license tax was void, because it impaired the bank's contract of exemption, and so violated the constitution of the United States, and we find that this was the sole ground considered by the court of appeals in its opinion, we can have no doubt what was the point adjudged.

The case of *City of New Orleans v. Citizens' Bank of Louisiana*, 167 U. S. 371, 17 Sup. Ct. 905, is relied on to support the contention that a judgment that a license tax violated the bank's contract of exemption cannot be pleaded as *res judicata* in a case presenting the question whether a franchise tax violates its right of exemption. In the *City of New Orleans* Case the language of the exemption was: "The capital of said bank shall be exempt from any tax laid by the state, or by any parish or body politic under the authority of the state, during the continuance of its charter." It was held that a judgment holding this to be a valid exemption, and one which rendered void any attempt to tax its capital or real and personal property used in its business, or to tax its shareholders by imposing an obligation on the bank to pay a tax on its stock for them, did not estop the city and the taxing officers from taxing property held by the bank, but not as capital, or from taxing shares of stock in the hands of the shareholders, or from imposing a license tax. This result was reached, as the court points out, because the exemption clause might be entirely valid and inviolable as a contract, so as to exempt capital and business property, and yet, under many decisions of the court, might not prevent the taxation of the shares of stock, and upon the same principle might not prevent a tax or license upon its business. In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt act is that "such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." If this exemption clause is irrevocable, it certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable, and prevented the imposition of a tax even in the form of a license tax upon its business. If it prevents a license tax, a fortiori does it prevent a direct tax upon its property, tangible and intangible. The tax imposed by the revenue act of 1892 was called a "franchise tax," but it has been held, both by the supreme court of the United States and of the court of appeals of Kentucky, to be in fact nothing but an *ad valorem* property tax. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527; *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 31 S. W. 486.

Nor can there be any doubt that the parties to the former adjudications and this litigation are the same. The real parties in interest in this cause among the defendants are Franklin county, the city of Frankfort, and the city of Louisville. It is for them that the board of valuation and assessment are about to apportion the estimated value of the franchise, and to certify it to them for the collection of taxes. The members of the board of valuation are

nothing but their agents created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by the prior litigation, certainly the agencies acting for them under the law are equally bound. In this light the board of valuation and assessment is in respect to the former judgments privy to the city of Louisville and county of Franklin and the city of Frankfort. There is no dispute that the county of Franklin and the city of Frankfort were parties to the respective suits pleaded as former adjudications. The only controversy which is made is whether the city of Louisville was a party to the prohibition suit set forth in the bill. The original litigation was in form a criminal prosecution against the bank for failure to pay a license. That prosecution was in the name of the city of Louisville. The subsequent litigation, however, was in the form of a proceeding in prohibition against the judge of the city court, in which the criminal prosecution had been conducted, on the ground that that court was exceeding its jurisdiction, because proceeding under a void law. To that writ of prohibition the city of Louisville was not formally made a party in the Jefferson circuit court, but the litigation before the Jefferson circuit court was conducted by the city of Louisville. It was the real party in interest. It was against it that the writ of prohibition was really directed, for at its instance and for its benefit the criminal prosecution had been begun. When, therefore, an appeal had been taken from the Jefferson circuit court to the court of appeals, the appellants were the city of Louisville and the judge of the police court. By this means the city of Louisville formally made itself a party to the record, and the mandate which went down was as binding upon it as upon the judge of its court. Had it attempted to proceed with the prosecution, it might have been attached for contempt. *Bac. Abr. "Prohibition," M.* It is urged that the litigation was really a criminal litigation, and that a judgment in a criminal case cannot be made the basis of a plea of *res judicata* in a civil action. The original case was criminal in form, but the subsequent litigation by writ of prohibition was civil, and the real parties to it were the defendant in the police court and the city of Louisville, in whose interest the suit was prosecuted in that court. It would have been entirely proper to make the city of Louisville a party defendant to the original writ of prohibition. Indeed, some courts would hold that it was a necessary party. *Armstrong v. County Court*, 15 W. Va. 190; *Walton v. Greenwood*, 60 Me. 356. However this may be, the city of Louisville, admitting its interest, did appear as appellant, and so made itself a party to the whole litigation, and was so treated by the court of appeals of Kentucky. As the parties to this litigation are the same as those in the former suits except the board of assessment, which is in privity with the other defendants, and as the point adjudged is exactly the same, we can see no escape from the conclusion that the defendants here are estopped from asserting that the complainant has not a contract exempting it from any other taxation than

that provided in the Hewitt law, and, therefore, that the act of November 11, 1892, is an infringement of that contract, and impairs its obligation in violation of the constitution of the United States.

It is suggested that such a conclusion ousts this court from jurisdiction, because it makes the case turn on a question which does not arise under the laws or constitution of the United States. We cannot assent to this suggestion. The complainant asserts that it has a contract with the commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of Frankfort, and the county of Franklin, by the enforcement of a subsequent law of the state, are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties, such a contract exists. It appears that, as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties; but it does not free the court from the obligation to enforce the constitution of the United States, in favor of the complainant, by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established. The case of *City of New Orleans v. Citizens' Bank of Louisiana*, 167 U. S. 371, 17 Sup. Ct. 527, which presented precisely this aspect, was begun in the circuit court of the United States, and was carried to the supreme court of the United States, and the jurisdiction by the circuit court was not even questioned.

It is argued that the federal courts, in considering the question whether a state law impairs the obligation of a contract, will not accept as conclusive the construction which the supreme court of the state has put upon its constitution or laws in determining the existence of a contract and its violation. This is true, and is settled by a long line of authorities. *Shelby Co. v. Union & Planters' Bank*, 161 U. S. 149, 16 Sup. Ct. 558; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 492, 493, 14 Sup. Ct. 968; *Bryan v. Board*, 151 U. S. 650, 14 Sup. Ct. 465; *Railroad Co. v. Palmes*, 109 U. S. 256, 3 Sup. Ct. 193; *Douglas v. Kentucky*, 168 U. S. 488, 502, 18 Sup. Ct. 199, and cases cited. But the rule has application only where the judgment of the state court is under direct review, or in cases in which the opinion of the state court is cited merely as an authority and a precedent. It has no application to a case in which a prior judgment of the state court between the same parties is pleaded or is offered in evidence in a subsequent suit in a federal court as res judicata binding the parties. The state court is as much bound by the constitution of the United States as a federal court, and is vested with as complete jurisdiction in causes otherwise within its cognizance to decide, between the parties before it, whether a statute of the state impairs the obligation of a contract. *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. 544. Such decision, embodied in a judgment unreversed, is as binding with respect to the point adjudged as if it had been rendered by the supreme court of the United States. The distinction between the right and duty of the supreme court to decide for itself the question of contract or

no contract without regard to the state decisions, and its obligations to respect the bar of *res judicata* as between the parties, is quite clearly made in *Douglas v. Kentucky*, 168 U. S. 488, 503, 18 Sup. Ct. 199, although not expressly commented on. In that case, after maintaining in the strongest terms the obligation of the supreme court to exercise an independent judgment in determining the existence of a contract and its impairment, and after declining to follow a prior decision of the state court upon the subject, the court considered as a distinct matter the question whether the point had not been formerly adjudged in a state court between the same parties, and pointed out with much care that the point of the former adjudication was not the same as that then before the court. The whole discussion would have been wholly unnecessary if, as contended by counsel for defendants, the doctrine of *res judicata* has no application in the federal courts when the former adjudication is that of a state court upon a question arising under the federal constitution.

One other point remains for consideration. The answer pleads that a mandamus proceeding has been instituted in a state court by the city of Frankfort to compel the board of valuation and assessment to certify the apportioned valuation of the franchises of the complainant; that this mandamus proceeding was begun before the action under consideration, and is pending; and that the preliminary injunction issued by this court will be in effect an injunction against that proceeding in the state court. We do not think so. It is settled that the pendency of a suit in a state court is no bar to a suit upon the same subject-matter in this court. *City of North Muskegon v. Clark*, 22 U. S. App. 522, 10 C. C. A. 591, and 62 Fed. 694, and cases therein cited. The injunction which we shall grant may be offered as a defense by the board of valuation and assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in the other. The sufficiency of the defense will be for that court. We do not enjoin any suit at all by our order; all we do enjoin is the certification of the taxes. That does not require the defendants to disobey an order of any other court, or restrain their prosecution of a suit therein. The demurrer to the bill must therefore be overruled, and the preliminary injunction prayed for must issue.

BANK OF COMMERCE v. CITY OF LOUISVILLE.

SAME v. STONE et al.

(Circuit Court, D. Kentucky. June 4, 1898.)

Nos. 6,568 and 6,567.

1. ATTORNEY AND CLIENT—POWERS OF CITY ATTORNEY—AGREEMENT TO ABIDE BY JUDGMENT IN TEST CASE.

A city attorney charged with the duty of managing all the city's litigation may bind the city, in a number of controversies, to abide by the result of a test case to be brought involving the same questions.

2. RES JUDICATA.

A bank which agrees, by its attorney, with the attorney of a city, that a suit to be brought by it against the city shall abide the result of the judgment to be entered in a test case involving the same questions, may claim the benefit of the estoppel of the judgment which is subsequently rendered against the city in the test case.

Heard on demurrer to the bill and motion for preliminary injunction.

The Bank of Commerce is a state bank of Kentucky, organized under a statute of that state approved February 3, 1865. It is situated in Louisville, and when the Hewitt act was passed, to amend the revenue laws of the commonwealth of Kentucky, May 17, 1886, it duly accepted the terms of that act before the meeting of the next legislature of Kentucky. One of the grounds relied upon in the bill was that of *res judicata*. The averments of the bill upon this point were contained in paragraphs 4 and 5 of the bill, as follows:

Paragraph 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant the city of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator, and of every other bank and trust company in the city of Louisville, a tax equal to 4 per cent. of its gross receipts; and, this demand being refused, legal proceedings were commenced in the city court of Louisville, in behalf of the city, against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville; and, with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund; and it was agreed between the city of Louisville and its sinking fund commissioners, upon the one part, and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation which, by the agreement, was to be inaugurated, and without prejudice to the right of the banks they would make payments and loans to said sinking fund, as follows: First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the state under the present law and the amount which they would be required to pay for state taxes under the provisions of the Hewitt bill. This sum, it was provided, should be an actual payment, and not be repaid under any circumstances; but its payment was not in any manner or to any extent to prejudice the banks or trust companies paying it, or to be taken as a waiver of any legal right which they might have in the premises. Second. In addition to making the above payments, the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which, added to said payment, would equal 4 per centum of its gross earnings during the year 1893; and the sinking fund would execute for said loans its obligations, agreeing to repay the same with interest at 4 per centum per annum; and if it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void. Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to 4 per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund, as above described. Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and

diligently prosecute, such action as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them, or any of them, for doing business without license. The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked "A."

The Exhibit A referred to is as follows:

Sinking Fund Office, February 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville Clearing House, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same; but, in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement, whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees. After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable: First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the state for state taxes and the amount they would be required to pay for state taxes under the provisions of what is known as the "Hewitt Bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it, or be taken as a waiver of any legal right which they have in the premises. Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal 4 per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid; but, if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void. Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described. Fourth. This agreement is to be entered into with the understanding that the said banks and companies will institute without delay, and diligently prosecute, such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them, or any of them, for doing business without license.

A true copy. Attest:

J. M. Terry,
Secretary and Treasurer.

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville:

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board and the mayor of the city of Louisville, on one part, and the various banks, trust and title

companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part—First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the "Hewitt Bill," should be tested by appropriate litigation looking to that end. Second. In order to effectually test the question as to all of said companies, they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named. to wit: (A) Banks whose charters had been granted prior to 1856; (B) banks whose charters had been granted subsequent to 1856; (C) national banks,—it being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, named above. Third. In pursuance of that agreement, the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company, representing class B, and the Third National Bank, representing class C; and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances. It was distinctly understood and agreed at that time—and this agreement was made for the best interest of all parties to it—that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws, and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill. Fourth. On the faith of this agreement, all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners, of February 13, 1894, an attested copy of which is hereto attached as part hereof; but at a later date, and in further reliance upon said agreement, all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville, without reservation until the question thus raised should be finally disposed of.

Humphrey & Davie.

Helm & Bruce,

For the Banks, Trust and Title Companies of the City of Louisville.

H. S. Barker,

City Attorney.

Approved:

C. H. Gibson,

Prest. Comrs. Sinking Fund City of Louisville.

A true copy. Attest:

Huston Quin,

Arthur Peter,

M. McLoughlin.

So much of the certified transcript of the judgment in the proceedings in prohibition as is of importance has been set forth in the report of the case of Bank of Kentucky v. Stone, 88 Fed. 383.

Helm & Bruce, for complainant.

Henry L. Stone, for defendant city of Louisville.

W. S. Taylor, Atty. Gen., for defendants Samuel H. Stone, etc., board of valuation and assessment of the state of Kentucky.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). In the case of *Bank of Kentucky v. Stone*, 88 Fed. 383, just decided, we have held that, by the judgment of the court of appeals and of the Jefferson circuit court in the prohibition suits, the city of Louisville was estopped to deny, as against the parties to that judgment, that they had an irrevocable contract of exemption from any greater burden of taxation than that imposed in the Hewitt act. The complainant in the case now before us was not a party to the record in either of the three prohibition suits, but it claims the benefit of the judgment therein as a privy to the parties. This privity is said to arise from an agreement between the city of Louisville, on the one part, and certain banks of Louisville, including the complainant, on the other, by which it was stipulated that the controversies between all the banks and the city should abide the event in test suits to be instituted by three banks selected to represent three classes.

Two questions are presented for our consideration: First. Was the contract described in the bill, and attached to it as an exhibit, the contract of the city of Louisville? Second. If so, did the contract bring the complainant into such relation to the prohibition judgment and the parties thereto that it may claim the benefit of the estoppel of that judgment?

First. The averment of the bill is that the contract set forth was signed by the president of the sinking fund, and by the attorney for the city, under the authority and direction of the mayor and board of sinking fund commissioners, and by the counsel who represented the banks in said litigations. The bill further recites that the agreement was made between the city of Louisville and its sinking fund commissioners and the banks and trust companies, including the complainant. Upon demurrer to the bill, these averments would doubtless be sufficient to show that the contract which was made was the contract of the city of Louisville. But the case is pending also upon the motion for a preliminary injunction; and upon that motion it is proper for us to consider the answer of the city of Louisville, which, by stipulation, was permitted to be filed without the withdrawal of the demurrer. The answer contains this averment:

"This defendant denies that said alleged agreement, an alleged copy of which or the substance of which is filed with complainant's bill, marked 'A,' was signed by the attorney for the city of Louisville, under the authority of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville; and said alleged agreement or contract set forth in said copy, marked 'A,' is not the act and deed of this defendant, and, in so far as the same purports to be an agreement or contract by or with this defendant, it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant; and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant; nor does the same operate

to prevent or defeat the power and authority vested in this defendant by said act entitled 'An act for the government of cities of the first class,' approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies. This defendant states that said commissioners of the sinking fund of the city of Louisville was in 1894, and long prior thereto and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the state of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract at the time, in the manner, or under the circumstances alleged in complainant's bill or otherwise."

Upon a motion for preliminary injunction, therefore, the issue is raised whether those who signed the contract on behalf of the city of Louisville were authorized to bind it thereto. We are of opinion that the city attorney was vested with ample authority to bind the city of Louisville to the contract mentioned in so far as it affected the complainant herein. By section 2909 of the Revised Statutes of Kentucky it is provided that:

"There shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

The foregoing section makes this officer the retained attorney of the city in every suit brought against it. The question at issue between the banks and the city of Louisville was whether the city could collect license taxes under one of its ordinances. The banks notified the city attorney and the commissioners of the sinking fund, whose duty it was to receive the money for the benefit of the city, that they intended to resist the collection of the tax by litigation. It was the duty of the city attorney, under the statute above set forth, to take charge of the litigation thus about to be brought. It was his duty, as the attorney of the city, to save, so far as he could without prejudice to the city's interests, costs which might be accumulated should suits to the number of 20 be brought and won by the banks against the city. It seems plain to us that it was within his general authority as attorney to make an arrangement with the intended litigants, by which the litigation to be brought should be reduced in volume to as few cases as possible by means of a stipulation that all the suits involving the same questions should abide the result in one suit to be brought. We think that such a stipulation was a mere step in the management of the litigation, and was entirely under the control of the attorney retained for the suits. It did not work to the prejudice of the city in the slightest. Had the suits actually been brought, a stipulation between the city attorney and the attorneys for the banks of this character would

have been as clearly part of the ordinary management of the suits as any other arrangement for expediting their trial. No material distinction can be suggested between the power of the city attorney to make an agreement of this character with respect to intended suits and suits actually filed. The control that an attorney has by virtue of his office over the suit in which he is employed is very wide in respect to those matters that relate to the progress of the suit and the mode of reaching a conclusion, and which do not deprive the client of a full opportunity to be heard by his attorney on the issues raised in the case. Such authority inheres in the relation between an attorney and client in respect to litigation, and the authorities fully sustain this conclusion.

In *Railroad Co. v. Stephens*, 36 Mo. 150, the plaintiff railroad company brought several suits against different stockholders in which the questions were precisely the same. The attorneys for the respective parties entered into a written agreement stating that, as the same facts arose in all the cases, they would abide by the judgment that should be rendered in one of them, and that a like judgment should be rendered in each of the several cases. It was contended in that case that the attorneys who made the agreement had no authority to make the agreement, and that it was void. The court sustained the agreement as within the authority of the attorney. It said:

"The arrangement in this case is not a 'compromise' according to the usual acceptance of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of the thing to be recovered. It comes nearer within the general management of the case."

In *Ohlquest v. Farwell*, 71 Iowa, 231, 32 N. W. 277, a client was a party to two suits involving substantially the same question. It was held competent for his attorney to bind him by an agreement that only one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. In delivering the opinion of the court, Judge Beck said:

"It is undoubtedly true that an attorney cannot consent to a judgment against his client, or waive any cause of action or defense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It cannot be doubted that, under them, counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued,—to the manner of trial,—and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases. This is just what was done by the counsel for Becker in this case. The form of agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial."

See, also, *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933; *Gilmore v. Insurance Co.*, 67 Cal. 366, 7 Pac. 787.

In *Thompson on Trials* (volume 1, § 195) the author says:

"Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys, in virtue of their general retainers, to stipulate that only one shall be tried, and that the others shall abide the result of that one."

We think, therefore, that, in so far as the issues arising between the banks not actually engaged in the litigation and the city of Louisville were the same as in the three suits which were brought as test cases, the contract made by the city attorney was binding upon the city.

The next question is whether the contract made enables the complainant bank to claim the benefit of the estoppel of the judgments thereafter rendered. We think it does. In *Patton v. Caldwell*, reported in 1 Dall. 419, the action was on a policy of insurance. Counsel for plaintiff offered to read in evidence a special verdict that had been given in another action against a different underwriter. This was objected to on the ground that the verdict was given between other parties, and therefore not admissible, upon which an agreement of all the underwriters to be bound by one verdict was proven. McKean, C. J., said:

"The defendant had no opportunity of cross-examining upon the former trial; and the answer is that he, with the rest of the underwriters, had agreed to be bound by one verdict, which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel. Whether this agreement was made in person or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the witnesses then produced. Although, therefore, we should not have allowed the special verdict to be read, without full proof of the agreement, yet, on receiving that satisfaction, we think it would be unfair to suppress it; and, for the future, we desire that all such agreements may be entered on the records of the court."

The court then held that the verdict thus offered was not conclusive. As the latter proposition, however, is in conflict with the rule laid down by the supreme court of the United States in a recent case of *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, that part of the decision cannot be regarded as authority here.

In *Brown v. Sprague*, 5 Denio, 545, several ejectments were pending between one claiming title and persons having only the naked possession of the lands. An agreement was made between all the parties that the suits should be stayed and await the event of a suit between other parties in which the same questions arose. It was held that a judgment in that suit would operate as an estoppel between the parties to the agreement.

Mr. Freeman, in his work on *Judgments*, says (section 174):

"Neither the benefit of judgments, on the one side, nor the obligations, on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons who, being neither parties upon the record, nor acquirers of interests from those parties after the commencement of the suit, are, nevertheless, bound by the judgment. Prominent among these are persons on whose behalf and under whose direc-

tion the suit is prosecuted or defended in the name of some other person. * * * The fact that an action is prosecuted in the names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein, is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action. * * * Where one seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly, to the knowledge of the adverse party, and for the protection of his own interests."

These principles are sustained by the cases cited by the learned author. See *Cole v. Favorite*, 69 Ill. 457; *Wood v. Ensel*, 63 Mo. 193; *Tate's Ex'rs v. Hunter*, 3 Strob. Eq. 136-140; *Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882; *Gill v. U. S.*, 7 Ct. Cl. 522, 526. See, also, *Herm. Estop.* § 139.

In 1 Greenl. Ev. § 523, the principle is stated as follows:

"But, to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the same proceedings. We have already seen that the term 'privity' denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is that they are identified with them in interest; and, wherever this identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon them with whom they are in privity. And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage assigned by him shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him."

In the case of *Rapelye v. Prince*, 4 Hill, 119, Mr. Justice Bronson, speaking for the supreme court of New York, said:

"When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party."

In the present case there can be no doubt from an examination of the contract and the averments of the bill that the three suits which were conducted were openly conducted in the interest of all the parties to the agreement with the knowledge and by the consent of the city of Louisville, and that the counsel who appeared for the parties to the records were at the same time discharging their duties as counsel for the other banks who had made the agreement. If any one can be bound by a judgment to which he is not a party, it would seem that the banks here must have been so bound. Had the result gone the other way, and a judgment been rendered in favor of the city of Louisville in the cases referred to, it cannot admit of doubt that all the banks would have been bound by the decision. As part of the consideration for the settlement of the litigation in the manner fixed by the agreement, the banks paid to the sinking fund commissioners for the city of Louisville the substantial sum of

\$150,000. Had the agreement not been entered into, it is certain that the complainant would have obtained formal judgment in a prohibition suit, and would now have been in the same position as the Louisville Banking Company. Relying on the binding character of the agreement, however, judgment was not taken in the name of complainant. Equity and justice require that effect should be given to an agreement upon the faith of which \$150,000 was immediately paid to the city, and a formal judgment was not taken. It is just that, inasmuch as the banks would have been bound by a diverse judgment, they shall have the benefit of a judgment which was rendered in favor of their colleagues selected to represent them in the suit. This conclusion necessarily leads to the result that the demurrer to the bill must be overruled, and the motion for a preliminary injunction allowed.

LOUISVILLE TRUST CO. v. STONE et al. SAME v. CITY OF LOUISVILLE. FIDELITY TRUST & SAFETY VAULT CO. v. STONE et al. SAME v. CITY OF LOUISVILLE.

(Circuit Court, D. Kentucky. June 4, 1898.)

Nos. 6,583, 6,584, 6,581, and 6,582.

1. ATTORNEY AND CLIENT—POWER TO BIND CLIENT BY AGREEMENT.

The power of an attorney to bind his client by consenting that a decision in another case shall be binding on him in the case in question can only exist where the two cases involve the same questions of law and fact.

2. SAME.

Whether trust companies having no general banking powers, by accepting the burdens of the Kentucky tax law of May 17, 1886 (the "Hewitt Act"), thereby acquired an irrevocable contract right to exemption from other forms of taxation, is a different question from that as to whether regular banking corporations, by like conduct, acquired such a right; and hence, in proceedings brought by trust companies and banks against a city to establish an exemption on this ground, the city attorney has no authority to bind the city by an agreement that the suits involving the rights of the trust companies shall abide the result of suits involving the rights of the banks.

3. RES JUDICATA—QUESTIONS CONCLUDED.

An adjudication that banks accepting the provisions of the "Hewitt Tax Law" (Act Ky. May 17, 1886) acquired an irrevocable right to exemption from other forms of taxation is not conclusive that trust companies, having no general banking powers, by like acceptance, acquired a similar exemption.

Helm & Bruce, for complainants.

Henry L. Stone, for city of Louisville.

W. S. Taylor, Atty. Gen., for Samuel H. Stone, etc., board of valuation and assessment of the state of Kentucky.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. The Louisville Trust Company and the Fidelity Trust & Safety Vault Company were parties to the agree-

ment made between the banks of Louisville and the city attorney, by which the question of the liability of the banks of Louisville under the license ordinance of the city of Louisville was carried by three test cases to the court of appeals. By that agreement these trust companies were included within the clause represented by the Louisville Banking Company, as a bank of the state, organized since the act of 1856. The trust companies were organized under charters each of which contained the following clause: "But nothing herein shall be construed to permit said company to discount paper or to engage in the business of banking." By subsequent amendments some additional powers were given which are usually exercised by banks, but there was no amendment to the charter of either permitting it to engage in the business of regular or general banking. The power to qualify and act in various trust or fiduciary capacities constituted the chief object in the organization of these companies. Section 5 of the amended charter of the Louisville Trust Company contains the following:

"For purposes of taxation, this company shall be classed and treated as one of the banks of this state, and shall be subject to and pay the same rate of taxes, to same parties, at the same time, in same manner, and for the same purposes only, as may be provided by law from time to time, as the banks doing business in this state." Laws 1885-86, p. 687.

In the case of *Louisville Trust Co. v. City of Louisville* (Ky.) 30 S. W. 991, Judge Grace, in the course of his opinion, expressed the view that this was not a bank, and that it was not entitled to any exemption from taxation, because it rendered no public service to the state, and that this was the only ground upon which it could be excused from taxation under the old constitution. It has been held by the court of appeals of Kentucky that it was competent to exempt banks, under that constitution, because they did render public services. It is thus apparent that the question whether the trust companies had an irrevocable contract under the Hewitt act (Act Ky. May 17, 1886) was not the same as that presented with respect to the banks. The power of an attorney to bind his client by consenting that a decision in another case shall be binding upon him in the case in question can only exist where the two cases involve the same questions of law and fact; otherwise, the attorney might conclude his client's rights by an event having no relevant relation to the merits of the controversy in which he is acting as attorney. Hence it follows that the contract of the city attorney on behalf of the city of Louisville, in so far as it attempted to make the taxation of the trust companies depend upon the judgments in the three test cases of the banks, was beyond his authority, and that the trust companies cannot rely on those judgments as *res judicata*. Indeed, the same conclusion may be reached irrespective of the city attorney's authority. The point adjudged in the three cases was that banks accepting the Hewitt act had an irrevocable tax exemption. The point at issue here concerns the tax exemption of the trust companies. This is a different question, as we have seen, and is not foreclosed, therefore, by the judgment in favor of the banks. The indispensable element in a successful plea of *res judi-*

cata is that the point adjudged and the point at issue shall be the same. If the complainants cannot rely on the bar of the prior adjudication, we must, of course, reach the same conclusion upon the question of irrevocable contract on its merits that we have reached in the case of the Northern Bank of Kentucky. The motion for preliminary injunction must therefore be denied, the demurrers to the bills sustained, and the bills dismissed.

**FIRST NAT. BANK v. STONE et al. SAME v. CITY OF LOUISVILLE.
AMERICAN NAT. BANK v. STONE et al.**

(Circuit Court, D. Kentucky. June 4, 1898.)

Nos. 6,569, 6,575, 6,576.

1. STATE TAXATION OF NATIONAL BANKS.

The Kentucky revenue act of November 11, 1892, providing for the taxation of banks and other corporations, as applied to national banks, is a tax, not on the franchise granted by congress, but on the equivalent in value of its shares of capital stock, and is not therefore in violation of Rev. St. U. S. § 5219, prescribing the manner in which national banks may be taxed by the states.

2. SAME—DISCRIMINATION.

When a state taxing statute by its terms is designed to operate equally upon all banks, state and national, but, through the application of the doctrine of res judicata, certain state banks are exempted from its operation, this does not result in such a discrimination against national banks as is forbidden by Rev. St. U. S. § 5219.

Helm & Bruce, for complainants.

Henry L. Stone, for city of Louisville.

W. S. Taylor, Atty. Gen., for Samuel H. Stone, etc., board of valuation and assessment of the state of Kentucky.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. The First National Bank was organized in October, 1863, under the national banking laws, and its charter rights were extended September 6, 1882. It did not formally accept the Hewitt act, in accordance with the terms of that act. The averment of the bill upon this point is:

"Your orator shows, that from the 1st day of July, 1887, although it was not by the United States banking acts bound to submit to taxation under the 'Hewitt Bill,' it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the state of Kentucky, under, and in accordance with the provisions of said Hewitt bill; and the said state, through its proper officers, received and appropriated said taxes paid by your orator as aforesaid. Your orator has no real estate, and never had. In the way above stated, your orator accepted the provisions of the Hewitt bill."

The American National Bank was organized after the passage of the Hewitt act, so that it could not accept that act in accordance with its provisions. The averment of its bill upon this point is:

"Your orator shows that from the 1st day of July, 1890, although it was not by the United States banking acts bound to submit to taxation under the

Hewitt bill, it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the state of Kentucky, under, and in accordance with the provisions of said Hewitt bill; and the said state, through its proper officers, received and appropriated said taxes paid by your orator as aforesaid. Your orator has since its organization paid, to the city, taxes on the building in which it does business. In the way above stated, your orator accepted the provisions of the Hewitt bill."

Each of the bills in the above-entitled causes contained these averments:

"Your orator respectfully shows to the court that the existing laws of the state of Kentucky do not provide for taxing the shares of your orator as permitted by the act of congress, but attempt to subject to taxation its franchise granted by the congress of the United States and its other intangible property, such as its surplus, undivided profits, and investments, without lawful right to do so, and contrary to the act of congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of congress. And your orator respectfully submits that said statute of the state of Kentucky is repugnant to the act of congress in such cases made and provided, and, because of said repugnancy, is void and of no binding force as against your orator. Your orator further shows and submits to the court that by reason of the formal contract entered into by all the other banks and trust companies in the city of Louisville, and by reason of the former adjudication in favor of said banks and trust companies establishing the validity of said contract, they will escape local taxation, except on the houses owned by them respectively, in which they respectively do business; and your orator, coming, as it does, into direct competition with said institutions, will be driven out of business if subjected to local taxation; wherefore it respectfully insists it is protected by the acts of congress against such unjust discrimination."

The first question is whether the revenue act of November, 1892, taxes the national banks in a way inconsistent with the permission given by congress.

Section 5219 of the Revised Statutes of the United States is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent according to its value, as other real property is taxed."

The state derives its power to tax national banks from this section. The question is whether the provision for taxation of banks under the revenue act of November, 1892, is a violation of this section. The provisions of that act are that all banks shall be taxed upon their real property and personal property, and also taxed upon their franchises to be assessed by subtracting the value of the tangible property from the value of the capital stock of the company. It is argued that the state has no right to tax the franchises conferred by the government of the United States. But it has been

decided in the cases of *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, and *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, that the word "franchise," in the revenue act of 1892 was not employed in a technical sense, and that the legislative intention was plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies, possessing no franchise, should be valued as an entirety, that the value of the tangible property should be deducted, and that the value of the intangible property thus ascertained should be taxed under these provisions. It will be seen, therefore, that the taxation upon all banks is nothing but a tax upon the value of its capital stock. There is no discrimination whatever against national banks in favor of state banks, because they are all subject to the same rule of taxation.

The supreme court of the United States has given section 5219 a very liberal construction in sustaining state taxation of national banks if not inconsistent with the purpose of congress to prevent a discrimination in favor of state banks as against national banks. Mr. Justice Miller, in delivering the opinion of the court in the case of *Davenport Nat. Bank v. Davenport Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73, said:

"It has never been held by this court that the states should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of congress require anything more than this. Neither its language nor its purpose can be construed to go any further. Within these limits, the manner of assessing and collecting all taxes by the states is uncontrolled by the act of congress."

See, also, *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, and *Bank of Redemption v. Boston*, 125 U. S. 60, 8 Sup. Ct. 772; *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 324.

It is contended, however, that the definition given to the term "capital stock," used in the revenue act of 1892, includes more than the sum of the values of the shares of the capital stock of a corporation. It is true that in the case referred to (*Henderson Bridge Co. v. Com.*, 31 S. W. 486) the court of appeals of Kentucky held that it was proper for the board of valuation and assessment to fix a valuation of the capital stock of the Henderson Bridge Company at more than the market value of the sum of the shares of the capital stock. In that company the shares of capital stock aggregated \$1,000,000, the market value of which was 90 cents on the dollar. It had a mortgage upon its property to secure a bonded indebtedness of \$2,000,000. In reaching the amount of the capital stock of the bridge company, the board added the market value of the shares of the capital stock to the market value of the mortgage bonds, taking it for granted that that would show the real amount of property, tangible and intangible,

owned by the company. This mode of assessing the capital stock was held to be proper under the law. In such a case, of course, the assessment for taxation would be more than the value of the shares of the capital stock. There could be no such result, however, in the application of the law to national banks, because they are not permitted to issue bonds, and do not hold property under mortgage. It is not averred in the bill, and it does not appear, that the assessment of valuation for taxation against these complainant banks exceeds the market value of their shares of capital stock. However the law may operate, therefore, upon that class of corporations which have bonded indebtedness, it certainly does not in the case of the national banks tax anything more than the equivalent in value of the shares of the capital stock. If it does so, there ought to be some averment to show this. *Supervisors v. Stanley*, 105 U. S. 311. The bill contains no such statement.

Another objection to the operation of the revenue act upon the complainants is that certain of the state banks and national banks are now, by reason of the previous litigation, enabled to escape all taxation except that provided under the Hewitt act, and that this is a discrimination against them, in violation of section 5219, above quoted.

In *Lionberger v. Rouse*, 9 Wall. 468, the fact that a state could not collect a tax past a certain amount in the two banks of issue, which it had at that time, was held no bar to the collection of the tax on the shares of the national banks for a greater amount. In this case Mr. Justice Davis, who delivered the opinion of the court, concluded as follows:

"Without pursuing the subject further, it is enough to say, in our opinion, congress meant no more by the second limitation in the proviso to the forty-first section of the national banking act than to require of each state, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

In the former litigation certain banks have been declared to be free from taxation by reason of a contract of exemption. By subsequent decisions in the same court, if that be a material question in that court, the former ruling was declared erroneous. But, by the doctrine of *res judicata*, the particular banks engaged in the prior litigation are able to rely upon it as a bar to the enforcement of the law of 1892. That law, by its terms, applied to all banks equally. In so far as the state has had the power to do so, therefore, it has made the taxation of all banks equal. We do not think that the exceptions to the operation of the law, produced by the accident of litigation, can make the discrimination arising between the parties to the litigation and those who were not parties,—a discrimination within the inhibition of section 5219 of the national banking act. The motions for preliminary injunction will be denied, the demurrers to the bills will be sustained, and the bills dismissed.

NORTHERN BANK OF KENTUCKY v. STONE et al.

(Circuit Court, D. Kentucky. June 4, 1898.)

No. 6,585.

1. RES JUDICATA—PARTIES CONCLUDED.

In a suit by a bank to enjoin a county from collecting a tax, an adjudication that the bank had an irrevocable contract with the state for exemption from such taxes by reason of accepting the provisions of a certain prior act is not conclusive, in a subsequent suit involving the right of other counties and certain municipal corporations to collect taxes from the bank under the same statute.

2. SAME — CONCLUSIVENESS AS TO PARTY NOT OF RECORD — PRESENCE OF ATTORNEY.

The fact that, in a suit to restrain a county from enforcing collection of a tax under a state law, the attorney general of the state appears in the court of appeals in behalf of the commonwealth, which is not a party to the record, does not make the adjudication *res judicata* as against the state, and as against other counties and municipalities thereof.

3. CORPORATIONS—REPEAL OF CHARTER—IRREVOCABLE CONTRACTS.

Act Ky. 1856, declaring that all charters and grants of or to corporations, or amendments thereof, and all other statutes, "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed," applies not only to subsequent grants of original charters, but to extensions of pre-existing charters.

4. SAME—EXTENSION OF BANK CHARTER.

The Kentucky statute of 1884 extending the charter of the Northern Bank of Kentucky without new conditions, except that the extension shall be formally accepted by the bank, shows no intention that the extended charter shall not be subject to repeal or amendment in accordance with the provisions of the act of 1856.

5. TAXATION OF BANKS—CONTRACT EXEMPTIONS.

The Kentucky statute of 1886 known as the "Hewitt Act" lays a tax of 75 cents per share on banks and certain other corporations, and, in section 4 of article 2, declares that all banks and corporations accepting the act shall be exempt from all other taxation so long as said tax shall be paid. Section 6 provides that the act shall be subject to the act of 1856, making repealable and amendable all charters or amendments, and other statutes thereafter passed. *Held*, that the acceptance of the act by a bank merely created a contract exemption from other taxation which the legislature could revoke at pleasure.

Bill by the president, directors, and company of the Northern Bank of Kentucky against Samuel H. Stone and others.

The bill in this case averred that the complainant bank was a corporation originally organized by an act of the general assembly of Kentucky approved February 20, 1836, to do a general banking business. Its corporate life was made to terminate May 1, 1865. The act of February 15, 1858, continued the charter privileges of the complainant in full force for 20 years from May 1, 1865, upon its acceptance of certain conditions, to which the complainant duly consented. An act approved February 6, 1882, provided that the charter rights and privileges of the complainant should continue and extend in full force for 20 years from and after May 1, 1885; reserved to the general assembly the right to alter, change, amend, or repeal the act, and the charter and amendments thereto; and required that, before the act should go into effect, it should be approved and accepted by a majority in interest of the stockholders. The act was never accepted or approved by the stockholders. Thereafter another act was passed, approved March 6, 1884, providing that the chartered rights and privileges of the complainant should be extended in full force for 20 years from and after the 1st of May, 1885, and that the act should go into effect when it should be approved by the stockholders of

the bank and notice of the approval given to the governor of the commonwealth. It did not contain the clause reserving to the legislature the power of repeal. It was duly accepted. The fifteenth section of the original charter of the complainant required the cashier to pay to the treasurer of the commonwealth 25 cents on each \$100 of stock held and paid for in said bank which should be in full of all tax or bonus: provided, that the legislature might increase or diminish the same, but at no time should the tax exceed 50 cents on each \$100 of stock paid for in said bank. By an act of 1836 the legislature increased the tax to 50 cents; and this the complainant paid each year down to July 1, 1886, when the Hewitt law was passed. The court of appeals of Kentucky, as early as 1838, held that the language in the complainant's charter constituted a contract with the state, which was inviolable, and a limitation on the legislative power to tax the stock of the bank or its property. *Johnson v. Com.*, 7 Dana, 339. By a subsequent decision it was determined by the same court that the limitation included taxation by any of the municipal subdivisions of the state, and therefore prevented such municipal subdivisions from taxing the real estate of the bank, although situated within their boundaries. *Farmers' Bank of Kentucky v. Com.*, 6 Bush, 127. The complainant duly accepted within the required time, the benefit of the Hewitt act, by filing a consent in writing, under the seal of the bank, with the governor of the commonwealth, and paid the tax under the Hewitt act from that time down to July 1, 1893. Thereafter the auditor of state refused to receive the tax under the Hewitt law, although tendered by the complainant. Upon the announcement of the decision of the court of appeals in 1895 (31 S. W. 1013), payment was accepted from the bank for the amount due under the Hewitt law from 1893 to 1896. The principal office of the complainant is in the city of Lexington, in the county of Fayette. It has one branch in the city of Paris, in the county of Bourbon, and another in the city of Covington. The bill avers that the revenue act of 1892 violates the contract between it and the state in the charter and the amendments to the charter and the contract between it and the state under the Hewitt law.

The bill further avers that under the revenue act of 1892 the board of valuation and assessment certified to the authorities of the county of Bourbon the proportion of the franchises found to be taxable by the county of Bourbon in the year 1893; that thereupon the county of Bourbon caused to be placed in the hands of James McClure, sheriff of said county, and the collector of its revenue, the tax bill made out accordingly; that on July 13, 1894, the complainant filed in the circuit court of Bourbon county (that being a court of general jurisdiction) its petition against the said county and sheriff, setting forth in said petition, in apt terms, the contract between it and the state in regard to taxation under the original charter and under the Hewitt law, claiming that no taxes could be collected from the complainant except in pursuance thereof during its charter life, and that the act of November 11, 1892, was unconstitutional and void, as impairing the obligation of these contracts, and praying the court to establish these contracts, and to enjoin the said Bourbon county and McClure, the sheriff, from attempting to collect any taxes contrary thereto; that, issue having been joined upon the complainant's said suit, a judgment was rendered in the Bourbon circuit court to the effect that the act of November 11, 1892, did not violate any contract between the complainant and the state, and judgment was entered accordingly; that thereupon the complainant appealed from said judgment to the court of appeals of Kentucky; that in that court its appeal, having come on to be heard, was argued by counsel, among others, by the attorney general for the commonwealth of Kentucky on behalf of the commonwealth, who insisted upon the affirmance of the judgment; but the court adjudged that the judgment of the lower court was erroneous, and remanded the case to the Bourbon circuit court for a judgment in conformity to its opinion, in which opinion it was held that the Northern Bank of Kentucky had an irrevocable contract under the Hewitt act and its charter, which prevented the authorities of the state or any of its municipal subdivisions from imposing any other tax than that prescribed in the Hewitt act. The bill concludes as follows: "The premises considered, the complainant says it has been fully and finally adjudicated in proceedings between it and the said Bourbon county (which rep-

resented the commonwealth, and in law all other municipalities deriving power from the commonwealth) that complainant's contract is valid and enforceable, and that the complainant cannot be subjected to any greater rate of taxation than that agreed upon by it under the Hewitt law; if the commonwealth of Kentucky shall be adjudged to have retired from said contract, then to no greater rate of taxation than is provided for under the complainant's charter and amendments."

J. D. Hunt and Humphrey & Davie, for complainant.

W. S. Taylor, Atty. Gen., for Samuel H. Stone, etc., board of valuation and assessment of the state of Kentucky.

John R. Allen, for Fayette county.

W. P. Kimball, for city of Lexington.

W. McD. Shaw, for city of Covington.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). Under the decision already rendered in the case of the Bank of Kentucky against Stone and others, there can be no doubt that, on the case made both in the bill and on the proof, the defendants the board of valuation and assessment and Bourbon county are estopped by the former adjudication from asserting that the complainant bank is liable for any taxes to Bourbon county under the revenue act of 1892, because, as between the complainant and that county, it was adjudicated that the complainant had an irrevocable contract with the commonwealth by which all taxation against it should be limited to the tax provided in the Hewitt act, and that the tax upon the franchise under the revenue act was a violation of such contract.

It is also contended on behalf of the complainant that the other defendants, Fayette county, the city of Lexington, the city of Covington, and the city of Paris, are equally bound by the adjudication against the county of Bourbon. We do not think that this contention can be sustained. The theory seems to be that, as the county of Bourbon is a municipal corporation under the state government, the state is bound by the adjudication against it, and therefore every other subdivision is bound. It seems to us that this would be extending the doctrine of *res judicata* further than any authority will justify. The argument is based upon the decision of the court of appeals of Kentucky in *Franklin County Court v. Deposit Bank of Frankfort*, 87 Ky. 382, 9 S. W. 212. In that case the Deposit Bank of Frankfort was seeking to enjoin the county court of Franklin county from levying a tax upon its property in addition to the tax of 50 cents a share upon its stock which its charter provided should be in full of all tax or bonus. It was held that this was a contract which prevented any additional tax in any form upon its property by the state. The court then continued:

"But it is contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position counsel clearly overlook the fact that the county and city are integrant parts of the state, and that they cannot levy and collect taxes without the authority of the state conferring that right upon them. So, the absurdity is presented that the state contracts with the appellee, in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of all

tax or bonus (this is the meaning of the language), and at the same time authorizes its local subdivisions to levy and collect other taxes off of the appellee; that is to say, that the state, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off of the appellee, but may, notwithstanding, authorize all of its subdivisions, if the appellee's property were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one at first blush that such a procedure would be a palpable violation of the contract. Under such a contract between individuals, a doubt could not exist. The state, when she makes a contract based upon a valuable consideration, stands upon precisely the same footing."

This decision adjudged two things: First, that the state had power by contract to impose a limitation upon the taxing power, whether exercised by itself or by municipalities in which it might vest the same power; and, second, that the language of the restriction in this case must be construed as intended to limit the whole power, whether exercised by state or with the state's permission by municipalities. The argument of counsel assumes that as the county derives its power to tax from the state, which is all that was decided in the case cited, it is, in levying taxes, the mere agent of the state, and therefore a judgment against the county on a tax question is a judgment against the agent in respect of the business of the principal, and is binding upon the latter as a privy. Indeed, the argument goes further. It assumes that a county is a part of the state government, and therefore a judgment against the county is a judgment in fact against the state. This is applying the doctrines of agency and privity under circumstances to which they have but little application. The source of all political power including the power to tax is in the people of the state. By a constitution they create a state government and a legislature, and confer upon the legislature power to organize local municipal governments, and to give such governments the power to levy taxes in order to discharge their other appointed functions. The municipal governments are entities distinct from the state government, incurring liabilities of their own in no way binding upon the state, and acquiring rights and property in which the state has no property interest. Except where the law makes the municipal government an agent for the state in collecting the state's taxes or in discharging some other state function, there is no relation between the one and the other of principal and agent, as that relation is usually understood in the law. The state may, through its legislative branch, confer upon, and withdraw from, the counties and cities, power of taxation. But, when the power thus conferred is for the benefit of the local community in which it is to be exercised, its exercise is not by an agent for a principal; it is by a quasi independent government, for the benefit of the people within its limits. The legislature, if not restrained by the constitution, may, by contract with individuals, limit its power either to levy taxes itself or to grant the right of taxation to municipalities; and the individual may avail himself of such restriction by resisting taxation in violation thereof either by the state or municipality. But in a controversy between the individual and the municipality as to the restriction, its existence or extent, the latter is contending for the benefit of

itself and its people, not for the state and its people. The taxes it proposes to collect are to be spent, not for the state at large, but for the convenience and benefit of the people within its limits. In seeking by suit to establish its right to tax, therefore, the city or county is not acting as agent for the state, but for itself. Hence the judgment is not binding upon the state as principal.

The only other possible relation of privity of the state to the litigation must grow out of the fact that it involves the validity of a power granted by the state to the city or county; but this does not make the state privy to the judgment. In granting the power, the state did not enter into an enforceable covenant of warranty with the counties and cities that the power as against every individual was valid. Certainly, it cannot be claimed that the state could be vouched in by the county or city as a warrantor of the validity of the power, or, by notice of the pendency of the suit, could be bound conclusively by the subsequent judgment. If the contention of counsel for the complainant is sound, it must follow that the state and all its municipalities, great and small, would, by a judgment in favor of an individual or corporation against a village in a remote county adjudging a limitation upon the taxing power of the state, be estopped to deny the limitation in any future litigation with the same individual or corporation, although no appeal may have been taken to a higher court, and although neither the state nor the other municipalities may have had any notice whatever of the litigation, or any right or opportunity to be heard upon the question decided. We do not decide, because it is not necessary to do so, whether a county or city would be privy to a judgment against the state adjudging a limitation upon the taxing power; but it suffices to say that the question is in some important respects different from the one we have been discussing.

The case of *People v. Holladay*, 93 Cal. 241, 29 Pac. 54, does not, it seems to us, support the contention of the complainant. In that case the question was of the title to certain property claimed to have been dedicated as a park. The lot was situated in the city of San Francisco, and the city and county of San Francisco brought a suit in ejectment to recover possession of the tract from the defendant, who had obstructed the use of the same by the public, and excluded them therefrom. In this action the city and county were defeated, and a judgment rendered finding that the defendant was the owner of the undivided $\frac{19}{30}$ of land, and his title thereto was quieted as against the city and county. Subsequently, the attorney general, on behalf of the people of the state, on relation of one Bryant, brought another suit raising the same question, and seeking to oust the defendant from the possession of the same tract. It was held that the city and county of San Francisco had the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and in such action it was authorized to put in issue the alleged rights of the people to such easement; and the state was bound by the result of such litigation, if the same was not collusive. It is unnecessary for us to ex-

press an opinion upon the correctness of this decision, because it can be easily distinguished from the case at bar. The city and county of San Francisco in the former litigation represented the same public which was represented by the state in the case before the court. The controversy was over the public use in the city of land claimed as a public square. It was obvious that the city, county, and state were representing the same interest and the same right with respect to exactly the same subject-matter. In the present case the subject-matter of the former litigation was the taxes due from the complainant bank to Bourbon county,—taxes which were to be expended by Bourbon county for county purposes and for the benefit of the people living in Bourbon county. The subject-matter of the present action which it is sought to conclude by the former action is the taxes due from the complainant bank to the city of Paris, to be expended for the benefit of the people of that city; to the county of Fayette, to be expended for the benefit of the people of Fayette; to the city of Lexington, to be expended for the benefit of the people of Lexington; and to the city of Covington, to be expended for the benefit of the people of the city of Covington. The rights of these various municipal corporations to the taxes claimed grow out of the same revenue act of November, 1892, but the parties and the persons in interest are different.

We have not deemed it necessary to consider another serious objection which might be urged to the use of a decree against Bourbon county to bar the state and other counties, and that is that, in the absence of power to enjoin the state in a suit, it would be difficult to justify the plea against the state of *res judicata* based on a decree of injunction against a municipality or state agency which does not enjoy the same immunity. To give the decree such an effect would seem to violate the state's exemption from suit. It suffices, however, to place our decision on the ground first above stated.

The fact that the attorney general appeared on behalf of the commonwealth in this litigation when it reached the court of appeals is not a circumstance which could be held to bind the commonwealth and all of its agencies by the litigation. There were a great many tax cases pending before the court at the same time. In some of these cases the commonwealth was a party, and the attorney general was therefore present to argue the question on its behalf in those cases. Even if this had not been the case, the case of *Carr v. U. S.*, 98 U. S. 433, shows that the appearance of the attorney general on behalf of the counties could not bind the state. In the case referred to, the point in controversy was over the title to land of the United States to certain lots in possession of its officers in San Francisco. The United States filed a bill to quiet title to the property. The defendant set up, by way of estoppel, certain judgments in ejectment rendered by the state court at the suit of his grantor against certain officers of the government, who, as its agents, had possession of the lots. In those actions the United States district attorney and additional counsel employed by the secretary of the treasury appeared for the defendants, and the question of title had been the same. It was held that the former judgment was not an estoppel

against the United States. Mr. Justice Bradley, in delivering the opinion of the court, said:

"It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defense. But we do not think that any such inference can be legally deduced from the action of the secretary of the treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the government; and, in fact, he had no authority to waive these rights."

The attorney general of the state in these cases, in appearing in the court of appeals of Kentucky for the county of Bourbon, did not intend to waive any rights of the state, and, so far as appeared, he had no authority to do so. Our conclusion, therefore, is, that the complainant bank cannot, in its controversy with the city of Lexington, Fayette county, the city of Paris, and the city of Covington, and with the board of valuation and assessment so far as concerns the apportionment and certification of the assessment by the board to those municipalities, rely upon or derive any benefit from the decree in the complainant's favor against Bourbon county.

We are thus brought to the question whether, as between the defendants just named and the Northern Bank of Kentucky, the latter has, by virtue of its acceptance of the Hewitt act, an irrevocable contract with the state of Kentucky, by which the taxes to be imposed during its corporate existence upon it shall be limited to those provided in the Hewitt act. A second and alternative question is presented by the bill of the bank and by the argument of its counsel. It is contended that, even if the state had the right at any time to withdraw from the contract with the complainant bank entered into by the latter's acceptance of the Hewitt act, there must be restored to the complainant the tax limitation under its charter which it was enjoying when it accepted the terms of the Hewitt act.

The original charter of the bank, granted in 1835, provided that it should pay into the treasury 25 cents a share of stock, which should "be in full of all tax or bonus: provided, that the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each" share of stock. In 1836 the legislature increased the tax to 50 cents a share. In 1838 this was held by the court of appeals of Kentucky to be an irrevocable contract between the bank and the state, preventing the state from taxing the property of the bank or its stock either against the bank or against its holders. *Johnson v. Com.*, 7 Dana, 339. In 1869 it was held by the same court that the same contract in another charter prevented taxation of the bank by counties and cities. *Farmers' Bank of Kentucky v. Com.*, 6 Bush. 127. These decisions never have been overruled. Manifestly, if the limitation was continued in extensions of the charter, it was broad enough to prevent taxation by the counties and cities, defendants in this case, under the revenue act of 1892. The original charter of the bank expired May 1, 1865. By an act approved February 15, 1858, the chartered privileges and rights of the president, directors, and company of the Northern Bank

of Kentucky were continued in force for 20 years from the 1st day of May, 1865. The extension was granted subject to certain restrictions on the powers of the bank not contained in the original charter, and imposed on it the obligation to establish certain branches. In 1882 the legislature passed an act to extend the charter of the bank for 20 years from May 1, 1885. That act contained this clause:

"Sec. 3. The general assembly of the commonwealth of Kentucky hereby reserves to itself the right to alter, change, amend or repeal this act, and the charter and amendments thereto extending this act at its pleasure."

This act was not accepted by the bank in accordance with its terms. Two years later another act was passed, which read as follows:

"Section 1. That the chartered rights and privileges of the president, directors and company of the Northern Bank of Kentucky shall continue and be extended in full force for twenty years from and after the first day of May, one thousand and eight hundred and eighty-five.

"Sec. 2. That said bank, under the continuance and extension hereby granted, shall be subject to all the restrictions, limitations, penalties, conditions and duties, and be entitled to all the rights granted to and imposed upon it by the act of its incorporation, and the acts amendatory of or relating thereto.

"Sec. 3. Said bank may be known by, and sue and be sued, contract and be contracted with, by and under the name of the Northern Bank of Kentucky, as fully as by and under its present name.

"Sec. 4. This act shall go into effect when it shall be approved by the stockholders of said bank at their regular annual meeting, or at a called meeting ordered for that purpose by the president and directors of said board, at which called meeting a majority in interest of said stockholders shall be present. Notice of said approval shall be given by the president of the bank to the governor of this commonwealth."

The question is whether this act is to be construed and read with the act of 1856 as a part of it. The act of 1856 read as follows:

"Section 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

"Sec. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter, or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.

"Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporations to be granted hereafter; and that this act shall take effect from its passage."

The court of appeals of Kentucky, in the case of the Franklin County Court v. Deposit Bank of Frankfort (June, 1888) 87 Ky. 382, 9 S. W. 212, held that the act of 1856 did not apply to subsequent acts extending charters granted before its passage, and that the exemption from further taxation was as inviolable under the extended charter as it was during the life of the original charter. But in the case of Deposit Bank of Owensboro v. Daviess Co. (Ky.; March, 1897) 39 S. W. 1030, a majority of the court of appeals ex-

pressly overruled the decision in *Franklin County Court v. Deposit Bank of Frankfort*, and held that the act of 1856 must be read into all charter extensions granted after its passage, whether the original charter was granted before the act of 1856 or not. It is said that the last ruling was obiter dictum, and unnecessary in deciding the case before the court. But this is by no means clear. In the latter case the question involved the construction of the Hewitt act. In all discussions of that act it had been supposed to be a material preliminary step to determine whether there were any banks which would surrender an irrevocable tax exemption privilege in accepting the terms of the Hewitt act. We think we must therefore treat the two decisions above cited as conflicting; and, in any event, it is for us now to exercise an independent judgment in the matter. In the earlier decision the court of appeals held that the extension related back to the date of the original charter, and that, therefore, the act of 1856 did not apply, because, by its third section, its application was limited "to charters and acts of incorporations to be granted" thereafter. It was further held that, even if the act of 1856 would apply to extensions of old charters, it did not do so here, because the various provisions of the extension act of 1872 manifested an intention of the legislature, so clear as to be "plainly expressed," that the act of 1856 should not apply. We cannot concur in the view that the act of 1856 did not apply to subsequent extensions of old charters. The purpose of such a reservation act is too clear to be misunderstood. It was to prevent the granting of corporate powers, franchises, or privileges in such a way as to be beyond the control and regulation of the legislature, unless the legislature "plainly expressed" its purpose to reserve the power to alter, amend, or repeal. The reason for the act was the inconvenience experienced from the irrevocable charters theretofore granted. Is it to be supposed that the legislature, in the act of 1856, intended to allow those charters, which had led to the enactment of the law, to be extended without being affected by its restrictive provisions? The first section of the act applies "to all charters and grants of or to corporations or amendments thereof, and all other statutes." The third section limits the application of the act "to charters and acts of incorporations to be granted hereafter." We think that this extension was a grant to a corporation or an act of incorporation granted after the act of 1856. It seems to us a strained and narrow construction to carry back its date by relation to the time of the original charter. In some senses it is true that the extension merely carries on the same old corporation, giving it additional life; but, within the purpose of the act of 1856 to prevent the granting of irrevocable exemptions, the giving of additional life to such an immunity was a new grant,—a new charter. It is our duty to give effect to this act so as to avoid the evil aimed at by the legislature, and no refined reasoning as to the question whether an extension is the lengthening of an old life, or the granting of a new one, ought to blind us to the palpable intention of the legislature to prevent, except by express words, the future granting of irrevocable powers, privileges, or exceptions.

It is well settled by the supreme court of the United States that tax exemptions are not favored, and are to be given the strictest construction (*Trust Co. v. Debolt*, 16 How. 435); and it may well follow, as a corollary to these principles, that laws passed by the legislature to prevent irrevocable tax exemptions are to be liberally construed.

The next question is whether there is anything in the act of extension to justify us in holding that there is an intention "plainly expressed" in it to make the rights and privileges therein extended irrevocable. The act of extension under consideration in the case of *Franklin County Court v. Deposit Bank of Frankfort*, *supra*, was the first act of extension, which was quite elaborate, and contained many new conditions; but the one we have to consider is a simple extension without new conditions, except that it shall be formally accepted by the bank. We are unable to perceive any plain expression of the intention of the legislature to make the rights and privileges granted irrevocable. They are granted for 20 years, and, without the rule of construction enjoined in the act of 1856, this would be held to imply an intention that they should not be subject to amendment or repeal during that period. But the act of 1856 was passed for the precise purpose of avoiding the usual implication, and of requiring affirmative language to sustain the claim that rights and privileges granted for any length of time could not be revoked before its expiration. *Griffin v. Insurance Co.*, 3 Bush, 592; *Cumberland & O. R. Co. v. Barren County Court*, 10 Bush, 609. We find no such affirmative language in this act. We cannot attach the significance that counsel do to the passage of two acts extending the charter of the Northern Bank, the one containing an express reservation, and the other enacted two years later omitting it. Each act must be construed as it stands, and, in the absence of something affirmative in the latter act itself to exclude the act of 1856, it is to be treated as part thereof. This conclusion makes it unnecessary for us to consider the soundness of the proposition that, upon repeal of the Hewitt act, those who had surrendered exemptions were entitled to a restoration of them.

We come, then, to the question: Did the Hewitt act confer on the banks accepting it a contractual immunity from taxation incapable of repeal during their corporate existence? The first section of the second article of the Hewitt act provided that shares of stock in state and national banks, and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock, should be taxed 75 cents a share, and upon all surplus over and above 10 per cent. on their capital stock the same rate of taxation as was assessed upon real estate, which, it was declared, should be in full of all tax, state, county, and municipal. The fourth and remaining sections of the article we give below:

"Sec. 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of congress or under the charters of the state banks to a different mode or smaller rate of

taxation, which consent or agreement to and with the state of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.

"Sec. 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next general assembly: provided, they pay the tax provided in section 1 from the passage of this act.

"Sec. 6. This act shall be subject to the provisions of section 8, chapter 68, of the General Statutes.

"Sec. 7. If any bank, state or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its surplus, undivided accumulations and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes—state, county and municipal—shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits and undivided accumulations as is imposed on the assessed taxable property in the hands of individuals: provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned or used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 8, chapter 68, of the General Statutes, referred to in section 6, was the above act of 1856.

But for the respect we feel for the judgment of the majority of the court of appeals, deciding the Bank Tax Cases, 97 Ky. 591, 31 S. W. 1013, and the very able opinion of Chief Justice Pryor in support of that judgment, we should have thought that there could be no doubt of the necessary construction of the article of the Hewitt act above quoted. The act of 1856 is incorporated in the article of the Hewitt act above quoted, not merely by a rule of construction enjoined by a preceding legislature, and presumably accepted by the legislature passing the Hewitt act, but the latter legislature has expressly and affirmatively adopted it as part of the article.

It is said, however, that the sixth section was not intended to apply at all to the contract of limited tax exemption contained in the fourth section, but that its purpose is to be found in, and limited to, the desire of the legislature to secure to itself the right to repeal the act before the acceptance of its terms by the banks. The suggestion seems to us utterly inadequate to explain the insertion of the section in the act. All the banks were required to accept the act before the next meeting of the legislature, so that the right to repeal must, in this view, have been limited to the short time remaining of the pending session of the legislature, and the interval when the legislature was not in session. With submission, a construction limiting the reservation clause to so inconsequential a purpose is unreasonable. Since the decision by the supreme court in *Bank v. Knoop*, 16 How. 369, in 1853, that a state might restrict its taxing power over a corporation by charter provisions in the nature of a contract which was irrevocable, the main object of the clause reserving power in the legislature to alter or repeal charters and acts of incorporation has been to render tax exemption revocable; and it is to miss wholly the significance of such a clause to hold that it has no applica-

tion to a tax limitation, when it is expressly made part of the act declaring such limitation. It would be extremely difficult for a court, bound to follow the decisions of the supreme court of the United States, to hold that a clause of an act expressly reserving in the legislature the right to amend or repeal it does not apply to tax exemptions conferred by the same act. In *Tomlinson v. Jessup*, 15 Wall. 454, an act of South Carolina provided that every charter or incorporation granted or renewed should at all times be subject to amendment, alteration, or repeal, unless the granting or renewing act should in express terms provide otherwise. The question was whether this applied to a tax exemption of the property of a company which was in terms to last during the continuance of the existing charter. The supreme court held that it did. Mr. Justice Field said, in delivering the opinion of the court:

"There is no subject over which it is of greater moment for the state to preserve its power than that of taxation. It has, nevertheless, been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the state. * * * In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the state which give to the transaction the character of a contract. It is thus that it is brought within the protection of the federal constitution. In the case of a corporation, the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The state only asserts in the present case the power under the reservation to modify its own contract with the corporators. It does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

The "reservation" clause has been applied to tax exemption privileges in accordance with the doctrine above declared in *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, and *Hoge v. Railroad Co.*, 99 U. S. 348.

The court of appeals of Kentucky in the *Bank Tax Cases* relied much on the case of *New Jersey v. Yard*, 95 U. S. 104. In that case the question was whether a tax exemption was subject to repeal under a general reservation act. The railroad company which was claiming the exemption had been organized in 1835, before the passage of the reservation act. A supplement was passed expressly reserving the power of repeal. A second supplement without any

reservation was passed. This second supplement related to a tax controversy, and provided for a settlement of it by written acceptance by the railroad company. It was held that the general reservation act did not apply to a limited tax exemption granted to the company in this supplement. The court pointed out that general acts of reservation passed by one legislature are binding on a subsequent legislature only so far as it chooses to conform to them, and that it is a question in every case whether the legislature making a contract intends the former reservation act to become by implication a part of the contract. In the case before the court it was held that the provision for specific rate of taxation was inconsistent with such an implication, because there was a fair adjustment of a subject of dispute for a valuable consideration on both sides, because the contract assumed the shape of a formal written contract, and because of the scope of the words of the contract, which were that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this state or any law thereof." Were it not for the sixth section of the Hewitt act, the case would have a most important bearing in considering whether the legislature passing the Hewitt act intended that the act of 1856 should be incorporated by implication in the Hewitt act. But that which was a matter of inference and argument in *New Jersey v. Yard* is in the case before us determined by the express declaration of the legislature passing the Hewitt act. Those circumstances and that language of the act under consideration which were regarded in the *Yard Case* as inconsistent with an implication that the general reservation act should be read into it cannot prevail against the express direction by the legislature that the reservation act must be applied to it. It is, as the supreme court declares it to be, only a question of legislative intention; and, when the intention is expressly declared, there is no room for implication.

The fourth section of the Hewitt act, construed in the light of the reserved power of repeal in the sixth section, was a proposal to the banks that they should pay a certain tax, and no more, during their corporate existence, unless the legislature should see fit sooner to withdraw from the agreement. The question is asked why the old banks should surrender their charter right to a lower tax assessment for the rate fixed under the Hewitt act if it is true that the legislature could withdraw from it at pleasure. It is a sufficient answer to say that they had in fact no irrevocable exemption to surrender; and though they claimed it, and had then the decision of a state circuit court upholding the claim, it was so doubtful that they preferred to accept a somewhat higher rate of taxation by the state alone than to run the risk of being subjected to the much heavier taxation, both state and local, imposed by the seventh section of the Hewitt act upon banks which should not accept the proposal of the fourth section.

Having concluded that the act of 1856 must be applied to the fourth section, the question remained whether the tax exemption, after acceptance by the banks, was a "right previously vested"

within the proviso of that act. If so, it cannot be impaired. The court of appeals held that it was such a right. We cannot concur in this view. It seems to us that the legislature in this proviso was merely expressing in words the limitation that always exists upon the reserved power of amendment or repeal of corporate charters. A legislature cannot, by amendment or repeal of a charter, deprive the members of a corporation of the property or contract rights it has acquired by the exercise of its corporate powers. *Com. v. Essex Co.*, 13 Gray, 239; *Miller v. State*, 15 Wall. 478; *Sage v. Dillard*, 15 B. Mon. 349; *Holyoke Co. v. Lyman*, 15 Wall. 500. It cannot annul contracts made by the corporation with third persons in the exercise of its lawful franchises. It cannot undo that which is done. It cannot say that that does not exist which does in fact exist. It cannot recall an executed grant of property. But it can revoke for the future anything in the charter of a promissory character, whether it is contractual or merely gratuitous. In *Greenwood v. Freight Co.*, 105 U. S. 13, 19, the question was of the effect of the repeal of an act conferring a charter upon a street-railway company that had built its track in the streets. Mr. Justice Miller, speaking for the court, said:

"If the essence of the grant of the charter be to operate a railroad and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights."

See, also, *Miller v. Railroad Co.*, 21 Barb. 513; *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178; *Railroad Co. v. Veazie*, 39 Me. 571; *Hawthorne v. Calef*, 2 Wall. 10-24; *Com. v. Essex Co.*, 13 Gray, 239.

The limited tax exemption under the Hewitt act was a contract between the bank and the state. The reserved right to repeal made the contract one which the state could revoke at pleasure. The court of appeals, in the Bank Tax Cases, relied on *Commissioners of Sinking Fund v. Green & B. R. Nav. Co.*, 79 Ky. 73. In that case it was decided that the legislature could not, under the act of 1856, take from the navigation company, without making compensation therefor, the right it had acquired under a contract with the state to take for a term of years tolls from vessels navigating the Green and Barren rivers, in consideration of its agreement, then fully performed, to put in repair, and maintain at its own expense, the line of navigation. It may be hard to reconcile this case with *Greenwood v. Freight Co.*, but it can be distinguished from the case at bar. In the case cited, the court treated the right which the state proposed to exercise as a reserved right of rescission, and held that it could only be exercised on condition that the grantee of the state should receive compensation for the money advanced to improve the property of the state the use of which he was not permitted to enjoy. In the case at bar, the banks surrendered nothing of value to the state for the limited tax exemption of the Hewitt act, and the power of revocation was not in any view, therefore, trammelled by conditions.

In view of our conclusion that the complainant has not established, as against any of the defendants except Bourbon county, the existence of an irrevocable contract of tax exemption, either by res judicata or on the merits, and as this issue thus presented and decided is the only one upon which complainant, a corporate citizen of Kentucky, can ask a federal court for relief, we do not pass upon or decide the question raised by complainant under the state decisions whether prior decisions of the court of appeals, though now overruled, prevent the collection of taxes accruing during those years when the prior decisions holding them uncollectible and void remained unreversed. For the reasons given, the order of the court will be that the motion for an injunction against Bourbon county and the certification of the assessment to it by the board of valuation is granted, and to this extent the demurrers to the bills are overruled; but, as to the certifications of the assessment to the other municipalities, the demurrers are sustained, and the bill dismissed.

WELSBACH LIGHT CO. v. MAHLER.

(Circuit Court, S. D. New York. June 6, 1898.)

EQUITY PRACTICE—DISCONTINUANCE.

When a cause has been at issue for over two years by filing of replication, and nothing whatever has since been done, complainant cannot then discontinue; and defendant is entitled to put the cause on the calendar, and take an order dismissing the bill.

This was a suit in equity by the Welsbach Light Company against William Mahler. The cause was heard on complainant's motion for leave to discontinue.

John R. Bennett, for the motion.

Edward N. Dickerson, opposed.

LACOMBE, Circuit Judge. This case was at issue by filing of replication more than two years ago. Since that time nothing has been done by complainant, except serving the papers for this motion. In consequence, there is no evidence upon which complainant could ask for judgment; nor has the time to take testimony been extended by order of court, nor by express stipulation nor by implied stipulation, as in cases where both sides take testimony after the expiration of the time fixed by rule. Defendant is therefore entitled to put the cause on the equity calendar, and take an order dismissing the complaint. To allow the plaintiff to discontinue would deprive defendant of the right to enter such judgment of dismissal, and possibly avail of it hereafter in future litigation between the same parties. The motion for leave to discontinue is denied; but, if complainant so desires, a decree may be entered reciting the progress of the action, and dismissing complaint, with costs to defendant.

BICKFORD et al. v. McCOMB.

(Circuit Court, W. D. Tennessee, W. D. May 20, 1898.)

No. 421.

1. LIABILITY OF STOCKHOLDER—BILL TO SUBJECT ASSETS—PARTIES.

Mill. & V. Code Tenn. § 4168, allowing any creditor or stockholder, whether he has recovered a judgment or not, to file a bill to subject assets to the payment of his debt, is not applicable to a suit to which the corporation is not a party, and in which a judgment creditor seeks to subject assets in the hands of a creditor or stockholder; and in such case the bill must show execution and nulla bona return.

2. INSOLVENT CORPORATION—BILL FOR CONTRIBUTION—NULLA BONA RETURN.

Where a judgment creditor of an insolvent corporation, who was not a party to the insolvency proceedings, files a bill for contribution against a distributee who has received more than his equitable share of the assets, he need not make the corporation or other creditors parties, nor allege execution and nulla bona return.

3. EQUITY—SUIT FOR CONTRIBUTION AGAINST DISTRIBUTEES OF INSOLVENT—LACHES.

Where insolvency proceedings against a corporation were pending for nearly ten years, a resident creditor, engaged for over four years of the time in litigation with the corporation over a claim growing out of his relation as its landlord, who does not become a party to the insolvency proceedings, and file his claim therein, is guilty of both willful neglect and want of diligence, and cannot maintain a suit against distributees for contribution.

This is a suit in equity by W. A. Bickford and H. B. Sherrod against J. J. McComb to subject to the payment of their judgments against the Southern Oil Works assets of such corporation received by him on final distribution in insolvency proceedings. It was submitted on the pleadings, certain record evidence, and an agreed statement of facts.

Prior to the transactions hereinafter mentioned, the Southern Oil Works was a Tennessee corporation, doing business at Memphis. On the 27th of May, 1876, the state, upon the relation of Kortrecht and other stockholders, filed a bill in equity to dissolve the corporation, wind up its affairs, sell its assets, and pay its debts, as provided in the statutes of Tennessee in such cases. Mill. & V. Code, §§ 4146-4168 (Thomp. & S. Code, §§ 3409-3431). J. J. McComb, the principal stockholder, was also a very large creditor, both as a lienholder and as a general creditor. He filed a cross bill for the enforcement of his lien and the collection of his debt, not only by the sale of its properties, but also by an assessment for the unpaid stock of the stockholders. After about 10 years of voluminous and formidable litigation, there was a final decree disposing of the assets by sale, assessing the stockholders upon the unpaid stock, and a distribution of the proceeds among the creditors, according to the terms of that decree. The date of this decree was January 7, 1885. McComb was declared a creditor for \$126,190.30, and he was assessed, as unpaid on his shares of stock, \$36,375, which was credited upon his debt. From the assessments on other stockholders and other assets there also was realized by him in the distribution a further sum of \$25,172.42, which was also credited upon his debt against the company; making a total credit of \$61,547.42 which he received out of the assets, leaving a balance due to him of \$64,642.83. Pending that suit, and about a year after it was begun, W. A. Bickford and H. B. Sherrod, the plaintiffs in this case, leased to the Southern Oil Works certain storehouses in the city of Memphis, to be used as a warehouse for the storage of its products. On the 28th of November, 1876, this building collapsed, and was totally destroyed. On the 18th of January, 1881, Bickford and Sherrod respectively began suits against the Southern Oil Works claim-

ing that the damage was caused by overloading the floors of the building contrary to the terms of the lease, and on the 5th of May, 1885, in the supreme court of Tennessee, each recovered a judgment for the sum of \$4,080. Counsel say in their briefs that an execution issued upon these judgments, and was returned nulla bona. It is not so stated in the bill filed in this case, does not appear so by the transcript of the record of the suit filed as proof in the case, does not appear so in the agreed statement of facts filed by counsel, and I have had the records searched which were agreed to be used in evidence, by the clerk, who does not find any such execution or return, if in fact they ever existed. But on the 1st of January, 1887, they filed this bill in the chancery court of the state, from which it was removed to this court, against J. J. McComb alone, except that they made the Memphis & Charleston Railroad, in which he was a stockholder, a party, for the purpose of securing service upon him in this suit by attachment, which became unnecessary, as he subsequently appeared and answered. The company was named a defendant, but there was never any service of process to bring it in as a party.

The bill states substantially the foregoing facts. Alleges that the judgments have never been paid; that McComb had appropriated all the assets to the payment of his own debt against the company, of which he was the principal, if not the only, creditor, and the largest stockholder; alleges that Bickford and Sherrod had no notice of the pendency of that suit at the time they made the leases or at any subsequent time, and no knowledge whatever of its character and object; that the company contested the claim for damages, taking the case to the supreme court of the state, where the judgments obtained were finally affirmed. It sets up that the company was at the time of the filing of this bill insolvent, and that at the time of the filing of the Kortrecht bill it was insolvent, and wholly unable to pay its debts; that, being so insolvent, its assets have passed into the hands of McComb as a trust fund for the payment of its debts, and particularly for the payment of these judgments; and then prays that all the money and property heretofore owned by the Southern Oil Works, and heretofore delivered and paid to the defendant McComb, as well as the unpaid capital stock of McComb in the Southern Oil Works, be declared a trust fund for the payment of the debts of the Southern Oil Works, and that the same may be administered in this court according to the practice of courts of equity. It prays for an account, for a decree upon final hearing, for the amount due upon the judgments, and that the payment thereof by the said McComb be decreed, or a just and equitable proportion thereof, according to the amounts found to be due, and for general relief. The answer of McComb sets up and pleads the Kortrecht suit and decrees as a bar to the relief prayed for in the bill, and also relies upon the facts in that suit; that McComb is a creditor with preferred liens, and, after having advanced very large sums of money, has still a large amount due him, as appears by the record in that suit. It avers that, if the plaintiffs were not formal parties to that suit, they were, by operation of law, substantial parties to it as creditors of an insolvent corporation bound to take notice of its winding up; that if, in fact, they had no notice of the pendency of that proceeding, they were nevertheless chargeable with notice of the pendency of the suit, and that their contract of lease was actually made after the suit was commenced, and under circumstances requiring them to take notice of its condition, and the fact that it was being wound up as an insolvent corporation; that they were residents of the city of Memphis at the time of the bringing of this suit, at the time of the making of their lease and of obtaining their judgments, of the filing of this bill, and continuously during the whole progress of the proceedings in that suit; and that they were as effectively and completely bound by the said decrees as if they had been formal parties thereto. The respondent also states that he has already had assessed against him the unpaid, outstanding amounts due on his shares of stock, and that he is not liable for any further or other assessments in this suit. He then sets up his indebtedness against the company, and reiterates his claim against it, and denies any responsibility to the plaintiffs by reason of the facts for the judgments they have obtained against the company.

To save the expense of taking the testimony and producing the records, the parties have filed a stipulation, by which it is agreed as follows:

"In the above cause, with the view of saving the trouble and expense of taking testimony, and in order to fix the facts upon which the case is to be tried, it is agreed as follows: (1) That the charter of the Southern Oil Works is contained in chapter 105, pp. 592-594, of the Acts of the General Assembly of the state of Tennessee of 1869-70 (Private), to which reference is hereby made, and such charter may be used in evidence for all the purposes of this suit. (2) It is further agreed that the suit mentioned in the bill and also in the answer of J. J. McComb, on file herein, was brought in the First chancery court of Shelby county, Tenn., on the 27th day of March, 1875, and that the bill was filed under sections 4146-4168 (3409-3431) of the Code of Tennessee, and more particularly under the last-named section; that is, 4168 (3431). (3) It is further agreed that all the statements of fact contained in the said answer of the said J. J. McComb are to be taken as true for all the purposes of this suit, except where the same are contradicted by the statements contained in this agreement, and in such cases this agreement is to be taken as true. (4) It is further agreed that the copy of the decree of the chancery court of Shelby county, Tennessee, attached to and made an exhibit to the said answer of the said J. J. McComb, is a true copy of the decree pronounced by the said chancery court in the suit mentioned in the second paragraph of this agreement, and that the said decree has never been reversed, vacated, or set aside. (5) It is further agreed that the original records in the two suits of W. A. Bickford v. The Southern Oil Works et als. and H. R. Sherrod v. The Southern Oil Works et als., mentioned in the bill in this cause, or certified copies of such records, including the records in the circuit court, and the records in the supreme court, and a certified copy of final judgment in said court, may be considered as evidence in this cause for all proper purposes. (6) It is further agreed that both W. A. Bickford and H. R. Sherrod resided in Shelby county from the beginning of the suit mentioned in the second paragraph of this agreement until the end of it, but neither one of them was made a party plaintiff or defendant in the suit, and neither one of them was served with process therein, or appeared therein, or asked to be made a party thereto.

"January 24, 1893."

J. M. Gregory and Gantt & Patterson, for complainants.

Wm. M. Randolph & Sons, for defendants.

HAMMOND, J. (after stating the facts). Because of its vagueness and too general averments it is difficult to determine the technical character and purpose of this bill. Seemingly, it is a bill to administer the assets of the corporation in insolvency, and yet it makes only one of the stockholders a party, and does not make the company itself a party, but selects one of the stockholders who had, through legal proceedings for that purpose, been paid out of the assets of the company a part of the debt due him as a creditor, and who, by the same legal proceedings, has paid all that was due from him as a stockholder, and asks to charge him as a trustee of the assets for the payment of its debts. It does not seek to bring in other creditors to share in those assets, but confines its operation to the simple purpose of having that stockholder and creditor pay the judgments of the plaintiffs. In effect, it is a bill to charge McComb with the payment of those debts as if he were himself the judgment debtor, upon the theory that he has come into the possession of assets of the company which would have been liable to execution in satisfaction of these judgments if the assets had remained in the hands of the company, treating the legal proceedings by which McComb was paid his own debt against the company as having had no effect whatever in establishing any right to the possession of that

which he has received. This is a very broad, if not loose, view of the doctrine that the assets of a corporation are a trust fund for the payment of its debts, wherever the assets may be found. There can be no doubt about the doctrine in its general statement nor in its particular application, as suggested here, that a creditor cannot selfishly appropriate the assets to the payment of his own debt, ignoring all other creditors; but, thus broadly stated, the principle is confined to an appropriation by the creditor, which the courts will not sustain as a lawful application of the assets, to the payment of his debt. It does not follow from the general doctrine that when a creditor has by a judgment and an execution levied upon the assets, or by any other legal proceeding adequate for the purpose, procured a judicial judgment and decree that the assets are liable to the payment of his claim, and by like judicial judgment and decree appropriates particular assets to that purpose, that he can be in that condition always, and under all circumstances, charged as a trustee for other creditors who have not been paid. It depends, of course, upon the validity of the proceedings and their legal effect. Even if a creditor, by his vigilance and diligence, has succeeded in collecting out of the insolvent corporation more than other creditors have received, it is not, as a matter of course, to charge him as a trustee for the benefit of other creditors. The outstanding creditors must have some equity as against him arising out of the wrongfulness of his advantage in the premises.

Treating the bill as one to charge a stockholder or a creditor with liability for the debts of the corporation because of his possession of the assets, it may be very doubtful whether such a bill can be maintained, at least in the federal courts, unless there has been an exhaustion of remedies against the corporation itself, at least to the extent of an execution and nulla bona return, and this, even though the corporation be insolvent. *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397; *Jones v. Green*, 1 Wall. 330. But, assuming that this equitable remedy has been enlarged by the Tennessee statute (Mill. & V. Code, § 4168), which allows any creditor or any stockholder, whether he has recovered a judgment or not, to file a bill to subject the assets to the payment of his debt, this bill cannot be treated as a suit of that kind, for the reason that the corporation is not made a party, and therefore the bill does not come within the provisions of that statute. It is a bill against McComb only, and the case must be determined with sole reference to the rights of these creditors against him seeking to charge him as trustee, and it would seem to fall directly within the above-cited cases requiring a judgment and nulla bona return. For want of an averment in the bill that there has been an execution issued, and nulla bona return, and for want of proof of that fact, it might be sufficient to dismiss this bill upon the apparent theory of its draftsman as a bill to enforce a trust against the assets of a corporation. But under the general allegations of the bill, and its prayer for general relief, there is another view of the rights of the plaintiffs to maintain it which was suggested and argued. Reasonably, it may be treated as a bill for contribution against a distributee of an insolvent corporation to

compel him to refund, for the benefit of any creditor who has not received his share of the insolvent assets, whatsoever part may belong to him as a surplus over and above that which he, the said distributee, ought to have received upon an equitable distribution of the assets. The principle is stated in the case of *Williams v. Gibbes*, 17 How. 239, 255, as " * * * well settled, in respect of proceedings in chancery for the distribution of a common fund among the several parties interested, that an absent party who had no notice of the proceedings, and was not guilty of willful laches or unreasonable neglect, will not be precluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of court, against the distributees." Quoting from the case of *David v. Frowd*, 1 Mylne & K. 200, the court, first relating the practice of giving notice by advertisement for creditors and others interested in the distribution of the fund to appear and file their claims, remarks upon the fact that such advertisements may and must in many cases not reach the parties really entitled, because they are abroad, or from a multitude of circumstances, and then observes as follows:

"If a creditor does not happen to discover the proceedings in court until after distribution has been actually made, by order of the court, amongst the parties having, by the master's report, an apparent title, although the court will protect the administrator who has acted under the orders of the court, yet, upon a bill filed by that creditor against the parties to whom the property has been distributed, the court will, upon proof of no willful default on the part of such creditor, and no want of diligence on his part, compel the parties defendant to restore to the creditor that which of right belongs to him."

Again, referring to the case of *Gillespie v. Alexander*, 3 Russ. 130, with approval, the court further says that:

"If the creditor does not come in until after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree,—that is, the decree of distribution. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees except by suit, and he cannot affect the executor at all."

I cannot find that any of the cases on this subject require that the creditor shall have a judgment and nulla bona return. He stands in the suit against the overpaid distributee precisely as if he were appearing in the original suit where the assets were distributed to prove his claim. It seems to me that the bill, in this aspect of it, is not subject to objection for want of parties, or for the want of judgment and nulla bona return; and the only question in the case is whether or not the absent party who has failed to receive his part of the assets has been "guilty of willful laches or unreasonable neglect," or has made "proof of no willful default, and no want of reasonable diligence on his part."

It is agreed between the parties that the plaintiffs in this case were neither parties plaintiffs nor defendants in the suit of the state ex rel. Kortrecht against the Southern Oil Works; that neither of them was ever served or appeared therein, or asked to be made a party thereto; and it is further agreed that they both resided in Shelby county from the beginning of that suit until the end of it.

It otherwise appears from the records in evidence that the suit was actually pending at the time their lease commenced, and had been for more than a year. After the collapse of the warehouse, which took place more than a year and a half from the beginning of the lease, they brought a suit for damages, which was dismissed without a trial on the merits. For what reason, does not appear. A second suit was brought on the 12th of January, 1881, more than four years after the disaster, and nearly five years after the Kortrecht suit was commenced, and while it was still pending, and about five years before the final decree in that suit, being about six years before the filing of the bill in this case. It is stated in briefs of counsel for the plaintiffs that McComb was the only creditor appearing in the suit, that there was never any advertisement for other creditors to appear and file their claims, but this fact is not covered by the agreement of counsel, and the court here does not know how the fact may be. Occupying the relation of landlords to the Southern Oil Works it would seem almost incredible that these plaintiffs should allow 11 years to elapse without any knowledge of the circumstance of that suit, or without any information as to the existing conditions that would have put them upon inquiry as to the affairs of the corporation. They lived in the same city, and were for nine years of that period engaged in litigation with the company to establish their claims for damages. Indeed, they waited nearly two years after they obtained the judgments before they filed this bill, and all this time, both before and after judgment, they allege that they were in ignorance of the existence of the Kortrecht suit.

It is to be observed that the cases establishing the right of the outlying creditor to sue the distributees for contribution not only require that he shall be without willful default, but that he shall establish by proof that there was no want of reasonable diligence on his part in ascertaining the true condition of affairs. In the case of Board of Public Works v. Columbia College, 17 Wall. 521, 530, it is held that the rule requiring the existence of special circumstances bringing the case under some recognized head of equity jurisdiction should not only be insisted upon with rigor whenever the property sought to be reached constitutes, as here, assets of a deceased debtor which have already been subjected to administration and distribution, but some satisfactory excuse should be given for the failure of the creditor to present his claim in the mode prescribed by law before the distribution. It is true that these creditors were suing at law to establish their claim for damages; that the Southern Oil Works was resisting the claim step by step; that the company carried the case by appeal to the supreme court, and submitted to judgment only in the court of last resort; and it is true that that litigation was for some reason protracted during a period of more than nine years counting from the beginning of the second suit to the final judgment in the supreme court. But all these facts do not answer the rule of diligence, because they have no relation to the duty of the plaintiffs, whether they procured judgment or not upon their claims, to take the necessary steps to present them in the court of insolvency, where the assets were being administered. They could

not act as if the pendency of their suits were a lien on the assets, as if by judgment or attachment on the bill. All they had to do in order to share in the assets of the Southern Oil Works in the Kortrecht suit was to appeal, and file their petition stating the pendency of their suits at law, their expectation of judgment, and asking the court of insolvency to retain a sufficient amount of the assets to answer that judgment, or to then and there itself adjudicate the amount due, and pay the plaintiffs their pro rata according to the allegations of the petitions and the order of the court. Ignorance in fact of the pendency of the proceedings is not an answer to the rule of diligence, because, if it were, there would be no limitation upon the rule that an absent creditor, who is as ignorant, might come in under any circumstances, and ask for a contribution and restoration of a sufficient amount to pay his claims. But we have seen that this is not the rule. The question is, has there been any willful neglect on the part of these plaintiffs to appear in the Kortrecht suit, and take the necessary steps to protect their interests and receive their share, or has there been diligence on their part to inform themselves of the facts in that behalf? It seems to me too plain for any argument that on the facts stated there has been both a willful neglect and a want of diligence. Common prudential considerations on the part of one bearing the relation that these plaintiffs bore to the Southern Oil Works in respect of their claims, both as landlords and claimants, for damages, would require that inquiry should be made as to the condition of the company and its affairs. Common repute about the courts and about the town would have been sufficient to have put the plaintiffs, who were renting to the Southern Oil Works, and claiming damages against them, upon inquiry as to whether or not it was a solvent or insolvent corporation, and whether it was being administered in insolvency or not; and the mere lapse of time during the pendency of those proceedings is almost conclusive of a want of diligence and willful neglect where the parties did not reside abroad, and there are no special circumstances to account for the alleged ignorance of the facts. Nothing is shown in the proof in this case to excuse this ignorance. Nothing is set up in the proof to explain it. It is relied upon as a bare fact, without explanation or excuse, as a ground of equity to support this bill. It would break down all the safeguards of legal proceedings to allow them to be disturbed under such circumstances.

This view of the case makes it unnecessary to consider many of the other questions that have been argued in the case, especially those in relation to the right of a creditor to pursue the assets of an insolvent corporation for the payment of its debt by proper proceedings for that purpose. I do not think this is that kind of a bill, but, if it can be held to be so, it must fail for want of proper parties. I doubt very much if that principle would authorize a creditor to file what is substantially a second bill to administer the affairs of an insolvent corporation for the payment of its debts and the distribution of its assets; and, if the bill can be supported at all, it can only be upon the ground mentioned in the case of *Williams v. Gibbes*, *supra*, of the right of a creditor to sue the distributees inde-

pendently, and upon distinctive and wholly different grounds of equity than those involved in a bill to administer the assets of an insolvent corporation.

The bill will be dismissed at the plaintiffs' costs. Ordered accordingly.

WRIGHTMAN v. BOONE COUNTY.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,038.

1. CONSTRUCTION OF STATUTES—RETROSPECTIVE LEGISLATION.

A statute is not to be given a retrospective effect unless it clearly and unequivocally appears that such was the legislative intent.

2. LIMITATION OF ACTIONS—REVIVOR OF JUDGMENT—RETROSPECTIVE LEGISLATION.

Act Ark. April 8, 1891, providing that no scire facias to revive a judgment "shall be issued but within ten years from the date of the rendition of the judgment," and that the act should take effect one year from its date, was intended to have a retrospective operation.

3. CIRCUIT COURTS OF APPEAL—JURISDICTION—CONSTITUTIONAL QUESTIONS.

Under Act March 3, 1891, §§ 5, 6, a circuit court of appeals has no jurisdiction of a case in which the question is whether a state statute is void because it contravenes the constitution of the United States.

4. SAME.

If it is claimed that a law of a state is void because it contravenes the constitution of the United States, a circuit court of appeals has no jurisdiction of the case, although it may involve the consideration of many other questions.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

O. W. Watkins, for plaintiff in error.

Joseph M. Hill and James Brizzolara, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. On April 6, 1897, George W. Wrightman, the plaintiff in error, sued out a writ of scire facias to revive a judgment which he had recovered in the court below on May 13, 1880, against Boone county, in the state of Arkansas, the defendant in error. The county answered, among other things, that the scire facias was not issued until after more than 10 years had elapsed from the rendition of the judgment, that the judgment had never been revived, that more than 10 years had elapsed since the last payment was made thereon, and that the action was barred by the statute of limitations. Upon a demurrer, and at the close of the trial, the court below sustained this defense, and rendered a judgment against the plaintiff. Its ruling is based upon this state of the law: On and prior to April 8, 1891, the owner of a judgment in the state of Arkansas had the right to a writ of scire facias to revive it at any time within 20 years after its rendition. *Brearly v. Peay*, 23 Ark. 172, 174; *Crane v. Crane*, 51 Ark. 287, 294, 11 S. W. 1. On that

day the legislature of the state of Arkansas passed, and the governor of that state approved, an act in these words:

"Section 1. That no scire facias to revive a judgment shall be issued but within ten years from the date of the rendition of the judgment; or if the judgment shall have been aforetime revived then within ten years from the order of revivor.

"Sec. 2. This act shall take effect and be in force from and after one year from the date of its passage."

Acts Ark. 1891, p. 192 (Sand. & H. Dig. § 4208).

The court below held that this law was a bar to the prosecution of this action, and this ruling is challenged on the ground that, if this act was intended to have that effect, it was in violation of section 10 of article 1 of the constitution of the United States, that no state shall pass any law impairing the obligation of a contract. Of course, the question whether or not the act was intended to have a retrospective effect, whether or not it was intended to prevent the issue of writs of scire facias to revive judgments rendered before it was enacted, accompanies, and is presented with, the question of its constitutionality as it always is when a law is challenged under this clause of the constitution; but no other question of any importance is raised by the record before us. It is conceded that a construction which gives to a statute a retrospective effect should not be adopted unless it clearly and unequivocally appears that the legislature enacted it with the intention to cause that effect. End. Interp. St. § 271; *Twenty Per Cent. Cases*, 20 Wall. 179, 187; *Shreve v. Cheesman*, 32 U. S. App. 676, 689, 16 C. C. A. 413, 417, and 69 Fed. 785, 792; *Bank v. Reithmann*, 49 U. S. App. 144, 25 C. C. A. 101, and 79 Fed. 582; *Jaedicke v. U. S.*, 29 C. C. A. 199, 85 Fed. 372, 375. An examination of the law in question, however, has left no doubt in our minds that the legislature of Arkansas intended that this act should affect judgments rendered before as well as those rendered after its passage. It provides that no scire facias shall issue to revive any judgment except within 10 years from its rendition. The legislature had the power to except from this broad prohibition judgments rendered before the enactment of the law, but it did not do so. The fact that it failed to make any exception raises a strong presumption that it intended to make none, and brings any exception that a court might be disposed to make into the forbidden category of judicial legislation. *Madden v. Lancaster Co.*, 27 U. S. App. 528, 540, 12 C. C. A. 566, 573, and 65 Fed. 188, 195; *Morgan v. City of Des Moines*, 19 U. S. App. 593, 8 C. C. A. 569, and 60 Fed. 208; *Paving Co. v. Ward*, 55 U. S. App. 730, 741, 28 C. C. A. 667, and 85 Fed. 27, 35; *McIver v. Ragan*, 2 Wheat. 25, 29; *Bank v. Dalton*, 9 How. 522, 528; *Vance v. Vance*, 108 U. S. 514, 521, 2 Sup. Ct. 854. The second section of the act provides that it shall not take effect until one year after its passage. The plain purpose of this provision was to give the holders of judgments rendered 10 years or more before the passage of the act a reasonable time within which to revive their judgments before the law took effect. A construction that the act has no application to judgments rendered before its enactment would render this provision nugatory, and would fly in the teeth of the maxim

that "all the words of a law must have effect, rather than that part should perish by construction." *City of St. Louis v. Lane*, 110 Mo. 254, 258, 19 S. W. 533; *Knox Co. v. Morton*, 32 U. S. App. 513, 518; 15 C. C. A. 671, 675, and 68 Fed. 787, 790; *Paving Co. v. Ward*, 55 U. S. App. 730, 741, 28 C. C. A. 667, and 85 Fed. 27, 35. The result is that the real question in the case is whether or not this law of the state of Arkansas is void because it is in contravention of the constitution of the United States. But section 5 of the act of March 3, 1891 (26 Stat. 828, c. 517), declares that appeals may be taken to the supreme court "(6) in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." Section 6 provides that in cases other than those provided for in section 5 the circuit courts of appeals may exercise appellate jurisdiction unless otherwise provided by law. This is not a case other than those provided for in section 5, and consequently this court has no jurisdiction of it. A careful examination of these sections of the act of congress in *Hastings v. Ames*, 32 U. S. App. 485, 15 C. C. A. 628, and 68 Fed. 726, and in *Pauley Jail Bldg. & Mfg. Co. v. Crawford Co.*, 28 C. C. A. 579, 84 Fed. 942, led us to the conclusion that, if it is claimed that a law of a state is void because it contravenes the constitution of the United States a circuit court of appeals has no jurisdiction of the case, although it may involve the consideration of many other questions. Upon the authority of these cases the writ of error in this case is dismissed for want of jurisdiction.

LEZINSKY v. METROPOLITAN ST. RY. CO.

(Circuit Court of Appeals, Second Circuit. June 24, 1898.)

No. 112.

1. STREET RAILWAYS—LIABILITY FOR TORT—UNAUTHORIZED ACTS OF EMPLOYEES.

In the absence of testimony showing authority from the company, the act of a street-railway conductor in causing the arrest of a former passenger immediately after ejecting him from the car for refusing to pay fare is outside the course of his employment, so that no action will lie against the company for malicious prosecution and false imprisonment.

2. SAME—RATIFICATION OF UNAUTHORIZED ACT.

The action of a clerk in the claims department of a street-railway company, in endeavoring to convince a magistrate that a conductor was right in causing the arrest of a passenger after ejecting him from the car for refusal to pay fare, is not a ratification of the conductor's unauthorized action, where the clerk was merely directed by his superior to go to the police court, "and see what the matter was."

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action at law by Eugene Lezinsky against the Metropolitan Street-Railway Company for malicious prosecution and false imprisonment. In the circuit court a verdict was directed for defendant, and judgment entered accordingly, to review which the plaintiff sued out this writ of error.

Samuel S. Slater, for plaintiff in error.
Charles F. Brown, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is a writ of error to review a judgment in the circuit court for the Southern district of New York for the defendant, upon a verdict which was directed by the court upon the defendant's motion at the close of the plaintiff's case. The action was against the Metropolitan Street-Railway Company for malicious prosecution and for false imprisonment. The facts were as follows: The plaintiff, on April 3, 1896, at 12:30 p. m., entered at Spring street, in New York City, a car of the defendant, which was going uptown, and paid his fare. The car stopped, on account of a blockade, before it reached Houston street, when the conductor told the passengers that, if they were in haste, they had better walk to Houston street, where cars were being switched back, and take an uptown car, that he had no transfers, but that "it would be all right" if the passengers would explain to the inspector who was in charge of switching the cars. The plaintiff walked to Houston street, but a car had just left. The inspector told him to explain to the conductor of the next northward car the circumstances in regard to the payment of fare, and that a new payment would not be required. The plaintiff, with other passengers from the original car, boarded a car at Bleecker street, a block above Houston street; but its conductor demanded fare from all the passengers, would not recognize the previous payment, stopped the car at Ninth street, and ordered the passengers to pay the fare or to leave the car. The plaintiff refused to obey either direction, was ejected, and thereupon the conductor charged him with disorderly conduct, and requested a policeman to arrest him. He was put under arrest, and made a countercharge against the conductor, who was also arrested, and both were taken to the station house, detained 2½ hours, when the plaintiff was tried and discharged. Upon the way to the station house, the party met the conductor of the first car, who explained the facts to the second conductor, but he persisted in making the charge. At the station house, one Isaacson, a clerk in the defendant's claim department, who was sent there by some one of the defendant's officers to find out what the matter was, endeavored to persuade the plaintiff to withdraw his charge, saying that the conductor would also withdraw; but the plaintiff refused, and the case was heard, Isaacson arguing before the magistrate in support of the charge against the plaintiff.

The complaint was not brought to recover damages for the defendant's unlawful ejection of the plaintiff from the car, but to recover for a malicious prosecution and false imprisonment by the defendant's agent, after the plaintiff left the car. The defendant's liability depends upon the answer to the questions: First. Was the conductor acting in the course of his employment and within the scope of his authority, express or implied, in causing the arrest of the plaintiff, after he left the car, for his prior disobedience?

And, secondly, if the conductor acted without authority, was there any testimony from which a jury could properly infer a ratification by the defendant of the conductor's act in causing the arrest?

The defendant is a common carrier, and it was its duty, upon the payment of fare, to exercise due care in the safe carriage of the defendant to the point upon the line of the road where he wished to go; and for his improper removal from the car it would have been liable in damages, because the carrier's obligation to transport safely "includes the duty of protecting the passenger from any injury cause by the act of any subordinate or third person engaged in any part of the service required by the act of transportation." *Steamship Co. v. Kane* (decided at the present term of this court) 88 Fed. 197. The subsequent act of the conductor in causing the arrest of the passenger was apparently outside of the course of his employment, outside of his service as a conductor, and was his act as an individual. It cannot be inferred, in the absence of testimony, that it is in the course of the employment of a conductor of a street cable car to cause the immediate arrest of a former passenger for his conduct in refusing to pay fare or to leave the car, and thus to take the risk of being compelled to leave his car in the street temporarily unprovided with a conductor. A criminal charge, under the circumstances of this case, was baseless (*Lynch v. Railway Co.*, 90 N. Y. 77); and while it is established that "a corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied," though there be no written appointment or authority (*Railway v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286; *State v. Morris & E. R. Co.*, 23 N. J. Law, 369; *Rounds v. Railroad Co.*, 64 N. Y. 129; *Mott v. Ice Co.*, 73 N. Y. 543), yet there should be some testimony or some circumstance to show that authority had been conferred for such a manifest apparent departure from the line of the business of a conductor of a street electric car.

It was sought to show ratification of the act by the attendance and conduct of one Isaacson at the hearing before the magistrate, and by the scope of Isaacson's employment. He was a clerk in the defendant's claim department, which had charge of the preparation of accident cases for trial, and was sent by his superior officers to go to the police court, "and see what the matter was." Inasmuch as a conductor had left his car, and been taken to the station house in charge of an officer, the direction was a very natural one to give. Isaacson went, and after ineffectually trying to induce the plaintiff to abandon his charge, and have a dismissal of both cases, he endeavored to show the magistrate that the conductor was in the right, and, in so doing, imitated the conductor in departing from his employment, without authority and with intrusive meddlesomeness. There would have been no propriety in submitting to the jury the question of ratification, based upon Isaacson's act or authority or course of business. The judgment of the circuit court is affirmed, with costs.

AETNA LIFE INS. CO. v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,036.

1. LIFE INSURANCE—DELAY IN PAYING PREMIUMS—PREMIUM RECEIPTS.

On the back of a premium receipt was printed, among other things, the following: "Provided satisfactory evidence and guaranty is furnished that the person whose life was insured is in good health and acceptable for new insurance, which guaranty shall be binding upon the insured and beneficiaries under said policy, the agent will receive a premium, and the insurance will be revived by the delivery of this receipt within 60 days from the time said premium became due." *Held*, that (applying the rule that contracts written on forms prepared by the insurer will, when ambiguous, be construed most favorably to the insured) the above provision was a mere direction by the company to its agents, so that the mere acceptance of such a receipt on the payment of an overdue premium would not imply a guaranty of good health on the part of the insured.

2. SAME—VIOLATION OF RULES BY AGENTS — KNOWLEDGE OF THE COMPANY'S OFFICERS.

Where, in violation of the rules of the company, it is the practice of its agents to accept overdue premiums without requiring a guaranty that the insured is in good health, and this course of business is shown to be such that a reasonably prudent man, acting in the capacity of an executive officer, ought to have known of it, this is sufficient to warrant a finding that the executive officer of the company did in fact have knowledge of the practice.

3. SAME—AUTHORITY OF AGENTS—ACQUIESCENCE BY COMPANY.

By knowingly permitting its agents to accept for a considerable period overdue premiums without taking health certificates, the company grants them authority so to do, and cannot avoid the effect thereof by showing that its printed instructions did not authorize the practice.

In Error to the Circuit Court of the United States for the District of Minnesota.

This action was upon two life insurance policies, both dated February 16, 1893,—one for the sum of \$20,000, and the other for \$5,000,—insuring the life of Cassius O. Merritt, who subsequently died on April 27, 1894, at Duluth, Minn. The suit was brought by Hanson E. Smith, the defendant in error, as administrator with the will annexed of said deceased. In his complaint he alleged, among other things, that the deceased paid all the premiums that accrued on both of said policies prior to his death; that the last premiums thereon, which fell due February 16, 1894, were not paid until March 6, 1894, at which time the defendant company accepted said premiums and gave receipts therefor as provided in its policies. The defenses interposed by the defendant company were as follows:

That the premiums on said policies which became due on the 16th day of February, 1894, were not paid, and that said policies, by the terms thereof, became void and inoperative. That on March 6, 1894, one Merrill M. Clark, a friend and agent of Cassius O. Merritt, volunteered to pay to the defendant's agent at Duluth, Minn., the amount of the premiums due on the aforesaid policies on February 16, 1894. That said agent of the defendant company consented to receive the same, and to deliver receipts therefor, upon the express condition that the premiums should not be deemed paid, nor the receipts be deemed delivered, unless said Merritt was at the time in good health; that, if he was not then in good health, the said premium money should be returned and the receipts surrendered upon demand. That at the time in question, March 6, 1894, neither the defendant company nor its agent had any knowledge of the state of health of said Merritt, but that in fact, as the said Merritt and said Clark well knew, the said Merritt was not in good health, but was sick and diseased, and already suffering from the complaint of which

he subsequently died. That within a few days thereafter, and during the month of March, 1894, it came to the knowledge of the defendant's agent that said Merritt was not in good health when the aforesaid premiums were paid. That said agent thereupon demanded the return of said receipts from said Clark upon the ground that the insured at the time of the delivery thereof was not in good health, and offered to, and did in fact, return the premium money. And that said receipts were thereupon surrendered by said Clark to the defendant's agent, in pursuance of the condition upon which they had been originally delivered. The defendant company further alleged: That it was expressly stipulated in the written application for the aforesaid policies that no person other than the executive officers of the defendant company could make any agreement binding upon said company, and that in and by one of the conditions of said policies it was stipulated that no other person, save one of the executive officers of the company, could alter or waive any of the conditions of said policies, or make an agreement binding upon the defendant company. That the premium receipts referred to in the complaint, which were delivered on March 8, 1894, were in the following form:

"Hartford, Conn., February 16, 1894.

"Received the annual premium on policy No. 43,728, on the life of C. C. Merritt, continuing said policy in force for twelve months from date, ending at five o'clock p. m. on the 16 day of February, 1895. Premium, \$557.40.

"Not binding without date of payment and signature of agent here.

"Paid this 6th day of February, 1894. * * *

"J. L. English, Secretary,

"St. Paul.

"G. H. MacClelland, Agent at

"Duluth, Minn."

—That upon the back of said receipt was plainly printed the following, to wit:

"Take Notice. No grace is allowed for the payment of premiums. Policies cease and determine in accordance with their provisions if the premiums are not paid on or before the date stipulated therein for such payment. Any receipt given therefor must be signed by the president or secretary of the company, and the only evidence to the assured of the authority of any agent to receive a premium is the possession of such a receipt. This receipt will not bind the company unless the date when the premium is paid is stated hereon by the the agent over his signature. Provided satisfactory evidence and guaranty is furnished that the person whose life was insured is in good health and acceptable for new insurance, which guaranty shall be binding upon the insured and beneficiaries under said policy, the agent may receive the premium, and the insurance will be revived by the delivery of this receipt within sixty days from the time when said premium became due. After the expiration of said sixty days, the delivery of this receipt on any terms will not revive the insurance, nor bind the company. All policies and agreements made by this company are signed by its president, vice president, secretary or assistant secretary. No other person can alter or waive any of the conditions of its policies, or issue permits of any kind, or make agreements binding upon the company."

It was further alleged that the foregoing provisions contained in said application, policies, and receipts were well known to Cassius O. Merritt, the deceased, and to persons connected on his behalf with the payment of said premiums, including the said Merrill M. Clark; that, as said persons well knew, the said agent had no authority to receive the premiums which were paid to him, or to surrender the receipts, without receiving the guaranty referred to on the back of said receipt, that the insured was then in good health and acceptable for new insurance; and that the said local agent of the defendant company, as the said Merritt and all persons representing him well knew, was not authorized or empowered to waive any of the conditions of said application for insurance, or of said policies of insurance, or of said receipts, or to surrender the said receipts, or to receive the said premium money, under other circumstances than therein prescribed.

For a reply to these averments of the answer the plaintiff below alleged, in substance, that it was not true, as therein stated, that said Merrill M. Clark

on March 6, 1894, volunteered to pay the overdue premiums on said policies, acting in that behalf as the friend and agent of said Merritt; that it was not true that the premiums so paid were accepted on the express condition alleged in the answer, that, if said Merritt was not then in good health, the money paid as premiums should be returned by the defendant company, and the premium receipts given therefor should be surrendered by the insured; that in truth and in fact the premiums due on February 16, 1894, were paid and accepted, and renewal receipts were given therefor, on March 6, 1894, under and subject to no conditions whatsoever, and the policies were thereby renewed for the succeeding year; that afterwards, on March 11, 1894, the agent of the defendant company at Duluth falsely represented to said Clark that the company had refused to accept the money theretofore paid as premiums on said policies, and requested a return of the renewal receipts theretofore delivered, and that said Clark having access to said receipts as security for money which he had loaned to the insured to pay the premiums, and being deceived and misled by said false statement, was thereby induced to surrender the receipts to the defendant company's agent, and to accept a check for the amount of the premiums theretofore paid, doing so wholly without the knowledge, consent, or sanction of the insured; that the statement so made to said Clark by the defendant's agent as a means of obtaining the renewal receipts was wholly false, the fact being that the defendant company had before that time accepted and treated as its own the money that was paid as premiums on March 6, 1894, and the fact being that the premium receipts which were given therefor, a copy of which is correctly set forth above in the defendant's answer, had been in the possession of the defendant's agent at Duluth, awaiting payment, for more than 30 days before they were delivered to the insured.

On these issues the case was tried before a jury, which returned a verdict in favor of the plaintiff. The case comes to this court on a writ of error which was sued out by the defendant company.

W. W. Billson (C. A. Congdon and D. A. Dickinson, on brief), for plaintiff in error.

A. A. Harris and W. O. Pealer (Henry E. Harris and Bert Fessler, on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The principal issue in this case which was raised by the pleadings, and concerning which there was most controversy at the trial, was whether the premiums on the two policies in suit that were due on February 16, 1894, and were not paid until March 6, 1894, were paid at the latter date in pursuance of an express agreement, between the agent of the company and those who at the time were acting for the insured, that, if it transpired that the latter was not at that time in good health, the premium money so paid should be refunded to the insured, and the premium or renewal receipts given therefor surrendered to the company. The defendant contended that the premiums were paid in pursuance of such an agreement, the insured being at the time absent from home, and his physical condition being unknown to its agent, while the plaintiff below just as strenuously insisted that the money was accepted by the defendant's agent at Duluth unconditionally, and that such acceptance operated to renew the policies until February 16, 1895, long after the insured died. This issue was fairly submitted to the jury, under appropriate instructions, of which no

complaint is made; the finding was against the defendant; and it must be taken for granted by this court that there was no express agreement made on March 6, 1894, entitling the defendant company to refund the premiums on that day paid, and to demand the surrender or cancellation of its renewal receipts, if it subsequently ascertained that the insured was not in good health when the premiums were paid. Failing to obtain a favorable verdict on this issue of fact, the defendant now contends that the mere acceptance of the renewal receipts, with the notice indorsed on the back thereof, constituted a guaranty by the insured that he was then in good health, and that, if such was not the case, the policies were not renewed, and that there can be no recovery thereon. The case is likened by counsel to those in which persons accepting warehouse or express receipts, having statements indorsed thereon showing upon what conditions the property is received, or the terms upon which it will be transported, have been held bound thereby, even without an express oral assent to such terms or conditions. *Watkins v. Rymill* (1883) 10 Q. B. Div. 178; *Duntley v. Railroad* (N. H.) 20 Atl. 327; *Oppenheimer v. Express Co.*, 69 Ill. 62, 69; *Hart v. Railroad Co.*, 112 U. S. 342, 5 Sup. Ct. 151. It is questionable, to say the least, whether this latter defense, namely, that the insured guarantied that he was in good health on March 6, 1894, was pleaded in the defendant's answer, or intended to be pleaded. The portion of the answer which is relied upon as containing in substance such a plea would seem to have been framed for a far different purpose, namely, for the purpose of showing that the defendant's agent had no power to waive a regulation requiring him to cause policy holders whose premiums were overdue to sign health certificates, as a condition of reinstatement,—that being the usual manner in which a policy holder's state of health was made known to the company's agents,—and that the insured was advised of such want of authority on the part of its agent to dispense with the signing of a health certificate. But, waiving the defendant's failure to plead specifically that the insured guarantied that he was in good health, and that the guaranty was broken, we think that the defense which is attempted is untenable for other reasons. To establish the existence of a guaranty of good health, reliance is placed on a clause printed on the back of the renewal receipt, quoted above in the statement, which clause, when transposed so as to make its meaning more apparent, reads as follows:

"The agent may receive the premium, and the insurance will be revived by the delivery of this receipt within sixty days from the time when said premium became due: provided satisfactory evidence and guaranty is furnished that the person whose life was insured is in good health, and acceptable for new insurance, which guaranty shall be binding upon the insured and beneficiaries under said policy."

This clause on the back of the receipt does not say to the insured, as it should have done if the mere delivery and acceptance thereof were intended to bind him by a contract of guaranty, that the acceptance of the receipt by the insured should be construed as a guaranty that he was at the time in good health, and that the policy should not stand renewed unless such was the fact; but it contains, rather, a di-

rection to the agent of the company as to the mode and manner of discharging his duty. It required him, when a premium was overdue, to obtain satisfactory evidence and a guaranty that the insured was in good health and acceptable for insurance, before accepting the premium and delivering the receipt. Being, therefore, in the nature of a direction by the insurer to its agent, the law, we think, will not imply a guaranty of good health on the part of the insured from the mere acceptance of the receipt. Even if the language contained in the notice on the back of the receipts was sufficient to give some color to the claim that the mere acceptance thereof by the insured was tantamount to a guaranty of good health, yet inasmuch as the receipts in question, like the policies in suit, were written on forms which were prepared by the defendant company or its legal advisers for use in its daily business, we should esteem it our duty, the intent of the parties not being clear, to resolve any doubt against the company, and to do so in obedience to the well-established rule, that, where contracts are written on forms which are prepared by the insurer, they are to be interpreted in all cases of doubt or uncertainty in a manner which is most favorable to the insured. *National Bank v. Insurance Co.*, 95 U. S. 673, 679; *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019; *Insurance Co. v. McConkey*, 127 U. S. 661, 666, 8 Sup. Ct. 1360; *Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 309, 7 C. C. A. 581, 58 Fed. 945; *Insurance Co. v. Randolph*, 24 C. C. A. 305, 78 Fed. 754, 761, 762.

On the trial in the circuit court the plaintiff below undertook to show by proper evidence that while the defendant's agents were required, by directions contained on the back of its renewal or premium receipts, to obtain from persons whose premiums were overdue "satisfactory evidence and a guaranty" that such persons were in good health, before accepting their overdue premiums, yet that, in the actual transaction of the company's business, its agents frequently accepted overdue premiums, and turned them over to the company, without requiring such a guaranty. In other words, the plaintiff undertook to prove that the company's agents in the state of Minnesota were vested with an authority, to be exercised in their discretion, to accept overdue premiums without a guaranty, and that they exercised that power, doing so in the case at bar. The evidence in support of that contention, stated briefly and in substance, consisted of proof that guaranties of good health, in the case of overdue premiums, were taken on a form prescribed by the company, termed a "health certificate," which was signed by or in behalf of the insured, and of reports of premium collections made by agents to the home office, which reports showed that, in a good many instances, premiums had been collected after maturity without exacting such health certificates. It was conceded on the oral argument, as we understand, that the proof in question was adequate to support the finding that the agents of the defendant company were clothed with the discretionary power above described, and no doubt can well be entertained on that point. It is insisted, however, that the trial court erred in its charge on this issue, in that it instructed the jury, in one part of its charge, as follows: "The plaintiff is not required to show that the

executive officers of the defendant actually knew personally of the practice of its agents in receiving renewal premiums, and delivering renewal receipts therefor, after the same were past due, without requiring evidence and guaranty that the insured persons were then in good health,"—and that it thereby permitted agents of the company to acquire an enlarged authority, different from that conferred by the company's renewal receipts, by a mere practice or course of business which was not known to the company's executive officers. This criticism of the instruction is not tenable, we think, because the trial court immediately explained the meaning of that part of the charge which is last quoted; saying to the jury, in substance, that it meant merely this: That the plaintiff was not required to prove by direct evidence that the executive officers had knowledge of the practice of the company's agents, and that, if the plaintiff had shown that the course of business was such that a reasonably prudent man ought to have known what the practice or course of business on the part of the company's agents was, such evidence was sufficient to warrant a finding that the executive officers did in fact have knowledge of the practice. As thus modified and explained, we think that the instruction given was substantially right. The jury might well be left to infer that the executive officers of the company were acquainted with the practice of its agents, if, in view of the course of dealing and method of transacting business, in the exercise of a reasonable supervision over the company's affairs, they would have known it.

Complaint is further made by the defendant company that the trial court erred in excluding from the jury a pamphlet entitled "Instructions to Agents," which purported to have been compiled by it in the year 1891. This pamphlet was attached to a deposition which was read in evidence by the defendant, and was offered, as we shall assume, for the purpose of showing that the printed instructions issued by the defendant to its agents did not permit them to accept overdue premiums without exacting a written certificate or guaranty of good health, signed by the insured. It may be conceded that the pamphlet had a tendency to prove that such were the company's printed instructions, but there are several reasons, we think, why the exclusion of this pamphlet cannot be regarded as a material error. In the first place, the pamphlet contained the same directions to agents, requiring them to obtain a written guaranty of good health in case of the payment of an overdue premium, that were printed on the back of the renewal receipts heretofore mentioned, which were already in evidence. The proof therefore was merely cumulative in its character. In the second place, two witnesses testified for the defendant, and without objection, to substantially all the facts which the printed instructions tended to establish. But a more conclusive reason why the exclusion of the pamphlet cannot be regarded as a material error is found in the fact that for the purpose of establishing that the agents of the company had power to accept overdue premiums, in their discretion, without exacting a guaranty of good health, the plaintiff relied exclusively upon proof of their actual practice in that regard, as shown by their reports to the home office, and the pamphlet had no tendency to disprove the practice in question. The defendant

could not avoid the necessary effect of knowingly permitting its agents, for a considerable period, to accept overdue premiums without taking health certificates, by showing that its printed instructions did not authorize such a practice. Its agents could acquire the power in question by exercising it for a considerable period with the knowledge of the executive officers of the company, as well as by printed or written instructions.

There are some other alleged errors enumerated in the lengthy written argument with which we have been favored by counsel for the defendant company, but the questions of law which they present are subordinate to those heretofore discussed, and are in effect decided by what has already been said. We find no error in the record which would warrant a reversal, and the judgment below is therefore affirmed.

DOOLEY v. PEASE.

(Circuit Court of Appeals, Seventh Circuit. July 26, 1898.)

No. 472.

1. APPEAL AND ERROR—REVIEW—SPECIAL FINDINGS OF FACT.

Whether a special finding of fact made by the circuit court is in accordance with the preponderance of the evidence, cannot be considered on a writ of error.

2. SAME—MIXED QUESTIONS OF LAW AND FACT.

The decision of a circuit court on a mixed question of law and fact cannot be reviewed on a writ of error.

3. SALE—VALIDITY—CHANGE OF POSSESSION.

A sale of personalty, not followed by open and visible or notorious change of possession or ownership, is void, under the law of Illinois, as against creditors of the seller.

In Error to the Circuit court of the United States for the Northern Division of the Northern District of Illinois.

Counsel for plaintiff in error submitted on brief.

Lockwood Honore, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge. This was an action of trespass by the plaintiff in error, Michael F. Dooley, as receiver of the First National Bank of Willimantic, Conn., against the defendant in error, James Pease, charging him with having forcibly seized and carried away a stock of goods in store at Nos. 213 and 215 Fifth avenue, in the city of Chicago. The defendant pleaded the general issue, under which it was agreed that all defenses, of whatever nature, might be proved as if specially pleaded; and by stipulation in writing a jury was waived, and the court made a special finding of facts, upon which it pronounced the defendant not guilty, and gave judgment accordingly. Error is assigned to the effect that the judgment is not supported by the facts found.

The special finding is made of great length by the statement of many facts which, though relevant and important, are evidentiary only of the ultimate facts found. For the present purpose a short statement will be sufficient: At the time of the alleged trespass (May 20, 1895) the defendant, Pease, was the sheriff of Cook county, Ill. He seized the goods by virtue of a writ of attachment for the sum of \$14,786.53, issued out of the circuit court of Cook county against the Natchaug Silk Company, a corporation of Connecticut; and four days later he levied on the goods another attachment out of the same court, against the same company, for a sum exceeding \$8,000. The validity of the writs under which the seizure was made is not questioned. The dispute is over the ownership of the goods at the time of the seizure. They had belonged to the attachment defendant, the Natchaug Silk Company, prior to and on April 25, 1895; and the point of dispute is whether the instrument of sale that day executed in the name of the company by its president was valid and effective to transfer title to the plaintiff in error, as receiver of the First National Bank of Willimantic, Conn. The validity of that instrument is denied on several grounds. The first is that the president of the company was without authority to make the sale. Upon this point the court found, as a fact, and also as a matter of legal conclusion, that the president of the company had no authority to make the sale, and seems to have placed its decision of the case mainly upon that ground. It is insisted that certain facts specifically stated in the finding require the contrary conclusion. The facts chiefly relied on are that the president of the company had also been made its general manager; that, as president, he was empowered by a by-law of the corporation to "perform all duties especially required of him by the statute laws of this state [Connecticut], but his charge of the executive business of the company shall be subject to the control of the directors"; and that by an amendment of the by-laws a general manager was to be chosen annually, who should "have entire charge of the business and affairs of the said company, subject to the order and approval of the board of directors." On the authority of *Dooley v. Hadden*, 38 U. S. App. 651, 20 C. C. A. 494, and 74 Fed. 729, *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775, and especially of *Lewis v. Manufacturing Co.*, 56 Conn. 25, 12 Atl. 637, it is insisted that the power of general management so given to the president of the company included the power to pay the debts of the company by the application of any portion or all of its personal property. Manifestly, however, such a question is not one of law, purely, but also of fact, dependent upon the circumstances of each case. The cases mentioned, it is to be assumed, were decided correctly upon the proofs adduced. In this case the court found the fact to be that the sale was unauthorized, and had never been ratified, by the company; and there are many circumstances and evidentiary facts set forth in the special finding which tend to support the conclusion,—the chief being that the debtor company was at the time absolutely insolvent and on the verge of suspending business, and that, without the sanction of any other officer or member of the company, the president, knowing the

situation, made this sale, and others, covering the entire property of the company, to particular creditors, for the purpose of preferring them over other creditors. Whether the finding of the court upon this question was according to the preponderance of the evidence is a question which this court cannot consider. Besides the provision in section 1011 of the Revised Statutes, that "there shall be no reversal * * * upon a writ of error * * * for any error of fact," it is well settled that under sections 649 and 700 the right of review, when judgment has been rendered upon a special finding, extends only to "the rulings of the court in the progress of the trial," and to "the determination of the sufficiency of the facts proved to support the judgment." The cases on the subject in the supreme court and in the circuit courts of appeals are numerous. See *Fourth Nat. Bank of St. Louis v. City of Belleville*, 53 U. S. App. 28, 27 C. C. A. 674, and 83 Fed. 675; *Smiley v. Barker*, 55 U. S. App. 125, 28 C. C. A. 9, and 83 Fed. 684; *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234; *Hathaway v. Bank*, 134 U. S. 494, 10 Sup. Ct. 608; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337. In *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837, it is said that "findings of fact made by the court below are binding here, if there be any evidence to support them." It necessarily follows, and has often been decided, that a mixed question of law and fact cannot be reviewed on a writ of error. *Dennistown v. Stewart*, 18 How. 565; *Jewell v. Knight*, 123 U. S. 426, 8 Sup. Ct. 193; *Smith v. Craft*, 123 U. S. 436, 8 Sup. Ct. 196; *Burnham v. Railway Co.*, 46 U. S. App. 670, 23 C. C. A. 677, and 78 Fed. 101. When the trial is by jury, the law part of such mixed questions may be saved for review on exceptions to the rulings of the court. *Norris v. Jackson*, 9 Wall. 125. But, if a party sees fit to waive a jury in a case involving a question of that kind, he puts it beyond his power to challenge the court's finding, unless he may chance to be able to do so upon an exception to a ruling during the progress of the trial. For instance, if the issue be negligence, which rarely is resolved into a pure question of law, a special finding of the ultimate fact either way cannot be overthrown by force of merely evidentiary facts stated in the finding, however strong; and so, here, the finding that the sale was unauthorized, and had not been ratified, cannot be impeached on the strength of the circumstances stated tending to show the contrary. The sale, made as it was without authority, did not pass title, and the goods were therefore subject to seizure by virtue of the writs of attachment.

Another ground on which the sale was clearly invalid is the finding of the court that the sale was not followed by an open or visible or notorious change of possession or ownership unless, as matter of law, the facts stated in the finding constituted sufficient information to the public of the change. The facts so stated were evidentiary only, and, instead of being conclusive of publicity, tended rather to show intentional concealment. They were certainly sufficient, even if we were required to look into the evidence, to support the finding of the ultimate fact. The sale was therefore void, under the law of Illinois, which "will not permit the owner of personal property to

sell it, and still continue in the possession of it." *Green v. Van Buskirk*, 7 Wall. 139; *Hervey v. Locomotive Works*, 93 U. S. 664; *Martin v. Duncan*, 156 Ill. 274, 41 N. E. 43; *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51; *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876. It is urged that while the federal courts follow the rule of the state, that a transfer of personal property, where the vendor is permitted to remain in possession, is fraudulent and void as to creditors, the federal courts are not bound to give heed to the opinions of the supreme court of Illinois upon matters of fact, and that what will constitute a sufficient change of possession must necessarily be determined upon the facts of each case. That may be conceded; but the court here having determined the fact against the appellant, whether according to the weight of the evidence or not, the finding, by the authorities already cited, cannot be reviewed.

There are other propositions embraced in the finding, which, it is urged, are sufficient to support the judgment rendered, but they need not be considered. The judgment is affirmed.

CITY OF SOUTH ST. PAUL V. LAMPRECHT BROS. CO.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1898.)

No. 1,043.

1. VALIDITY OF STATUTES—SUBJECTS EXPRESSED IN TITLE.

A constitutional provision that no law shall embrace more than one subject, which shall be expressed in its title, does not prevent the legislature from inserting in an act any provision which is germane to the general subject to which the act relates. It is only intended to prevent surreptitious legislation, and the union in the same act of incongruous matters, having no natural relation to each other, or to the general subject with which the act deals.

2. SAME—ACT AMENDING MUNICIPAL CHARTER.

An act revising and amending the charter of a city located on the bank of a large river is not obnoxious to a constitutional provision limiting legislative measures to one subject, merely because it authorizes the municipality, among other things, to issue bonds to defray the cost of a railroad and wagon bridge across the river.

3. MUNICIPAL BONDS—RECITALS—BONA FIDE PURCHASERS.

The issuance of bonds containing the representation that they are "authorized by" a certain act of the legislature estops the municipality from tendering proof, as against a bona fide purchaser, that they were not so authorized, and that certain requisite preliminary steps were not in fact taken.

4. SAME—AUTHORITY TO CONSTRUCT BRIDGE.

A charter provision authorizing a city situated on one bank of a river to issue bonds to aid "in defraying the cost and expense of constructing a combination railroad and wagon bridge" is sufficient authority for issuing bonds to aid in building such a bridge across the river in question, though part of the bridge will necessarily be outside the corporate limits.

5. SAME—BONA FIDE PURCHASERS.

A purchaser in the open market of municipal bonds purporting to have been issued to aid in constructing a bridge across a navigable river is entitled to presume that the secretary of war had approved the proposed location of the bridge.

8. SAME—MATURITY OF BONDS.

Under a charter provision authorizing the issuance of bonds "payable at such times not to exceed 30 years" as may be determined, the bonds are not void when they run 30 years from the time they first begin to bear interest, though this is more than 30 years from the time they were executed.

In Error to the Circuit Court of the United States for the District of Minnesota.

Albert Schaller, for plaintiff in error.

O. M. Metcalf and Henry C. James, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge. This was an action on coupons detached from 74 municipal bonds which were issued by the city of South St. Paul in the year 1891, to aid in defraying the cost of constructing a railroad and wagon bridge across the Mississippi river, on which said city is located. The case was tried in the circuit court on a written stipulation waiving a jury, and the trial judge made a special finding of facts. The questions to be considered, therefore, are those which were raised during the trial by exceptions to the admission and exclusion of evidence, or such as are comprehended by the general inquiry whether the facts found by the trial judge are sufficient to sustain the judgment. *Searcy Co. v. Thompson*, 27 U. S. App. 715, 13 C. C. A. 349, and 66 Fed. 92. We will consider them mainly in the order in which they have been discussed by counsel.

The first proposition to be noticed is the contention of the defendant city that the bonds from which the coupons were detached were issued without authority of law, and are therefore void. On April 23, 1891, the legislature of the state of Minnesota passed an act entitled "An act to amend 'An act to incorporate the city of South St. Paul,' as amended by the several acts amendatory thereof, and to authorize said city to issue bonds for various purposes." Sp. Laws Minn. 1891, p. 674, c. 58. This act altered various provisions of the law under and by virtue of which the city of South St. Paul had been incorporated, and was in the nature of a revision of the existing city charter. All the provisions of the act related to the powers which the city might exercise, or to the mode and manner of their execution. The eighteenth section of said act was as follows:

"The common council is hereby authorized to issue the bonds of said city for the purpose of aiding in defraying the cost and expense of constructing a combination railroad and wagon bridge, or both, as may be determined hereafter, to an amount not to exceed seventy-five thousand dollars (\$75,000.00), to be issued in such denominations and payable at such times not to exceed thirty (30) years, and at such rate of interest not to exceed six (6) per cent. per annum, and at such place as may be determined."

It was then provided, in substance, that, before the bonds should be issued, the common council, by a three-fourths vote of all its members, should agree upon a "proposal or plan" for constructing the bridge which should embody an estimate of its total cost; that the proposition to issue bonds should be submitted to a popular vote of

the electors of the city, at a special election, and receive the approval of a majority of the electors voting at such election before the bonds were issued; and that such election should be called within 60 days after the adoption by the council of the proposal or plan for building the bridge.

It is claimed by counsel for the city, as we understand, that, because the aforesaid act contained a provision conferring power to issue bonds for the construction of a bridge, it embraced more than one subject, and was therefore obnoxious to section 27, art. 4, of the constitution of the state of Minnesota, which declares that "no law shall embrace more than one subject which shall be expressed in its title." This contention, we think, is based upon a misconception of the meaning and purpose of the constitutional provision in question. It was not adopted to prevent the legislature from inserting in an act any provision which is germane to the general subject to which the act relates, but to prevent surreptitious legislation, and the union in the same act of incongruous matters, which have no natural relation to each other, or to the general subject with which an act deals. *City of Omaha v. Union Pac. Ry. Co.*, 36 U. S. App. 615, 623, 20 C. C. A. 219, and 73 Fed. 1013; *Travelers' Ins. Co. v. Township of Oswego*, 19 U. S. App. 321, 332, 7 C. C. A. 669, and 59 Fed. 58; *Tabor v. Bank*, 27 U. S. App. 111, 10 C. C. A. 429, and 62 Fed. 383; *Johnson v. Harrison*, 47 Minn. 575, 577, 50 N. W. 923; *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391; *Cooley, Const. Lim.* (6th Ed.) pp. 169-172, and cases there cited.

This provision of the constitution ought not to receive a narrow or technical construction, which will embarrass legislation by making laws unnecessarily restrictive in their scope and operation; but, like all provisions of the organic law, it should be fairly and liberally interpreted and enforced, so that it will serve to prevent the abuses at which it was aimed, without placing unnecessary restraints upon legislative action. An act like the one now in hand, which revises and amends the charter of a city located on the bank of a large river, is certainly not obnoxious to a constitutional provision limiting legislative measures to one subject, merely because the act authorizes the municipality, among other things, to issue bonds for the purpose of defraying the cost of a railroad and wagon bridge across such river. A provision of that kind has a natural and an obvious relation to the general subject, to which the attention of the legislature was for the time being addressed, and for that reason such a provision must be pronounced germane to the general purpose of the act. We have no doubt that the act of April 23, 1891, would be pronounced valid by the courts of Minnesota. *City of St. Paul v. Colter*, 12 Minn. 41, 50 (Gil. 16); *City of Winona v. School Dist. No. 82*, 40 Minn. 13, 41 N. W. 539; *Boyle v. Vanderhoof*, 45 Minn. 31, 47 N. W. 396; *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923; *State v. La Vague*, 47 Minn. 106, 49 N. W. 525; *Willis v. Mabon*, 48 Minn. 140, 155, 50 N. W. 1110.

A variety of other questions are suggested in the brief of counsel for the city, and have been argued at some length, which, for the sake of brevity, may be disposed of collectively. It is contended, in substance, that the act of April 23, 1891, did not authorize an issue

of bonds to build a bridge like the one involved in the case at bar, which was partly outside of the corporate limits of the city; that it did not warrant the issuance of bonds to build a bridge across a navigable stream unless the consent of the secretary of war to the proposed location of the bridge had been obtained; that the common council did not adopt a proposal or plan for building the bridge, within the fair intent and meaning of the act of April 23, 1891, before the bonds in controversy were issued; that the proposal or plan, such as it was, contained no estimate of the cost of the structure; that the original resolution of the council adopting such proposal or plan, if the same was adopted by the council, was never signed by the mayor of the city, as it should have been to become operative; that William Thuet, who signed the bonds as comptroller of the city, was not at the time a city officer; that no valid election was held to obtain authority from the electors to issue the bonds; and that the provisions of the charter of the city of South St. Paul relative to the signing and publication of ordinances and resolutions were not followed in so far as the ordinances and resolutions relating to the issuance of the bonds in suit were concerned.

It is to be observed, however, that some of the assumptions of fact contained in the foregoing propositions are contrary to the special finding which was made by the trial judge. The trial judge found, among other things:

"That the common council of South St. Paul, by a vote of more than three-fourths of all its members, agreed to adopt, and did adopt, on or about May 7, 1891, a proposal or plan for building a combination railroad and wagon bridge across the Mississippi river, at or near South St. Paul, which proposal or plan stated the plan and specifications for constructing said bridge, together with an estimate of the total cost thereof, and that on the same date said common council of South St. Paul determined to submit to the qualified electors of said city the proposition of issuing the bonds described in the complaint, in aid of said bridge, and gave due notice to the qualified electors that an election would be held in the several election districts to determine the question whether the said bonds should be issued, and that an election was accordingly held on the 28th day of May, 1891, at which time a majority of the qualified electors voting at said election voted in favor of issuing said bonds; * * * that thereafter, on May 28, 1891, at a meeting duly held, the common council of the city of South St. Paul adopted a resolution of which Exhibit B (the same being a resolution authorizing the issuance of the bonds in suit) attached to the answer is a true copy, and that the same was duly signed by the mayor; * * * that William Thuet was on the 29th day of May, 1891, the city comptroller of the city of South St. Paul; * * * that the plaintiff purchased the coupons described in the complaint before maturity, * * * and in the open market, and is a bona fide holder thereof."

Inasmuch as the findings by the trial judge are not open to dispute in this court, but must be accepted as conclusive (*Insurance Co. of North America v. International Trust Co.*, 36 U. S. App. 291, 302, 303, 17 C. C. A. 616, and 71 Fed. 88), it follows that several of the contentions above mentioned are without merit. But, if such was not the case, it is nevertheless true, we think, that the defendant city is estopped in this action from asserting the invalidity of the bonds on any of the grounds last above indicated, by the recital which the bonds contained, and by the finding of the trial court that the plaintiff pur-

chased the coupons in suit before maturity in the open market, and is a bona fide holder thereof. The recital last referred to is as follows:

"This bond is one of a series of seventy-five bonds, issued to aid in building a bridge, and authorized by act of the legislature of the state of Minnesota, at a session thereof held in the year 1891, and in compliance with a resolution of the common council of the city of South St. Paul, at a regular meeting thereof, held May 28, 1891; and, to the payment of this bond and interest thereon, the faith and credit of the city of South St. Paul are irrevocably pledged."

The bonds were signed by the mayor of the city of South St. Paul. They were attested by the city clerk, countersigned by the city comptroller, and bore the imprint of the corporate seal. It was a part of the official duty of these officers to execute and deliver the bonds, and, before doing so, to ascertain and determine whether all of the antecedent conditions prescribed by the act under which they were issued, such as the adoption of a proposal or plan, the holding of a lawful election, and the passage of proper resolutions or ordinances, had been duly performed. Under these circumstances, the fact that bonds were issued containing a representation that they were "authorized by act of the legislature of the state of Minnesota at a session thereof held in the year 1891" estops the municipality from tendering proof, as against a bona fide holder of the securities, that they were not so authorized, and that certain preliminary action necessary to validate the bonds had not in fact been taken. A power having been vested in the city, by the act to which reference is made in the bond, to issue such obligations for the purpose therein expressed, an innocent purchaser was entitled to rely on the representation that they were authorized by the act, the same being a representation, in substance, that all antecedent conditions named in the act had been duly performed. *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272; *National Life Ins. Co. of Montpelier v. Board of Education of Huron*, 27 U. S. App. 244, 266, 10 C. C. A. 637, and 62 Fed. 778; *E. H. Rollins & Sons v. Board of Com'rs*, 49 U. S. App. 399, 26 C. C. A. 91, and 80 Fed. 692; *School Dist. v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84; *Town of Colloma v. Eaves*, 92 U. S. 484; *Commissioners v. Bolles*, 94 U. S. 104; *County Com'rs v. Beal*, 113 U. S. 227, 238, 239, 5 Sup. Ct. 433; *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803; *Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613; *Commissioners v. Block*, 99 U. S. 686; *San Antonio v. Mehaffy*, 96 U. S. 312.

With respect to the claim that the bonds in controversy were invalid because the bridge as projected did not lie wholly within the corporate limits of the city of South St. Paul, and that they were further affected by the fact that at the date of their issue the secretary of war had not fixed the exact location of the structure or approved of the proposed location, it may be said, in this connection, that neither of these considerations can be held to have impaired the validity of the bonds. Such considerations could in no event impair their validity in the hands of an innocent purchaser for value. The power to issue bonds, which was granted by section 18 of the act of April 23, 1891, was doubtless conferred for the express purpose of

enabling the city to aid in the construction of a bridge across the Mississippi river, a part of which structure would necessarily be on the opposite or east bank of the river, and outside of the city limits; and the bridge so had in view was of as great advantage to the city as it would have been if located wholly within the corporate boundaries. Ample authority is found in the act for the construction of the bridge now in question.

We are also of opinion that a purchaser of the bonds in the open market was not bound to inquire whether the secretary of war had approved of the proposed location of the bridge on account of which they purported to have been issued. The congress of the United States had authorized the bridging of the Mississippi river with a railroad, wagon, and foot passenger bridge "at a point suitable to the interest of navigation, * * * at or near the city of South St. Paul." This act was passed on April 26, 1890 (26 Stat. 69, c. 163). And, since the city had undertaken to aid in the construction of such a bridge across the river at that point, it was the duty of the city authorities to obtain from the secretary of war an approval of the plan of the structure and its proposed location before the bonds were issued; and a purchaser of the bonds in the open market was entitled to presume from their mere presence in the market that this duty had been duly performed, and that such approval had been obtained.

The validity of the bonds is also challenged on the ground that they were issued to aid in the construction or equipment of a railroad, and were in excess of the amount which could be lawfully issued for that purpose, under section 15, art. 9, of the constitution of the state of Minnesota. That section of the constitution, in substance, limits the sum which any municipal corporation may contribute, in the shape of bonds or otherwise, to aid in the construction or equipment of any railroad, to 5 per centum of the value of the taxable property within such corporation, to be ascertained by the last assessment on said property for state and county taxation previous to incurring such indebtedness; and it is assumed, in support of the argument in behalf of the city, not only that the bonds in suit were railroad aid bonds, within the meaning of the constitution, but also that the bonds were not issued until 1894, when the assessment of the city had fallen to a point which would not warrant an issue of bonds to the amount of \$75,000, that being the amount which was actually voted and issued. We are strongly disposed to conclude that bonds like those involved in the present controversy, which were issued in aid of building a bridge over the Mississippi river that was designed for the use of wagons and pedestrians as well as for the transportation of railroad trains, should be esteemed bonds issued in aid of a local improvement, and that they were in no proper sense "railroad aid bonds," within the meaning of the constitution. But, be this as it may, these bonds were executed on May 29, 1891. The trial court so found, and that finding must be regarded as conclusive. The last assessment preceding that date, according to the statement of counsel for the city, showed that the aggregate amount of city property subject to taxation was \$1,654,343, which was a sum more than sufficient to warrant the issue

here in question. The result is that the plea that the issue was excessive, and in violation of the constitution, is, in any event, untenable.

It is finally urged that the bonds were void upon their face, because they did not mature for more than 30 years after they were executed, and for that reason were not authorized by section 18 of the act of April 23, 1891. The fact is, however, that the bonds did not begin to bear interest until June 1, 1894, and they were payable on that day 30 years thereafter. This was a substantial compliance with the law, as has several times been held, and the bonds were not void, nor the validity thereof in any wise affected, for the reason last assigned. *Township of Rock Creek v. Strong*, 96 U. S. 271, 277; *Dows v. Town of Elmwood*, 34 Fed. 114, 117.

The result is that the record before us discloses no error, and the judgment of the circuit court is therefore affirmed.

ALABAMA G. S. RY. CO. v. COGGINS.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

No. 520.

1. CARRIERS OF PASSENGERS—NEGLIGENCE—PERSONAL INJURIES AT STATION.

Where a railroad passenger, without objection by the company or its agents, alights at an intermediate station, where passengers are received and discharged, for any reasonable and usual purpose, like that of refreshment, the sending or receipt of telegrams, or of exercise by walking up and down the platform, or of the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety.

2. SAME—QUESTION FOR JURY.

Plaintiff, an employé of a telegraph company, whose line extended along the railroad, was traveling in the caboose of a freight train to a point where repairs were to be made. Near an intermediate station the train stopped at the usual place for the alighting of passengers, which was some 1,500 feet from the station proper. Plaintiff alighted, and, according to the testimony in his behalf, started to walk to the station, to see if there was any telegram for him from his employer, going by the only practicable way, which lay between the train track and a side track. The evidence for defendant was that plaintiff had no business at the station, and was merely loitering between the tracks. He was struck while on a cut-off track by a car which the trainmen were switching to the side track. *Held*, that the question whether, at the time, he was entitled to the degree of care due a passenger, or merely to that due a stranger on the tracks, was properly left to the jury, under proper instructions.

3. NEGLIGENCE—EFFECT OF GEORGIA STATUTES.

Code Ga. §§ 2072, 3034, change the common law in respect to liability for negligence only in the particular that when there is negligence by both parties, which is concurrent and contributes to the injury, plaintiff is not barred entirely, but may recover damages reduced below full compensation by an amount proportioned to the amount of the fault attributable to him.

4. CARRIERS OF PASSENGERS—NEGLIGENCE AT RAILWAY STATION.

When a passenger is proceeding in the usual way from a train to the station, he has a right to assume that the company will not expose him to danger without full warning; and, though this does not relieve him from exercising ordinary care in a yard where trains are moving about, it is a

question for the jury whether he is not justified in assuming that a train on the main track would not suddenly be switched across the only practicable path open to him, without some special warning.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Wm. L. Frierson, for plaintiff in error.

Champe S. Andrews, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is a writ of error to reverse the judgment for the plaintiff below in an action for damages for a personal injury inflicted in Georgia. The plaintiff, Coggins, was a lineman or telegraph repairer in the employ of the Western Union Telegraph Company. His wages were \$50 a month, and his expenses. He was furnished by his employer with an annual pass over the defendant's road. Upon what consideration this annual pass was issued by the railroad company to the telegraph company did not appear in the evidence. The contract was called for by plaintiff's counsel, and was not produced. The court charged the jury that the rights of Coggins were the same as if he had paid his fare, and this, though excepted to, is not assigned for error. The evidence for the plaintiff tended to show the following state of facts: Coggins was directed by his superior to take passage on this train, which was a freight train carrying passengers, for Crudup, where the telegraph line needed repair. At Rising Fawn, Ga., an intermediate station, the train stopped to do some switching. The caboose in which Coggins was riding stopped about 1,500 feet from the station. This was the usual place for passengers by freight trains to alight. The only practicable way of reaching the station from this point was to walk between the main track and the house or scale track, which lay parallel to the main track on the right. Coggins had inquired of the brakeman how long the train would remain at Rising Fawn, and, on being told that its stay would be half an hour in length, alighted from the caboose, and walked between the tracks towards the station, to inquire whether there were any telegraph messages to him from his superior. It was customary for his superior, when he was out on the line, to telegraph orders to points where his train was likely to stop. As Coggins walked towards the station, he saw part of the train upon which he had come backing towards him on the main track. As it approached, he concluded it would be safer to cross over near to the house or scale track, lying parallel. A cut-off or switch track crossing diagonally from the main track to the house track lay just in front of him, and at his side. He crossed this, towards the scale track. His left side was now towards the approaching train. As he stepped over the second rail of the cut-off track, he heard a brakeman on the ground back of him calling in a loud voice to another brakeman on the approaching train. To see the cause of the calling, he turned half round towards the right, just as he reached the end of the ties of the cut-off track. As he did so, the cars, which, instead of continuing

on the main track, as he expected, had been switched on to the cut-off track, struck his right shoulder, whirled him about, and threw him on his back, with his left arm under the wheels. He was more or less familiar with the yard at Rising Fawn, and the brakeman engaged in switching the train had told him that they were about to switch a number of cars on to the furnace tracks, which lay to the east of the main track, and on the side opposite to the house or scale track. Hence he did not anticipate that the train, as it approached, would be switched over on the house track cut-off. Both the brakemen engaged in switching the train were where they could have seen Coggins had they looked; and one did see him, but was made so speechless at the sight of his danger as not to give him warning, and the other one, who was on the rear end of the backing train, did call, but not until it was too late for Coggins to escape. This is the case for the plaintiff.

The defendant introduced evidence to show that the accident occurred 15 or 20 minutes after the train stopped at Rising Fawn; that Coggins was loitering along between the tracks, talking with acquaintances whom he met there; that he had no ground to anticipate the receipt of telegraphic orders at that point; and that he was standing on or near the track, looking up at the telegraph wires, when struck. Counsel for the railroad company excepted to that part of the charge of the court in which, after explaining the high degree of care a railroad company owes to its passengers, the court submitted to the jury as an issue of fact whether Coggins was to be regarded as a passenger when he was injured. Upon this point the court said:

"Now, then, when the company undertook to carry him on this freight car so long and while he was a passenger, the company owed to him the highest degree of care for his protection, for his safety, as it did to any other passenger; provided, of course, that a passenger who takes or undertakes to ride on a freight car understands there is a difference between that and a passenger car, that it is managed differently, that the appliances are different, that its conveniences are different; and, of course, it is only the exercise of that high degree of care, such as it might practically exercise with a freight train as distinguished from a passenger train. The increased danger of riding on a freight train as compared with a passenger train the passenger undertook himself, and the company was required to exercise care of the highest character in the management of a freight train, but not of the same degree it would be bound to do in a passenger train.

"Now, when they reached Rising Fawn, that not being the plaintiff's place of destination, if he alighted from the car intending to go direct to the depot for a particular business purpose, and with the intention of returning when that purpose was accomplished, he would, while going to and from the depot, exercising the proper diligence due from a passenger, remain a passenger, and would be entitled to the degree of care belonging to a passenger. Now, that rule applies until he had time to get off the car, going along exercising reasonable prudence to do so, attend to his business (if he had any), and return, and no longer. The liability of the company to him as a passenger lasted only so long as to give him a reasonable time in which to get to the depot and return, after transacting his business, and did not extend to him after the lapse of that time. After that they owed him no duty, except that which they owed to any stranger,—not to wantonly or unnecessarily injure him.

"Now, then, coming back after the train stopped: If they stopped that train at the place where it was usual for passengers to get out and alight from a train whose point of destination was there, where it was usual for passengers to get out and go to the depot on proper business, and this man

Coggins got out and went along on his business, as an ordinarily prudent man would do, and was on his way to the depot, the company owed him that degree of care that it owes to its passengers not to hurt him, and so operate its trains as that during the time necessary for him to get out and back, that they would not strike him on his way, provided he was moving along the usual way of going to the depot; and if the company failed to exercise that degree of care, and he was struck and injured, it would be liable for the accident. Now, on the contrary, if, after they had got in the yard, he got out of the train, without having any business that required him to go to the depot, that not being his point of destination, or without having any particular business to go to the depot, and instead of going by the direct and usual route and within a reasonable time, such as any other man (a prudent man) would have required to go to the depot; and if, instead of that, he, out of mere curiosity, got out to look through the yard and talk with the employes in the yard,—if he stopped in the yard, and began to talk and loiter about the yards there in conversation, or if he began to look at the overhead wires, as one of the witnesses indicates probably he did (at least, there is a silent proof that tends to show that),—why, then, in each of these contingencies, he would cease to be a passenger, but would be there on the switch yard at his peril; and the only duty the defendant company would owe to him in such a situation as that would be the duty not to wantonly or unnecessarily injure him, and they would owe him no greater duty than they would owe to a stranger in the yard without any business."

The foregoing states the law correctly, and leaves to the jury the issue in such a way as to enable them, without difficulty, justly to determine whether Coggins was entitled to the high degree of care from the railroad company due a passenger when he was struck. The Georgia Code (section 2067) provides that:

"A carrier of passengers is bound to extraordinary diligence on behalf of himself and agents to protect the lives and persons of his passengers, but he is not liable for injuries to the person after having used such diligence."

As the accident happened in Georgia, this section furnishes the law of the present case. *Railroad Co. v. Ihlenberg*, 43 U. S. App. 726, 21 C. C. A. 546, and 75 Fed. 873. But the section is only declaratory of the common law, and the question when one who has been a passenger ceases to be such must still be determined by the common law. It is well settled that the obligation of a common carrier of passengers continues so long as they conform to the reasonable regulations of the carrier; not only while they are on the cars or other vehicle of transportation, but also while they are on the carrier's premises for the purpose of the journey in going to or coming from the means of conveyance. *Gaynor v. Railway Co.*, 100 Mass. 208; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. Railroad Co.*, 84 N. Y. 241; *Klein v. Jewett*, 26 N. J. Eq. 474, affirmed in 27 N. J. Eq. 550; and *Baltimore & O. R. Co. v. State*, 60 Md. 449, 463. The authorities are not quite so uniform upon the question whether the obligation of the carrier extends to the same degree of care over the safety of its passengers when they alight at intermediate stations, and go to the station house while the train is waiting. But we think the weight of authority, reason, and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does

not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety. The question is fully considered in a most satisfactory opinion in *Dodge v. Steamship Co.*, 148 Mass. 207, 19 N. E. 373; in which the conclusion just stated is announced, and is fortified by many authorities. Other cases in which the same view is taken are *McKimble v. Railroad Co.*, 141 Mass. 463, 470, 5 N. E. 804; *Parsons v. Railroad Co.*, 113 N. Y. 362, 363, 21 N. E. 145; *Packet Co. v. True*, 88 Ill. 612; *Dice v. Locks Co.*, 8 Or. 60; *Railroad Co. v. Riley*, 39 Ind. 568; *Railroad Co. v. Shean*, 18 Colo. 368, 33 Pac. 108; *Clussman v. Railroad Co.*, 9 Hun. 618, approved 73 N. Y. 606; and *Hrebrik v. Carr*, 29 Fed. 298, 300. There is nothing in the case of *Railroad Co. v. Thompson*, 76 Ga. 776, which in any way conflicts with these cases. There are two cases in which the contrary view is announced, though the facts of each case were such that it would seem to have been unnecessary to the decision. *State v. Grand Trunk R. Co.*, 58 Me. 176; *De Kay v. Railway Co.*, 41 Minn. 178, 43 N. W. 182.

In the case at bar it was well established that the point at which the caboose of the freight train stopped was more than 1,500 feet from the station; that this was the usual point for the alighting of passengers from that train; and that the only practicable way to reach the station house from there was to walk between the train track and the house track, as the plaintiff did. It was in evidence that he had reason to expect to find a telegram for him at the station, and that he went directly there to get it. If this was true, he was a passenger, and had a right to rely on the company's exercising a high degree of care not to run him down. His evidence was contradicted, and the testimony of the railroad company tended to show that he loitered between the tracks, and had no business at the station. That made an issue for the jury, which the court left to them under proper instructions.

Another exception by defendant was based on the refusal of the court to give a charge in the words following:

"If the plaintiff was himself at fault in having exposed himself to the danger of being hit by a moving car, he cannot recover at all, unless he has shown by a preponderance of the evidence that the servants of the defendant were guilty of such negligence as would amount to wantonness."

The legislature of Georgia has enacted laws defining the cases in which liability for negligence arises. They are as follows:

Code, § 2972: "If the plaintiff by ordinary care could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

Section 2067: "A carrier of passengers is bound to extraordinary diligence on behalf of himself and agents to protect the lives and persons of his passengers, but he is not liable for injuries to the person after having used such diligence."

Section 8083: "A railroad company shall be liable for any damage done to persons, stock, or other property, by running of the locomotives or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Section 3034: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."

Sections 2972 and 3034, when read together, introduce a variation from the common law in one respect only. They declare, first, that a plaintiff shall not recover when the accident is caused by his own negligence. They further declare that, even if the defendant was negligent in such a way as to cause the injury, the plaintiff shall not recover if, with the defendant's negligence as an existing condition of the situation, he could have avoided its consequences by ordinary care. So far these rules are the same as those established at the common law. *Coasting Co. v. Tolson*, 139 U. S. 556, 11 Sup. Ct. 653. Finally, however, they provide that, when the negligence of both parties is concurrent and contributes to the injury, then the plaintiff shall not, as at common law, be barred entirely, but may recover damages reduced below full compensation for the injury by an amount proportioned to the amount of the default attributable to him. The decisions of the Georgia court in construing these sections have not always been as clear and as intelligible as might be desired; but the foregoing coincides with the construction which has been put upon them by that court in the latest and earliest cases, which have been called to our attention. *Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Railroad Co. v. Johnson*, 38 Ga. 409, 433. In the case at bar, if the plaintiff was negligent, it was in stepping upon the cut-off track in the face of an approaching train, on the assumption that the train was about to pass him on the main track. If the defendant was negligent, it was in failing to warn the plaintiff, a passenger, that the train was to be switched off onto the cut-off. If the jury were to find both parties thus negligent, their negligence would be concurrent, and the damages must be apportioned. The case was not one where the negligence of defendant had begun, or was actually existing as a condition of the situation when the plaintiff's want of due care intervened, but the want of due care on the part of both was concurrent. Hence the charge asked was not applicable to the case.

Finally, it is assigned for error that the court refused to direct a verdict for the defendant as requested. In this the court was clearly right. If the plaintiff was a passenger at the time of the accident, as the jury might have found from the evidence, then the same rules for determining the existence of contributory negligence on his part do not apply as if he were a traveler at a railway crossing. *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. Railroad Co.*, 84 N. Y. 241; *Klein v. Jewett*, 26 N. J. Eq. 474. When a passenger is proceeding in the usual way from the train to the station, he has a right to assume that the company will not expose him to danger without full warning; and, though this does not relieve him from the duty of exercising ordinary care in a yard where trains are moving about, it might well be left to a jury to say whether it did not justify him in assuming that a train on a main track would not suddenly be switched across

the only practicable path open to him in reaching the station, without some special warning. The judgment of the circuit court is affirmed, with costs.

STEWART et al. v. MORRIS et al.

(Circuit Court of Appeals, Seventh Circuit. July 26, 1898.)

No. 476.

1. SET-OFF—MUTUALITY OF DEMANDS—SURVIVING PARTNERS.

In an action by a partnership, the defendant may plead in set-off a demand against a former partnership, of which the plaintiffs are the surviving members, and to which they succeeded.

2. WITNESSES—USE OF MEMORANDUM.

Under the rule in Illinois, which is followed by the federal courts in that state, a witness may use a memorandum to refresh his memory only when he has an independent recollection of the facts. If he can only testify to them because he finds them on his memorandum, he cannot properly either read or speak from it.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

S. P. McConnell, for plaintiff in error.

Chas. H. Aldrich, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. This action was brought by Robert B. Stewart and Elisha B. Overstreet, co-partners, doing business under the firm name of Stewart & Overstreet, against Nelson Morris, Frank E. Vogel, and Edward Morris, co-partners, doing business as Nelson Morris & Co., to recover the purchase price of cattle, amounting to \$14,931.44, sold by the plaintiffs to the defendants on December 31, 1894, and January 1, 1895. The defendants pleaded a set-off of \$15,406.71, arising from the failure of title to cattle which they had purchased from the co-partnership of Cash, Stewart & Overstreet on December 10, 1890, which firm was then composed of the plaintiffs in this case, and James G. Cash, who died in April, 1891. The firm of Cash, Stewart & Overstreet was succeeded by Stewart & Overstreet. It is urged that there is wanting here that mutuality of demands which is essential to the right of set-off; but the authorities leave no room for doubt on that subject. The question of mutuality is to be determined by the relations of the parties to the several demands at the time when the set-off is pleaded. 22 Am. & Eng. Enc. Law, 295, 296; Wat. Set-Off, §§ 227, 229.

The errors assigned on rulings of the court during the progress of the trial, excepting one, relate to questions which were purely technical, and which manifestly had nothing to do with the result; but an error was committed in admitting testimony which cannot be said, with certainty, to have been harmless. A witness was called to prove statements made by one of the plaintiffs in error, of which statements the witness had made a memorandum in longhand. The

witness, having been told by the court, over objection, that, "if he thought his recollection would be refreshed by referring to the notes, he might use them for such purpose," said:

"I would say, this is a matter of over six years ago, and I would not be able to give the language of Mr. Overstreet. But by looking at these memoranda I could tell almost verbatim what Mr. Overstreet stated, and I would prefer to state what took place at that time from my memoranda, instead of trusting to my memory. I can't tell whether I could recollect back to January 24, 1891, and state what took place, or what I recollect from the notes taken at that time. So I would prefer to refresh my memory by reading the memoranda as it took place exactly, because I do not wish to make any statement not in exact accordance with the facts."

Thereupon, with the permission of the court, the witness proceeded to read his memorandum to the jury.

While there is conflict of authority on the subject, such testimony having been held admissible in some instances (*Halsey v. Sinesebaugh*, 15 N. Y. 485, cited in *Maxwell's Ex'rs v. Wilkinson*, 113 U. S. 656, 5 Sup. Ct. 691; *Clark v. Vorce*, 15 Wend. 193; *Insurance Cos. v. Weides*, 14 Wall. 375; 1 Greenl. Ev. § 437, and notes), it seems to be clear that in Illinois such evidence is not admissible: *Elston v. Kennicott*, 46 Ill. 187; *Railroad Co. v. Adler*, 56 Ill. 344. At page 348 in the last-named case it is said:

"It has been held by this court that a witness may use a memorandum to refresh his memory. *Dunlap v. Berry*, 4 Scam. 327. But, while the witness may use the memorandum to refresh his memory, he must be able to state that he remembers the facts. If he has no recollection of the circumstances, and can only say that they are true because he finds them on his memorandum, it would not be proper to permit the witness to either read or speak from the memorandum."

The federal courts follow the rule of the state in which the trial is had. *Ex parte Fisk*, 113 U. S. 713, 720, 5 Sup. Ct. 724; *City of Chicago v. Baker*, 30 C. C. A. 364, 86 Fed. 753. The judgment below is therefore reversed, with direction to grant a new trial.

ROGERS v. LOUISVILLE & N. R. CO.

(Circuit Court, W. D. Tennessee. May 28, 1898.)

No. 180.

MASTER AND SERVANT—DEFECTIVE CAR—EVIDENCE—DIRECTING VERDICT.

The mere fact that a brakeman was killed by falling at night from a freight train, composed of 12 or 14 cars, and being run over, is not sufficient to warrant an inference that he slipped from the roof of a certain car, which was defective in having no footboard; and, in the absence of all other evidence, the court will direct a verdict for defendant.

Action by Susan Rogers, administratrix, against the Louisville & Nashville Railroad Company, for the death of her son. The court directs verdict for defendant.

Thomason & Thomason, for plaintiff.
Sweeney & Farbough, for defendant.

HAMMOND, J. (charging jury). Because the plaintiff has failed to show, by a preponderance of the proof in this case, that her son lost his life by the negligence alleged in the declaration, I am constrained to direct that your verdict should be for the defendant, and it will be entered accordingly.

Technically, this is all I need say to you, and we might end the case with that direction; but it is my great desire, and constantly my habit, whenever I take that course with a case, to justify, as far as I am able to do so, the action of the court, by giving to the gentlemen of the jury the reasons that actuate me in giving that direction, so that it may find approval in your own intelligence, if it can find approval at all.

The great trouble about all these cases is the human sympathy that demands and overwhelmingly suggests to everybody that where a man loses his life through such a calamity as came upon this plaintiff's son, and he was in the service of a railroad company, we should like to see her compensated for the loss in some way, by having a sum of money that will help take care of her, in the absence of the son upon whom she depended. But it would be utterly impossible to introduce into our law the practice that would make a railroad company an accident or a life insurance company, to pay all of its employes who are hurt and injured in its service a sum of money to compensate those who are dependent upon them. There is no such law as that, and it is the greatest injustice to the railroad companies to proceed upon the theory of compelling them to pay money to everybody who is injured in their service. They do not get any pay, like accident insurance companies. You had a trial of an instance of that before you,—that, where there is a life insurance policy or an accident insurance policy, the company gets its regular premiums, which are adjusted according to the circumstances of the case, and according to the risk, which premiums are supposed to compensate that company for its promise to pay damages when an accident occurs or when his life terminates. The railroad companies do not receive any such premiums as that. They pay high wages, and good wages, for the services that men do for them, and they pay them, and must pay them, upon the theory that the man's wages compensates him for the risk that he takes; and every man who enters into the service of a railroad company agrees, when he goes into it,—as a matter of bargain and as a matter of contract, he agrees with the railroad company,—that he will take the ordinary risks that belong to the service into which he enters. There is not in the history of human affairs any more dangerous employment, scarcely, than that of a railroad brakeman. Perhaps there are some more hazardous employments, in the handling of dynamite, gun cotton, powder, and explosives of that kind, but, outside of that class of business, men do not engage in any business so hazardous, and with so many risks attendant to it, as that of a railroad brakeman, and all that risk he takes when he goes into the service of the company; and statistics show that a very, very large per cent. of the men who go into it are sooner or later in some way injured or lose their lives.

Now, the railroad company, on its part, enters into a bargain that it will furnish to the men who work for it reasonably safe appliances, that are known to the business, for the purpose of their protection against the dangers that are involved in the service; and the law rigidly requires that every railroad company shall perform that obligation of its contract, and that it shall have its appliances for doing the work in a reasonably safe and proper condition; if the safety depends upon the structures and appliances, that the railroad shall have that which is reasonably safe. They are not required to have the best. You can sit down and calculate that, by the high art of mechanics, one structure would be safer than another. We are a great deal safer if we take an ocean greyhound to go across the Atlantic ocean than we would be were we to take a common, everyday tramp ship, but if we take the tramp ship we take the risks that attend the tramp ship. The company that runs the tramp steamer is not bound to furnish us all the safety that we find upon the ocean greyhound. And so it is with these railroads. They are not bound to furnish the best appliances that are known to the art of railroading to their employes. They have the right to furnish such as they are able to pay for, such as their business demands, and such as are in common use among railroad corporations in doing the transportation of the country, and that appliance which is ordinarily in use by them and considered safe is that which they have the right to supply; and, when a man goes into their service, he knows what kind of railroad company it is, what kind of appliances they have, and he knows what their ordinary method of doing business is, and he takes the risks that are incident to that service.

Now, we know, and it is in this record, that in making up these freight trains, for passing over the railroad, in what we call the "freight transportation department," the company may use cars that are furnished with air brakes, and when they use those cars, and have a train made up of cars that are using the ordinary air brake, the brakemen probably do not have to walk over the cars, and that danger is eliminated from that kind of a train, and it is a great deal safer than one where the brakeman has to walk about and over the train, and turn the crank or the wheel that sets the brakes on the freight cars. But we also know, as a matter of history,—the history of our country,—that the railroad companies do not all of them have their cars furnished with air brakes. They may not all be able to pay for them; at least, they all have not got them. We have a law, of course, that requires them now to use that kind of brake, and the interstate commerce commission has given them two years longer in which to equip their service with that kind of less dangerous and more useful brake, and also to put in a less dangerous coupling; but until that law takes effect, and the dangers incident to the service are lessened by obedience to the law of having the air brakes, and having the patent couplers, the brakemen, when they are in the service, take the risk of such appliances as they have.

And we know that, in the common everyday transportation of railroads and interchange of traffic with each other, they congregate to-

gether, in a train, cars that are not uniform in their construction, and they are not uniform in the appliances that they have for the protection and safety of the brakemen. Whatever danger there is in this want of uniformity the brakeman takes. He knows, when he goes into the service of the Louisville & Nashville Railroad Company, or any other railroad company in this country, no matter where it is located, that it is utterly impossible to provide a perfectly uniform train, with reference to its appliances and to the heights of the cars, and those things that would go to minimize and lessen the dangers, and therefore, when he goes into the service, he takes the risks of any inequalities that there may be about the train.

But, taking all that into consideration, there is nothing better settled in our law—because it is settled by a decision of the supreme court of the United States—than that, whenever a railroad company receives from another company a railroad car to be transported on its own line, it owes a duty to its railroad hands that they shall see that that car is reasonably safe for the service into which they are to put it. They are bound to inspect it, not only for the purpose of seeing to it that the wheels are all right and whether the brakes are all right, but they are bound to inspect it all over and everywhere, and see whether it is properly constructed, and properly adapted to the uses to which they are about to put it, and if they do not make that kind of an inspection they are guilty of negligence. If they do make that kind of an inspection, and they accept and put into the service a deficient and defective car, which is not reasonably safe, they are negligent; and I would submit it to you, as a question for your determination in this case, whether or not it was not an act of negligence on the part of the Louisville & Nashville Railroad Company to put in its train on this occasion a car which had a roof that was oval or cylindrical in its construction, and from 14 to 30 inches higher than the ordinary cars that they used in their freight trains, and without that car with the oval roof having on it the ordinary footrun for the safety of the brakeman, which we find on the ordinary freight cars. They might have put a temporary footrun upon it, or they might have rejected it and declined it entirely; but I have not any doubt, if you found, from the facts in this case, that this car was that kind of a car, and it had no footrun upon it, and they took it in that way, it would be an act of negligence, and I would so say to you, if I had any occasion to submit that question to you.

But the difficulty which the plaintiff has in this case is this: That the law requires every plaintiff to show, as I told you before,—not beyond a reasonable doubt, but by a preponderance of the testimony,—that the injury occurred through the particular negligence which is alleged against the railroad company. It is not sufficient to show that the railroad company was negligent, and the plaintiff has not entitled herself to a verdict when she shows that this railroad company was negligent in taking this car into its freight train without a footboard for the brakeman to walk over. She must go further than that, and show that it was by that specific act of negligence that the man was killed.

Now, what proof is there in this record that that was so? It is not necessary, and certainly it would be unreasonable, to demand that when these trains are worked in the night, and when the accident occurs, as this did, about daylight in the morning, the plaintiff should be required to bring forward here some eyewitness that saw him fall off the top of that car that did not have the footboard on it. No such unreasonable demand as that could be made upon the plaintiff. But it is her duty to show, by whatever proof is at hand,—if she has not got eyewitnesses, there must be circumstances or conditions that exist in the case from which you can see that it is a fair and reasonable inference upon a preponderance of the testimony,—that her son's life was lost by reason of that particular defect that was in the train.

If that kind of condition and that kind of circumstance are not found in the physical facts and in the proof, it is the plaintiff's misfortune. The law presumes everything in favor of the defendant until the plaintiff has proved the case by the preponderance of the testimony. You cannot charge negligence against a defendant upon mere inferences that are unfounded from the facts and circumstances of the case. Negligence must be proved in every case by either the positive testimony of witnesses who saw and can testify as to the facts in dispute, or by facts and circumstances—what we ordinarily call "circumstantial evidence"—that are reasonably conclusive of that fact.

This young man fell off the train not far from Bells, beyond all question, and was killed, but the proof here is that there were 12 or 14 cars in the train. We know, as well as we can know anything, that it is an easy thing for a man to have fallen off of any one of those 14 cars. He might have fallen between any one of the 14 cars that were on the train. He certainly might have fallen between any one of them that were in and about the middle part of the train, where it was his business to work. This car was in the rear part of the train,—the second car in front of the caboose,—and it is true that he had to pass over this unprotected roof in order to get to his place of working; but it does not follow, because he had to pass over it, that his foot slipped for want of a footboard on that car. It might have slipped after he had walked entirely across the train. It might have slipped as he went from one of those cars to the other. He might have gone entirely across that train, to a place on the other end, and been turning a brake in some other place, and have fallen off. It is not at all a reasonable inference to say, from the simple fact that there was a defective car in this train, that this man lost his life because of that defect, without any other fact to point to it as the place where he did slip off.

I have been very carefully listening to Col. Thomason's argument, and have been looking and searching through all the facts of this case to see if there was a single circumstance to lead to the fact that this man slipped off of this particular car any more than any other car, or that he might have fallen between this car any more than he might have fallen between any other car,—but it was apparent that he fell in between some car, as the wheels crushed him, but

it is impossible to identify the particular car that did run over him, because his coat sleeves protected or kept the wheels from being spattered up with the blood,—but I have been unable to find a single fact or a single circumstance that would point, reasonably or unreasonably, to an inference that this man fell off of this defective car, or fell between this defective car and the one next to it (for that was the way he was hurt unquestionably), any more than that he fell between any other two cars in that train; and, in the absence of such a fact or of such a circumstance, it is a pure assumption to say that he was hurt by falling in between the defective car and the one next to it. The fact that it was defective does not prove that fact. It might have been that he lost his footing in some other way, and there are so many other ways in which he might have done it that it is not reasonable to say that he lost it by that particular car simply because that particular car happened to be on this train; and for that reason I do not submit this question of the negligence of the company to your judgment, and do not submit the question of his falling off the train to you, because the plaintiff has wholly failed, in my judgment, to show by a preponderance of the testimony that her son's life was lost by reason of the defect which had been proved against this railroad company on this train, if you should come to the conclusion that it was such a defect as that.

The only matter that has troubled my judgment about it has been whether or not I should leave it to the jury to say, from the existence of the defect itself, that it was the cause of the accident; but I have come to the conclusion that, in the absence of any other fact or any other circumstance to show that it was lost by the defective car, it is my duty, instead of submitting it to you, to say to you there is no proof in this record that the plaintiff lost his life by the alleged negligence in the declaration, and for that reason I have directed your verdict, and let it be so recorded.

TURNER v. HAMILTON.

(Circuit Court, W. D. Missouri, W. D. June 27, 1898.)

USURY—ACTION ON JUDGMENT—RES JUDICATA.

In Kentucky, one who neglects to plead usury to an action for the debt, and suffers judgment to go against him, cannot, in an action on such judgment, interpose as a defense the amount of usurious interest paid prior to the judgment, though, under the state statutes as construed by the state courts, he would have a right, after paying the judgment, to sue, within one year, to recover the amount of usury embodied in it.

Stone & Suddath, R. G. Kern, Chas. W. Sloan, and F. M. Black, for plaintiff.

Karnes, Holmes & Krauthoff, for defendant.

PHILIPS, District Judge. On the 3d day of September, 1891, the New Farmers' Bank, a Kentucky banking corporation, recovered judgment against George Hamilton, A. W. Hamilton, and the above-named defendant, W. W. Hamilton, in the circuit court for Bath

county, in said state, a court of record of general jurisdiction, for the sum of \$25,000, and interest thereon at the rate of 6 per cent. per annum from May 30, 1891, until paid; and the further sum of \$3,898.45, with interest thereon at the rate of 6 per cent. per annum from the 4th day of June, 1891; and the further sum of \$575.18, with interest thereon at the rate of 6 per cent. per annum from the 20th day of June, 1891; and the further sum of \$10.55, as costs,—on which judgments various sums were afterwards paid, leaving a balance of \$15,550.67, including interest to the 22d day of April, 1897. In 1893 said bank executed a deed of assignment for the benefit of creditors under the statute laws of the state of Kentucky. The plaintiff is trustee under said deed of assignment for its execution and administration. An action at law on said judgment was brought in this court October 2, 1897, against the said W. W. Hamilton, who has filed answer herein. Among the defenses pleaded by the defendant is the following:

"For a seventh and further defense, this defendant says that the indebtedness out of which said judgment arises was created a great many years ago, to wit, thirty years before suit was brought thereon; that during all of said time the said George Hamilton, the principal in said indebtedness, had paid usurious interest to the said New Farmers' Bank, the exact amount of which is not known to this defendant, but which, on information and belief, he avers to be in excess of nine thousand dollars; and that the books of said bank, whereby the amounts of said payments and usurious interest will fully appear, are in the possession and under the control of the plaintiff, and to which this defendant has no access. Wherefore this defendant states that, as the surety of the said George Hamilton on said indebtedness, he is entitled to have said judgment credited with said amount of nine thousand dollars so paid by said George Hamilton as usury, aforesaid, the same being included in said judgment, and the New Farmers' Bank being hopelessly insolvent."

The plaintiff has filed a motion to strike out said plea, for the reasons that the matters therein set out constitute no defense, nor any part of a defense, to the plaintiff's cause of action, and for the further reason that the defendant is estopped from pleading usury to the cause of action merged in a judgment, and because the plea does not state any fact showing that usurious interest was paid or received.

At common law, the rule is universal, that a judgment between the same parties in an action for the ascertainment of the amount due and owing on a promissory note or other contract is, as between said parties, conclusive, not only as to every matter embraced within the pleadings, but also as to every admissible matter of defense which might have been presented in that litigation. *Cromwell v. Sac Co.*, 94 U. S. 352. It precludes the defendant in every forum wherever the judgment is produced as evidence from controverting the existence and amount of the debt, except where the judgment is assailed for fraud in obtaining it. If he had the means at the time of suit of proving the payment, release, or satisfaction, and he failed to show it, the matter as to the defendant has passed in *rem judicatum*. *Dimock v. Copper Co.*, 117 U. S. 559-565, 6 Sup. Ct. 855; *Black, Judgm.* § 754. This rule applies equally to the plea of usury in avoidance of a judgment. *Id.* § 759; *Freem. Judgm.* § 284 (a); *Heath v. Frackleton*, 20 Wis. 320; *McLaws v. Moore*, 83 Ga. 179, 9

S. E. 615; *Footman v. Stetson*, 32 Me. 17. Neither will the courts open up and vacate a judgment to let in a plea of usury because such plea is held not to evoke equitable interposition. Black, Judgm. § 349, and citations in note; 27 Am. & Eng. Enc. Law, p. 1032.

The contention of defendant is that, whatever be the rule at common law, such a defense as is here interposed is admissible under the statutes and decisions of the court of appeals of the state of Kentucky; and as the defendant, had he been sued in the state of Kentucky, could oppose this plea in an action at law on the judgment, he is, under the act of congress of May 26, 1790 (1 Stat. p. 122), entitled to make the same defense here. This may be conceded. *Hampton v. McConnell*, 3 Wheat. 234.

The statutes of Kentucky applicable to this question contain, in substance, the following provisions relating to interest:

The legal rate of interest is 6 per cent. per annum.

"All contracts and assurances made, directly or indirectly, for the loan or forbearance of money, or other thing of value, at a greater rate than legal interest, shall be void for the excess over legal interest. The amount loaned, with legal interest, may be recovered on any such contract or assurance; but if the lender refuse, before the suit is brought, a tender of the principal, with legal interest, he shall pay the costs of any suit brought on such contract or assurance."

"A court of equity may grant relief for any such excess of interest, and to that end compel the necessary discovery from the lender or forbearer."

"Such excess of interest may be recovered from the lender or forbearer, although the payment thereof was made to the assignee."

"Partial payment on a debt bearing interest shall be first applied to the extinguishment of the interest then due."

"And no action shall be prosecuted in any of the courts of this commonwealth for the recovery of usury theretofore paid, for the loan or forbearance of money, or other thing against the lender or forbearer, or assignee, or either, unless the same shall have been instituted within one year next after the payment thereof; and this limitation shall apply to all payments made on all demands, whether evidenced by writing or existing in parol." Ky. St. c. 72, §§ 2218-2220, 2517.

It has been held by the court of appeals of Kentucky that the borrower has the right to treat the payment of usury as a payment on the principal and legal interest as long as the debt remains unpaid. *Ellis v. Brannin's Ex'rs*, 1 Duv. 49. It is further held by the court that, when sued for the debt, the defendant may plead the fact of usury paid by him on the debt, or the amount of usury contained in the evidence of debt, and the judgment can only go for the balance, if any, after deducting such usury; but, in case of failure to interpose such defense to the action, the defendant is not precluded by the judgment from recovering back from the judgment creditor, by independent action, the amount of usury paid; or, after paying and satisfying the judgment, he may maintain appropriate action against the creditor for recovery of the amount of usury thus paid, provided he institute such action within the time prescribed by the statute of limitations. *Ellis v. Brannin's Ex'rs*, supra; *Scott v. Shropshire*, 2 Duv. 153; *Sherley v. Trabue*, 85 Ky. 71, 2 S. W. 656.

The interesting and controlling question, however, presented by this answer, is: Where the defendant has neglected and failed to plead usury to the action when sued for the debt, and suffers judg-

ment to go against him, as is admitted in this case, can he, in this jurisdiction, when sued in an action at law on such judgment, interpose, as matter of defense, the amount of usurious interest paid by him prior to the rendition of the judgment? No adjudicated case by the court of appeals of Kentucky can be found supporting such defense to an action on the judgment. On the contrary, the rulings of that court and the language employed in its decisions indicate that, after judgment has been suffered for the debt, the only remedy provided for the borrower where he had paid usurious interest before the rendition of the judgment is an independent action to recover back the amount so paid; and, where such usurious interest constitutes a part of the judgment debt, he may bring an action against the judgment creditor to recover back the amount enforced against him.

In *Ellis v. Brannin's Ex'rs*, supra, in speaking of the legislative act of 1862, which limited the time for instituting such action by the borrower to "one year after the payment of such excess of interest," the court, after citing certain prior adjudications in that state, said:

"These cases decide that a payment of usurious interest will, at the election of the borrower, be applied as a payment of the principal and legal interest, and that the borrower could not recover back the amount of such payment, either at law or in equity, until he had paid the whole of the principal and legal interest; hence it was held that where usurious interest had been paid more than five years before the institution of suit to reclaim it, and there remained a balance due and paid within the five years sufficient to cover the usurious interest previously paid, such balance so paid, or so much as would equal the previous payment of usury, might be recovered, and the claim was not barred by the statute. The previous payment was treated as a discharge to that extent of the debt and legal interest. The subsequent and final payment was treated as payment of the usury. Such was the well-settled law on the subject at the time the act of 1862 was passed. And the only change introduced by that act was to reduce the period within which actions for usury might be brought from five years to one year. It was not intended to deprive the borrower of the right to treat payments of usurious interest as payments of the principal and legal interest as long as the debt remained unpaid; nor was the act intended to give the borrower a right of action to recover back such payments until he had discharged the entire debt. Any other construction would do violence as well to the letter as to the obvious intent and spirit of the act."

In *Chinn v. Mitchell*, 2 Metc. (Ky.) 92, it is inferable that Mitchell had recovered judgment against Chinn for the sum of \$335, and that the defendant therein had executed a replevin bond for the property seized under execution. Thereupon Chinn filed a bill in equity against Mitchell, to enjoin the collection of an execution issued on the replevin bond, setting up as grounds of relief that, prior to the maturity of the replevin bond, he had paid to the clerk of the court, as the custodian of the bond, the sum of \$285 on account thereof, and that the remaining \$50 due thereon was for usury. Mitchell took issue upon the authority of the clerk to receive said money, and denied the validity of such payment, to the clerk, and, without denying the allegation respecting usury, alleged that it was too late for Chinn to present such defense, the matter of such defense being known to him prior to the judgment. The court held that the clerk was not authorized by virtue of his office to receive such payment,

and that the payment to him was no defense. In respect of the issue, as to usury, the court called attention to section 14 of the Civil Code of Practice of the state, which declares that:

"A judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceeding, except for a defense which had arisen or been discovered since the judgment was rendered. But such judgment does not prevent the recovery of any claim, though such claim might have been used as a defense by way of set-off or counterclaim in the action on which the judgment was rendered."

The court then said that:

"The foregoing section of the Civil Code was adopted as an amendment to the prior Code, and took effect after the decision of this court in *Dorsey v. Reese*, 14 B. Mon. 127, which recognized the validity of an equitable defense after judgment, though existing and known prior to judgment. So that that case does not apply to the present."

The court further observed that it had no difficulty upon the last point—

"Because of the Revised Statutes (section 3, p. 420), which authorizes a court of chancery to grant relief against usury, and compel necessary discovery from the lender. Such was the law prior to the adoption of the statute, and such is still the law. The party seeking such relief must pursue it in the manner prescribed by the Civil Code, *supra*, which, if in conflict with the Revised Statutes, must prevail, as is expressly provided in section 748 of the Code."

In conclusion, the court said:

"Here the matter of usury in the debt sought to be collected was known to the party before the judgment, and was then available in defense, either at law or in equity. He failed to rely on it, however, and now seeks an injunction or modification of the judgment to the extent of the usury. He comes directly within the inhibition of the section *supra*, and is therefore not entitled to the relief. *Greer v. George*, MS. opinion, Dec., 1856. If he had paid the usury, and sought relief on that ground, it would have been the duty of the court to have awarded him a judgment for the amount thus paid as upon a distinct cause of action against the party receiving it, although no modification or change of the former judgment embracing the usury could have been made; and, if he is yet compelled to pay it upon the execution, his cause of action will then accrue; but, as the law now stands, he cannot, in the mode adopted, avail himself of the usury embraced in the judgment to procure a modification of or an injunction against said judgment, or any part thereof."

The clear meaning of which is that, where the defendant neglects in the original action on the debt to avail himself of the defense of usury, in an ancillary proceeding for the enforcement of the judgment he is restricted to such equitable defense as "has arisen or been discovered since the judgment was rendered." If he has already paid the usurious interest when the judgment was rendered, he can recover that back in an independent action; and where the usury is included in the judgment, "if he is yet compelled to pay it upon the execution, his cause of action will then accrue"; but he cannot "avail himself of the usury embraced in the judgment to procure a modification of said judgment."

While the case of *Sherley v. Trabue*, 85 Ky. 71, 2 S. W. 656, involves principally the question as to whether or not an action at law would lie to recover back usury paid on a judgment of foreclosure of a mortgage in equity, the discussion of the court sustains the view

that the foregoing exposition of the statute is correct. After referring to the foregoing provisions of the Code, Judge Holt said:

"There is no opposing of a decree to a decree. The relief sought does not annul or modify a judgment. It has been satisfied. The borrower sues to recover from the lender that which he had no right to exact, and which was paid without any consideration. The right to recover it does not accrue until the payment. There is no modification or change of the former judgment; but a new and distinct cause of action arises in favor of the borrower, and against the lender, upon the payment of the usury. The law then raises a promise, by implication, of repayment. A cause of action, by virtue of the statute, arises eo instanti in the borrower's favor."

The case of *Bank v. Coke* (Ky. App.; May 19, 1898), reported in 45 S. W. 867, furnishes no support to the contention of defendant's counsel on the issue as to whether or not the matter pleaded in the answer constitutes a defense to plaintiff's action on the judgment. In that case the creditors of Coke had recovered judgment against him, and had enforced the same against property mortgaged by Coke to secure the payment of said debts, and the mortgaged premises were sold to satisfy said judgment against Coke. Thereupon the creditors of Coke, as his equitable assignees, instituted suit against the creditors to recover back usurious interest alleged to have been paid by Coke to the creditors anterior to the judgment in the foreclosure suit. It was simply held in that case that the right to recover usury embraced in a judgment satisfied by sale of the land does not accrue until the sale is confirmed, and therefore the statute of limitations runs only from that time; and, further, that payments made by the borrower as usury will, at his election, be applied, first, upon the legal interest then due, and then upon the principal; so that, if he so elects, no usury can be regarded as having been paid until the satisfaction of the principal and legal interest. It is observable in this, as in other cases cited by counsel for defendant, that resort conformably to the statute was had to an independent action against the judgment creditor to recover back usury paid after the enforcement of the judgment against the debtor. The case is no authority for the proposition that, in an ancillary proceeding to enforce a judgment once recovered, the defendant can be admitted to make the defense therein respecting usury which he might have made to the original action.

The right to thus get back of the judgment to recover usurious interest, being in derogation of the common law, dependent alone upon an enabling statute, must be strictly construed, and the remedy furnished by the statute cannot be broadened by the application of any equitable principle. As already shown, equity does not recognize usury in a contract as a ground of relief against a judgment. So, when the enabling statute provides a remedy and prescribes a method of exercising it, it is conclusive of every other mode of procedure. As the statute, as construed by the court of appeals of Kentucky, authorizes the defendant in the original action to plead, by way of set-off or counterclaim, the amount of usury paid, upon the maxim, "*Expressio unius exclusio alterius*," it precludes the idea of the right to interpose such plea at any other time or under any other conditions. After the judgment, the Code inhibits any modification

of it, "except for a defense which arises or is discovered after the rendition of the judgment; and such judgment does not prevent recovery of any claim which was not, though it might have been, used as a defense by way of set-off or counterclaim in the original action." The term "recovery," as thus employed, both from the context and its ordinary legal acceptation, implies an affirmative action, by which a party, by formal judgment in his favor, obtains redress from something "which has been taken or withheld from him." It is never employed to indicate a matter of defense.

To the suggestion of counsel that a suit against the plaintiff in the judgment to recover back usurious interest would be unavailing because of the insolvency of the bank and the nonliability of the trustee under the assignment, or, if a recovery could avail, what is the use of going through the formality of paying a sum on the judgment which the defendant could immediately recover back? there are two sufficient answers: In the first place, it is an appeal to the chancery side of the court, to prevent an unconscionable advantage, which in this jurisdiction can never be interposed as a defense to a law action. *Bennett v. Butterworth*, 11 How. 669; *Buller v. Sidell*, 43 Fed. 116; *Montejo v. Owen*, 14 Blatchf. 324, Fed. Cas. No. 9,722. And, second, the defendant's right to relief is given by special statute, contrary to common right; and when he saw fit to let the day of grace pass, when the statute empowered him to plead the payment in defense, he is without other recourse than that furnished by the statute, which is an action to recover back the usury paid. Without an enabling statute, he cannot claim it as a set-off to an action on the judgment when sued in this jurisdiction, as the right of set-off pertains to the remedy, and consequently is governed by the law of the forum. 2 Am. & Eng. Enc. Law, 238; *Savery v. Savery*, 8 Iowa, 217; *Ruggles v. Keeler*, 3 Johns. 263; *Roach v. Privett*, 90 Ala. 391, 7 South. 808; *Bank v. Trimble*, 6 B. Mon. 599; *Davis v. Morton*, 5 Bush, 160.

In view of the conclusion reached on the right to plead such matter in defense to the action on the judgment, it is hardly necessary to discuss the question of limitation raised by plaintiff's counsel. Apparently, the answer is double and contradictory. It first alleges that the principal debtor had paid usurious interest on the note to said bank, which, on information, is averred to be in excess of \$9,000, which, taken in connection with what precedes, is to be understood as payments made prior to 1891. Then, in the concluding part of the paragraph, it is alleged that this usurious interest is included in said judgment. If the usurious interest is included in the judgment, as no cause of action would accrue to recover the same back until payment of the judgment, the statute of limitation, according to the ruling of the Kentucky court of appeals, would not begin to run until from the date of such payment. If it is the meaning of the pleader that payments of usurious interest prior to the rendition of the judgment are to be regarded as so much payment on account of the principal and lawful interest, then, according to the ruling in *Ellis v. Brannin's Ex'rs*, *supra*, where usurious interest had been paid more than one year before the institution of suit to reclaim it, and

there remained a balance due and paid within the year sufficient to cover the usurious interest previously paid, such balance so paid, or so much as will equal the previous payment of usury, might be recovered, and such a claim would not be barred by the statute. But as this would be a defense of payment, it should have been made to the original action, as a plea of payment is bad after judgment. *Greenabaum v. Elliott*, 60 Mo. 25-29. But, according to the Kentucky statute, if the defense of payment was not made timely, the defendant may, nevertheless, institute suit to recover back the amount of usurious interest paid. When such suit should be brought, the defendant therein could interpose the plea of the statute of limitations.

It is not deemed essential to pass upon the question raised in argument by counsel for plaintiff as to whether, under the Kentucky statute entitling the borrower to recover back the amount of usury paid by him, the remedy could be invoked by the surety, further than to say that no recovery could be had by such surety until after he had paid off the judgment which contained usurious interest. It may be conceded that it would have been a matter of defense, which the surety could have availed himself of in the original action, to have set off the amount of usury paid in diminution of the amount of the judgment against them.

It results that the motion to strike out the paragraph of the answer in question is sustained.

LOWENSTEIN v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court, W. D. Missouri, W. D. June 13, 1898.)

No. 2,223.

1. ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—INVOLUNTARY ASPHYXIA-TION.

A clause declaring that the insurance does not cover injuries or death "resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not exempt the insurer from liability for death caused by involuntary and unconscious inhalation of illuminating gas, accidentally taken while asleep.

2. SAME.

The word "inhaled," as used in the above provision of the policy, means a voluntary and intelligent act by the insured, and not an involuntary and unconscious inhalation.

3. SAME.

The words "or otherwise," as used in the above provision, do not qualify the act of inhaling, but are used in connection with the preceding word, "accidentally," and mean an injury of a kindred character.

4. SAME.

Policies of insurance are to be liberally construed, and the conditions therein are to be construed strictly against those for whose benefit they are reserved. And any doubt or ambiguity as to the meaning of any clause in a policy should be resolved in favor of the insured, and against the insurer.

5. SAME.

An insurance company, continuing to issue, without change, policies containing clauses which have been construed unfavorably to its contention

by the highest court of the state in which the company is incorporated, may well be considered as issuing them with that construction placed upon them.

I. J. Ringolsky, for plaintiff.

Warner, Dean, Gibson & McLeod and D'Laguer Berier, for defendant.

PHILIPS, District Judge. This is an action brought to recover on an accident policy issued by the defendant, a New York corporation, to Emanuel Lowenstein, payable to his wife, the plaintiff, in case of death. On a trial to a jury, the jury have found that the assured died from asphyxiation caused by the involuntary and unconscious inhalation of illuminating gas, accidentally taken, in his bedroom, in the city of New York, while the assured was asleep. The defendant has filed a motion in arrest of judgment, which raises the question whether or not the defendant is exempt from liability for such accident by reason of the following provision of the policy: "This insurance does not cover injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." The court of appeals of New York, from which state this defendant received its charter, in *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. 347, held that a provision in an accident insurance policy that the insurance should not extend to a death caused by the taking of poison or inhaling of gas did not apply to the instance of an involuntary and unconscious inhalation. This conclusion is reasoned out by consideration of the whole context, indicating that the term "inhaling," as employed in the policy, could only be understood to mean "a voluntary and intelligent act by the insured, and not an involuntary and unconscious act." The court further said:

"Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment,—in which, *ex vi termini*, would be included the dentist's work,—or to a suicidal purpose. To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but, whatever the motive of the insured, his acts preceded either fact. * * * If the exception is to cover all cases where death is caused by the presence of gas, there would be no reason for using the word 'inhaled.'"

This decision was made in 1889.

This question, in its practical effect, came before Judge Blodgett, in the United States circuit court for the Northern district of Illinois, in 1891 (*Richardson v. Insurance Co.*, 46 Fed. 843), in which the ruling of *Paul v. Insurance Co.*, *supra*, was disapproved; the court adhering to the literal significance of the word "inhale," as implying only the physical act of drawing or breathing into the lungs, which would occur whether the person was conscious or unconscious of the operation. This conclusion the court sought to fortify by the suggestion that the clause in question was doubtless adopted by the insurance company because of the practical difficulty, in most cases of death resulting from the inhalation of gas, to determine whether the death was occasioned by suicidal intent,

or whether it occurred accidentally. To the suggestion respecting the purpose of the insurance company, consideration will herein-after be given.

The case of *Early v. Insurance Co. (Mich.)* 71 N. W. 500, cited by defendant's counsel, is hardly germane to the question under consideration. The policy exempted the insurance company from liability for injuries or death "by poison." Death ensued from the insured taking, by mistake, aqua ammonia, a poisonous drug. The court held that the expression "death by poison" covered an accidental death caused by poison, under whatever circumstances or conditions taken, and in that respect is differentiated from the New York cases, which contained the words "by the taking of poison." And the court calls attention to the language of the court in the Paul Case, that:

"If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says it meant by the present phrase, and there could have been no room for doubt or mistake."

So it was properly held by the Michigan court that "death by poison" included any and every manner of poison, whether intentionally or unintentionally, consciously or unconsciously, taken.

Again this question came before the court of appeals of New York in *Bacon v. Accident Ass'n*, 123 N. Y. 304, 25 N. E. 399, in which the ruling in the Paul Case was reaffirmed; the court observing:

"Upon the question decided, the case is conclusive, and we have no disposition to alter our views as expressed therein."

The supreme court of Illinois passed upon a kindred question in *Insurance Co. v. Dunlap*, 160 Ill. 642, 43 N. E. 765, in which the court held that drinking carbolic acid by mistake for peppermint was not within a clause of an accident insurance exempting the company from liability for death from taking poison, as such words mean—

"The voluntary, intentional taking of poison, and do not include cases of accidental poison by mistake, but do include injuries or death from voluntarily taking poison without any suicidal intent."

The court referred to and approved the ruling of the New York court in the Paul Case.

The question came before the supreme court of Pennsylvania in *Pickett v. Insurance Co.*, 144 Pa. St. 79, 22 Atl. 871, on a policy which exempted the company from liability for death resulting from the inhalation of gas. The insured descended into a well to make repairs on a pump, and died from asphyxia caused by poisonous gas at the bottom of the well. The court held that the inhalation of gas contemplated a voluntary, intelligent act, and not an involuntary and unconscious act; approving the ruling in the Paul Case.

The accident insurance companies were dissatisfied with the ruling in the Paul Case, and as late as March, 1896, the question was resubmitted to the New York court of appeals in *Menneiley v.*

Assurance Corp. 148 N. Y. 596, 43 N. E. 54. The ruling in the Paul Case was reaffirmed, with additional reasons in reply to the criticisms of counsel. Inter alia, the court said:

"The provision in the policy clearly implies voluntary action on the part of the insured or some other person. The insured must take or inhale, or another must administer. The manifest purpose of the provision is to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally, taken or inhaled, or something has been voluntarily administered which was injurious or destructive of life. We think that the particular accidents intended to be excepted by that provision are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial, or at least harmless. This is made more apparent by that portion of the provision which relates to something 'administered,' as it cannot be reasonably construed as referring to a thing involuntarily and unconsciously administered. Indeed, it is quite difficult to understand how a thing could be involuntarily and unconsciously administered. Coupled together as these provisions are, the same rule of construction must be applied to that portion which relates to something accidentally inhaled as is applied to the portion which relates to a substance accidentally taken or accidentally administered. All the cases thus provided for plainly involve voluntary and conscious action on the part of the insured or some other person. The leading and controlling idea in this provision is the performance of a voluntary act which accidentally causes the death or injury of the insured. That a proper construction of the policy requires us to hold that it applies only to cases where something has been voluntarily and intentionally, although mistakenly, taken, there can, we think, be but little doubt. * * * The argument that the provision as to inhaling gas has been given the same effect as is now given to the other and more general one, and that such could not have been their purpose, has little force. The inhaling of gas having been specially provided for when taken for surgical and like purposes, it is only when it is inhaled for some other purpose, or under other circumstances, that the general provision applies. The special provision is applicable when gas is inhaled for surgical and like purposes. The general provision applies when it is inhaled for other purposes."

At the May term, 1896, of the supreme court of Illinois, this question was taken to that court by this defendant, the Fidelity & Casualty Company of New York, in the Waterman Case, 161 Ill. 632, 44 N. E. 283, under a policy containing the same provisions, in the same language, as the one under consideration; and the supreme court reaffirmed the ruling in *Insurance Co. v. Dunlap*, *Bacon v. Accident Ass'n*, *Pickett v. Insurance Co.*, and the New York cases, *supra*. There, as in the case at bar, counsel for the insurance company placed much stress upon the word "otherwise," employed in the provision that "this insurance does not cover injuries resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled." It was there contended that these words included every possible way by which gas could be taken into the human system so as to cause death. The court said:

"Read in the light of the decisions, the words now in question do not mean otherwise than if they explicitly read, 'poison or anything accidentally or otherwise, consciously and by an act of volition, drawn into the system by inspiration.'"

I may add that the addition of the words "or otherwise" cannot by any technical or natural construction qualify the act of inhal-

ing. "Or otherwise,' in law, when used as a general phrase following an enumeration of particulars, is commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the clause before mentioned." Cent. Law Dict. It is to be read in connection with the preceding word, "accidental," and means an injury of a kindred character, and would cover an intentional taking as well as an accidental taking. The court of appeals of Kentucky has recently followed the Paul Case, in *Omberg v. Association*, 40 S. W. 209.

It is to be conceded to the learned counsel for defendant that, looking alone to the etymology of the word "inhale," and to its ordinary, dictionary definition, it means to draw in, as air into the lungs, and to inspire, as to inhale air,—a process of life that goes on whether sleeping or waking; and in such sense it may be said that a person, when sleeping, breathes the air without any volition or intelligent action. But, as was said by Welsford:

"Etymology has been so unsuccessful in establishing clear and definite principles, or so unfortunate in their application, that many persons regard it as bearing the same relation to grammar as astrology does to astronomy, alchemy to chemistry, or perpetual motion to mechanics."

As applied to the practical business affairs of life, these primary meanings of words do not always afford safe rules of interpretation and application. This is especially so in the construction of restrictive provisions in insurance contracts, placed there by the insurer. The courts read them in connection with all the other provisions of the policy, in *pari materia*, and give them a construction in harmony with other kindred terms, so as to afford the largest measure of protection, according to the understanding of the terms employed, to the assured. And this leads to the consideration of the history of the controversy over the meaning of like provisions in insurance contracts, and the conduct of this defendant in continuing the employment of this phraseology in its policy, as affecting the conclusion which I have reached. In the Paul Case the court used this significant language:

"If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says it meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and, as in all contracts, conditions are to be construed strictly against those for whose benefit they are reserved. It is an accepted canon of interpretation that, if there is any uncertainty as to whether given words were used in an enlarged or restricted sense, the construction should be adopted which is the most beneficial to the covenantee."

As very pertinently observed by the supreme court of Illinois in *Casualty Co. v. Waterman*, 161 Ill. 636, 44 N. E. 284:

"Appellant is a New York corporation, and made and dated its contract in the city of New York; and this was done several years after the decision in the Paul Case by the court of last resort in that state. It must be presumed that it was then fully advised of that decision, and knew when it entered into the contract now in suit what its liabilities were, and the agreement that it made."

Notwithstanding the decisive reiteration by the court of appeals of New York of its construction of the term "inhaling," made as late as March, 1896, and notwithstanding the ruling of the supreme court of Illinois against this company in the Waterman Case, it has continued to issue its policies, and made the renewal in the case at bar, according to the verdict of the jury, as late as January, 1897, with the same provisions, in the same words as theretofore employed by it. Under such circumstances, any taker of its policy would have been justified in taking it with the understanding that this New York corporation was issuing its policy with the construction placed upon it by the highest court of the state granting its charter. If it was the purpose of the company as suggested by its counsel in argument at the bar, in inserting the word "otherwise," to avoid the effect of the ruling in the Paul Case, it is a sufficient answer to say that the court in that case suggested to the company the apt and direct words which would accomplish that end, whereas, if it employed the words "or otherwise" for such purpose, it was a concealed purpose, not apparent to the ordinary mind, and not at all calculated to carry to the insured, like Lowenstein, even a suggestion that it was intended to say by the policy that the company would not answer for liability resulting from inhaling gas, or other poisonous substances, whether taken voluntarily and consciously, or involuntarily and unconsciously. In *Manufacturing Co. v. Jones*, 14 C. C. A. 30, 66 Fed. 124, a rule was advanced not inapplicable to this case. The company there had for years been sending its agents throughout the country, making contracts with farmers for the erection of butter and cheese factories. These contracts were drawn in such form as to make it debatable whether or not the subscribers to them became jointly and severally liable for the whole contract price of the factory, or to the extent only of the sum set opposite their names in the form of subscribers to stock. Some courts decided that such subscribers became individually liable for the whole contract price, while other courts decided that they became liable only for the sum set opposite their names as stockholders. Finally one of these cases reached the court of appeals, in the case just cited, and the court used this language:

"These conflicting decisions were presumably well known to the plaintiff company, but were unknown to the defendants. Under these circumstances, it was the duty of the plaintiff to alter the form of its contract then in use so as to avoid the question whether it imposed a joint or a several liability, which had theretofore given rise to the conflicting decisions. Not having done so, the plaintiff cannot complain if the courts adopt the construction of the contract which is most favorable to the defendants."

The language of Judge Taft in *Indemnity Co. v. Dorgan*, 7 C. C. A. 592, 58 Fed. 956, may be aptly applied as a conclusion to this discussion:

"It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all the language used to limit the liability of the company strictly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as nearly as possible the scope of the insurance. It

is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured, and against the insurer."

It is in this view of the relation sustained by this company to the state of New York, to which it owes its corporate life, that I feel constrained to overrule the motion in arrest of judgment.

UNITED STATES v. RILEY (three cases).

(District Court, S. D. New York. February 5, 1898.)

CUSTOMS DUTIES—SUMMONS FOR FORFEITURE—NONINDORSEMENT—GENERAL APPEARANCE—LACHES—WAIVER.

A summons for the "forfeiture" of the value of importations not indorsed with a reference to the statute, may be set aside; but not after a general appearance with knowledge of the nature of the action, and after several years' delay and the expiration by limitation of the government's time to bring a new action.

These were actions brought by the United States against William H. Riley to enforce a forfeiture of the value of various alleged fraudulent importations of merchandise at the port of New York, and motions were made to set aside the summons in each case.

Wallace MacFarlane, U. S. Atty., and James R. Ely, Asst. U. S. Atty.

Kellogg, Rose & Smith, for defendant.

BROWN, District Judge. A motion has been made in defendant's behalf in each of the above three causes to set aside the service of the summons, on the ground that the copy of the summons served upon the defendant, had no indorsement upon it indicating the statute or section upon which the claim for forfeiture was based, as required by sections 1897, 1962 and 1963 of the New York Code of Civil Procedure. The summonses without any complaint were personally served upon the defendant on January 5, February 7 and April 5, 1894, respectively. These summonses did not state the nature of the cause of action, but required the defendant to answer the complaint within 20 days, with a notice that in case of failure to answer or appear, judgment would be taken by default for the relief demanded in the complaint. Attached to the copy summons in action No. 2 was a notice that upon default judgment would be taken for 19 different sums specified with interest on said items from various specified dates in January, February, March, June and July, 1891, amounting in the aggregate to \$24,995.55, besides interest. On the copy summons served in action No. 3 a notice was indorsed that upon default judgment would be taken for the sum of \$48,515.63 with interest. On the copy summons served in action No. 4 was a similar notice that upon default judgment would be taken for the sum of \$8,122.42 with interest.

In each of these cases the defendant within 20 days after the service of the summons, put in a general appearance by his attorneys who served written notice thereof with a demand of a copy of the complaint in the usual course in accordance with the state practice. The plaintiff's attorneys thereafter obtained from time to time extensions

of time within which to serve a copy of the complaint in each of the actions, so that no copy of the complaint was served in either of them until November 23, 1897, and shortly thereafter, and before any other proceedings, notice of these motions on the defendant's behalf was duly served.

The complaints show that the actions are based upon various alleged fraudulent importations and entries of merchandise by the defendant at this port, at various dates in 1891, with intent to defraud the United States, and that the value of such importations became thereby forfeited to the United States under the ninth section of the act of congress of June 10, 1890. Judgment is accordingly demanded against the defendant for "the sum of said values so forfeited with interest," etc.

In the case of *Brown v. Pond*, 5 Fed. 31, it was held by Judge Choate in a carefully considered opinion, that in civil actions brought for the enforcement of penalties and forfeitures, the provisions of the New York Code of Civil Procedure as respects the indorsement required on the copy of the summons served, were obligatory; and in that case the action being for penalties under the copyright laws and no such indorsement having been made upon the copy served, a motion to set aside the service of the summons was granted, the appearance by the defendant having been with a reservation of the "right to set aside the summons for any irregularity or for any proper cause." The cases there cited show that in the New York state courts it has long been held that the service of the summons in such cases without the required indorsement, gives the government no jurisdiction over the defendant; and that the defendant in such cases is not obliged to appear, and cannot be held in default; and that after motion duly made to set aside such a service, if the motion be denied and the defendant plead over, and judgment is entered against him, the judgment will be reversed. The decision in *Brown v. Pond* was followed in the subsequent case of *U. S. v. Rose*, 14 Fed. 681. For the government it is contended, that the present actions, being not purely for a penalty, but being in part remedial and for the indemnity of the government for losses sustained by it (*Stockwell v. U. S.*, 13 Wall. 531; *U. S. v. Claffin*, 97 U. S. 546; *U. S. v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244) the provisions of the New York Code are not applicable.

I cannot sustain this contention. Though the object of the statute forfeiting the value of merchandise is no doubt partly remedial and for the indemnity of the government, it is also largely penal. The partial purpose of indemnity does not change the essential nature or character of the action. In the case of *Schreiber v. Sharpless*, 17 Fed. 589, and *Id.*, 110 U. S. 76, 3 Sup. Ct. 423, it was held that in a *qui tam* action for the recovery of penalties forfeited by the defendant for copying and printing the plaintiff's copyrighted photograph, the cause of action was abated by the defendant's death, although only one-half the recovery in such actions would go to the United States and the other one-half to the informer, and would often inure as indemnity to the person whose copyright was infringed. In the case of *U. S. v. De Goer*, 38 Fed. 80, which was an action of the same character as the present, for the forfeiture of value upon an alleged fraudulent

importation, it was held that such actions are mainly penal and abate with the defendant's death. It is not necessary, however, to dwell on such considerations, inasmuch as the statute itself on which these actions are based, declares a "forfeiture" of the value of the goods; the plaintiff alleges in the complaint a "forfeiture" under the statute, and seeks a recovery as upon a forfeiture, and not otherwise. But section 1962 of the New York Code of Civil Procedure expressly provides for actions where "real or personal property has been forfeited," and section 1964 expressly makes applicable to such actions the provisions of the preceding section 1897, above referred to, requiring an indorsement to be made upon the copy of the summons served to the effect above stated.

A further question arises, however, upon the general appearance put in by the defendant without qualification or reservation, after the service of the summons. In the case of *Bissell v. Railroad Co.*, 67 Barb. 385, it was held that after a general appearance, a judgment entered by default would not be opened or set aside for irregularity when more than a year had elapsed after the entry of judgment before the notice of motion was given, even though the summons had been previously set aside upon appeal from the special term to the general term, the court holding that the general appearance gave to the court jurisdiction of the action and of the defendant under the provisions of the New York Code of Civil Procedure, without the service of any summons; and that the effect of the previous general-term order setting aside the summons, was merely to strip the record of the summons, leaving the general appearance to stand; and this decision was subsequently affirmed at the general term. 67 Barb. 393, note. The appearance in that case was the usual notice of general appearance and a demand for a copy of the complaint, served three days after the service of the summons. The only other case that I have found in which the summons has been set aside after an unqualified general appearance, is the case of *Lassen v. Aronson* (Super. N. Y.) 21 N. Y. Supp. 452, where after service of the complaint the defendant's attorney moved for leave to withdraw his notice of appearance, and to set aside the service of the summons for the want of the requisite indorsement, and the motion was granted.

In both of the above cases, it may be fairly assumed from the nature of the actions, that the defendant at the time of putting in the general appearance had no information of the nature of the suit, and the motions were made promptly. The plaintiffs, by the granting of the motion, suffered no loss or prejudice to their rights of action. In such cases, where defendants have had no information of the nature of the action, and it is thus manifest that there could not have been any intentional waiver of the legal defects in the process, it may be just to allow the general appearance to be withdrawn, as inadvertently given.

In the case of *Brown v. Pond*, supra, Judge Choate, remarking upon the question of waiver, says:

"The defect being the want of one of the requisites for acquiring jurisdiction over the person, and not over the subject-matter, the defect may of course

be waived by the defendant, and is waived by his general appearance without taking the objection, after being informed of the nature of the suit; so that, at least from the time of such voluntary appearance, the court will be deemed to have jurisdiction, and the action to be duly commenced. An appearance, however, for the purpose of insisting on the want of proper process, or an appearance followed by the taking of the objection, when he is informed of the nature of the suit, will not be a waiver of the defect."

In the case of *Delisser v. Railroad Co.* (in the superior court) 20 Civ. Proc. R. 312, 14 N. Y. Supp. 382, Sedgwick, C. J., considered that a motion to set aside the service of the summons before the complaint was served was premature, the averments of the complaint itself being the only proper legal grounds upon which the motion should be based as showing conclusively the nature and object of the action. In that case, however, the appearance was qualified, and for the sole purpose only of moving to set aside the service of the summons. What was said had no reference to the import and effect to be given to an unconditional appearance, or whether such an appearance should be deemed a waiver of objections to the summons. From the observations of Judge Choate above quoted, the natural inference as to the nature of the information to be deemed sufficient to make a general appearance a waiver, is, that any actual and undoubted information as to the nature of the action is sufficient, and not alone the information derived from the complaint itself when served.

In the present cases all the circumstances disclosed by the affidavit submitted for the government on this motion, show that the defendant and his attorneys must have had sufficient and undoubted information that all these actions were brought for forfeitures of value. The importations, as above stated, were in 1891. The defendant on the 29th of October, 1893, was arrested on criminal proceedings for the same matters that are embraced in these three suits and in suit No. 1 which preceded these. The defendant was duly advised and informed of the criminal proceedings and was represented in them by his attorneys in these suits. On the 3d day of November, 1893, a summons was served on this defendant of the same character as in these suits and with a similar notice, in action No. 1. - The same attorneys served a general notice of appearance for the defendant in that suit, and a copy of the complaint in action No. 1 was served upon them on the 11th day of December, 1893. From this complaint, which was for a forfeiture of the value of a part of the importations embraced in the criminal proceedings, both the defendant and his attorneys had full notice of the precise nature of the claim and the grounds of it. The complaints in the present actions Nos. 2, 3 and 4 are precisely similar and differ only as to the date of the importations and amounts; but as appears by the affidavit, these were all set forth in the pending criminal proceedings above referred to. The indorsements upon the summonses in actions Nos. 2, 3 and 4, and the notices contained therein, giving the precise amounts claimed, were means of identification in connection with the criminal proceedings of such a character that I cannot conceive that the defendant and his attorneys should not have understood beyond question that the four civil suits were all for the

recovery of forfeitures of value upon the importations specified in the criminal proceedings. The complaint and hearings in the criminal proceedings and the conferences with the United States attorney referred to, must have disclosed this fact fully. The general appearance put in in actions Nos. 2, 3 and 4 were served respectively from six weeks to upwards of four months after the complaint in action No. 1 had been served and a full understanding of all the actions must have been had. The service of a general appearance under such circumstances must be regarded as a waiver of any objection to the want of indorsement upon the summons. The required indorsement could not in fact have given to the defendant or his attorneys any information which they did not already practically possess. Through the extraordinary delay and the extensions of time given for the service of the complaints, if the summonses and notices of appearance were now set aside, the government's right of action would be barred by the statute of limitations. This of itself would not be a sufficient reason for denying to the defendant any substantial right; but it is not credible that any such extensions for nearly three years would have been granted or such delays incurred, if the nature of the actions had not been fully understood. If that was understood, as I can have no doubt it was, when the general appearances were served, such appearances were a waiver of the defects. A motion to set aside the service after appearance, or for leave to withdraw a notice of appearance, ought to be made with reasonable promptness after information received; and if not so made, such motions should be denied. And where a long time has elapsed since the general appearance was served and the statute of limitations has become a bar to any new action, leave should not be given to withdraw such an appearance, nor the summons be set aside, except upon clear proof that the defendant was really and in good faith ignorant of the nature of the action, or had wholly misconceived it. This cannot be the fact here, and the motions must, therefore, be denied.

LEVER BROS., Limited, v. PASFIELD.

(Circuit Court, E. D. New York. July 8, 1898.)

1. TRADE-MARK—WORDS SUBJECT TO APPROPRIATION.

"Sunlight" is a good trade-mark for a soap, and is infringed by the use of the name "American Sunlight."

2. SAME—EVIDENCE OF INFRINGEMENT.

Proof of a single sale, though made to complainant's detective, may, in connection with other proofs, be sufficient to justify an injunction.

This was a suit in equity by Lever Bros., Limited, against George R. Pasfield, for alleged infringement of the trade-mark "Sunlight," used in connection with a soap. Final hearing on pleadings and proofs.

Rowland Cox, for complainant.
Louis B. Adams, for defendant.

LACOMBE, Circuit Judge. Whether the English predecessors of complainant, or the Milwaukee firm, were the first to use the word "Sunlight" in connection with soap, is immaterial, since complainant is the owner of all the rights of both concerns in that particular use of the name. It is undoubtedly a good trade-mark, and the use of the name "American Sunlight" in connection with soap is plainly an infringement. Indeed, the only point which is urged with any force by defendant's counsel is the fact that only one actual sale is shown, and that to an emissary of the complainant, who persuaded defendant to put up and sell the goods, and bill them under the infringing designation. It is not the law, however, that relief in equity will be denied when the only actual sale proven is one to complainant's detective. It may be, as suggested in *Byam v. Bullard*, 1 Curt. 100, Fed. Cas. No. 2,262, that such a sale is not per se an infringement; but as pointed out in *De Florez v. Reynolds*, 14 Blatchf. 505, Fed. Cas. No. 3,742, it may, in connection with other proof, be persuasive evidence of other sales, and convincing proof of an intention to sell whenever the opportunity of doing so without detection is presented. The testimony of the defendant himself, especially in regard to the letter produced by complainant; his careful qualification of his answers with the phrase, "I do not remember;" the circumstances attending the sale, and his own admissions as to what he said and did; his careful preservation of the infringing labels and die,—satisfy me that, unless restrained by injunction, he will continue to sell his soap under the infringing trade-mark whenever what he may think a safe chance to do so presents itself. Against this threatened injury complainant should be protected by an injunction, but there is not proof sufficient to warrant a decree for an accounting.

CAMP v. BRANHAM et al.

(Circuit Court, N. D. Ohio, W. D. June 8, 1898.)

No. 1,305.

1. PATENTS—INVENTION—APPARATUS FOR LAYING UNDERGROUND CONDUITS.

The production of a mandrel having at one end a handle for pushing it back and forth, and at the other a rubber rim which serves to break off and push or sweep ahead of it all the particles of cement that stick to the interior of a hollow tiling conduit for electric wires, *held* to involve patentable invention.

2. SAME.

The Camp patent, No. 467,650, for an apparatus for laying underground conduits for electric wires, *held* valid and infringed.

This was a suit in equity by H. B. Camp against Branham & Gest for alleged infringement of a patent.

Albert M. Austin, for complainant.

E. C. Reemelin, for defendants.

RICKS, District Judge. This is a bill depending on the validity of letters patent No. 467,650, dated January 26, 1892; being an apparatus for laying underground conduits for electric wires. The

demand for this patent was created by the extensive use of hollow tiling having one or more longitudinal openings laid in lengthwise parallel courses, with the end of the sections of each course arranged to register. The great demand for such a conduit induced the complainant to give his attention to some instrument which would remove from the inside of these hollow tile conduits the cement with which the end of each section was bound together, so as to make a continuous conduit, without obstructions in the interior to impede the laying of wire therein. The mandrel which the complainant made for that purpose is a very simple device. It has a rubber rim about one end of it, which serves to break off and push or sweep ahead of it all the particles of cement that stick to the interior of the conduit in laying it. The other end of the mandrel had a handle by which it could be moved backward and forward. With this simple device, the tile was laid lengthwise, and joints fitted, and the interior made smooth and passable; and the problem of an easy use of the interior of such hollow tiling was solved. Now, while it is true that there was no great invention developed in this simple device, it is just one of these happy successes which occasionally reward the inventor in his diligent search for something new and useful, and acceptable to the public. The fact that the use of this mandrel has so rapidly increased the sale of tiling is a significant fact, and tends to support the claim of invention. In all the large cities it was a problem of great importance how to put underground all the wires used for the many purposes for which electricity is now employed. But a mere multiplication of words would not make more plain what must seem a fair conclusion to every impartial mind,—that the patentee in this case did invent something new, and that his patent must be declared valid. The patent office allowed it without any hesitation, as the file wrapper and contents show.

The defendants concede that, if the patent is new, they infringe. They claim that the use of the mandrel accompanied the purchase of the tile. If they can show any such contract as this, it will have a material effect upon the amount of damages to be awarded, but does not go to the complainant's right to have the patent sustained. A decree may be prepared, referring the case to Mr. Belford, as master, to ascertain and report the damages to which the complainant is entitled.

HAGGENMACHER v. NELSON et al.

(Circuit Court, E. D. Pennsylvania. June 22, 1896.)

No. 6.

1. PATENTS—VALIDITY OF REISSUE.

A reissue in which all the claims of the original are literally reproduced, excepting one, which is predicated on the same invention as the original, but which expresses more clearly what would, under the ordinary doctrine of equivalents, be the legal effect of the original, is valid.

2. SAME—FLOUR-SIFTING APPARATUS.

The Haggenmacher patents, reissue No. 11,252 (original No. 428,907) and No. 428,908, for "apparatus for sifting and sorting flour," construed, and

held valid and infringed,—the former as to claims 1, 2, 4, 5, 6, and 11, and the latter as to claims 1 and 2.

This was a suit in equity by Carl Haggenmacher against William T. Nelson and J. H. Small, co-partners as the McAnulty Mill Works, and John A. McAnulty, for alleged infringement of reissue patent No. 11,252, dated June 28, 1892 (original No. 428,907, dated May 27, 1890), and also letters patent No. 428,908, both issued to complainant, Carl Haggenmacher. In the specifications of the reissue the machine is described in part as follows:

"This invention relates to machines for sifting and sorting meal and flour, and it consists in the novel construction and combination of the parts, as hereinafter fully described and claimed. In the drawings, Fig. 1 is a front view of the complete machine. Fig. 2 is a side view of the same. Fig. 3 is a longitudinal section through the frame box R, and Figs. 4 and 5 are, respectively, a cross section and a plan view of same, partly in section. Figs. 6 to 13, inclusive, are detail plans and cross sections. * * *

Fig 1

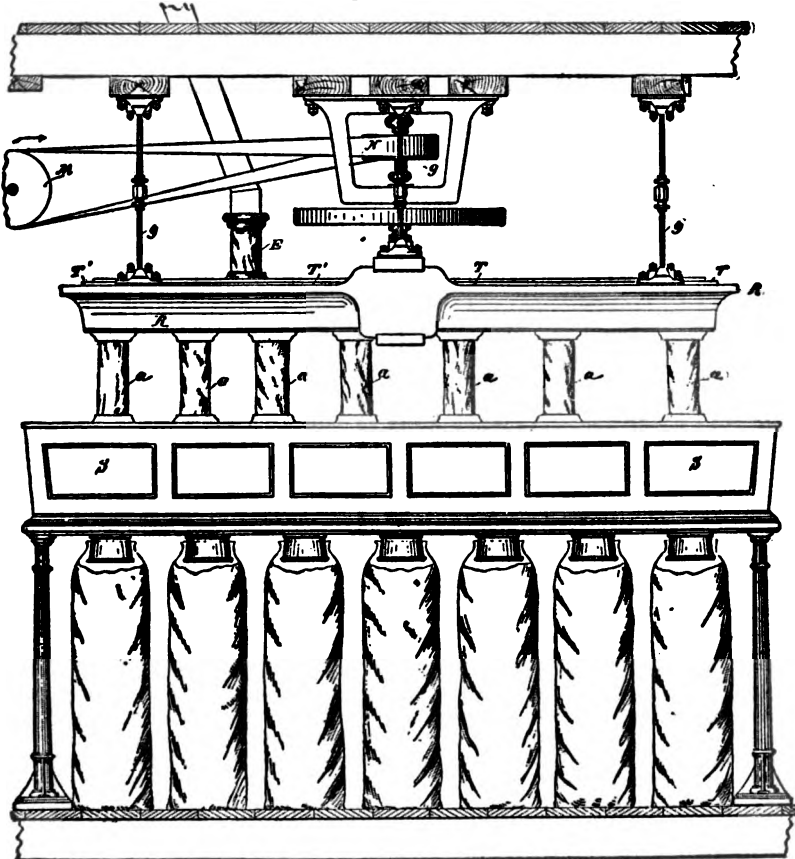
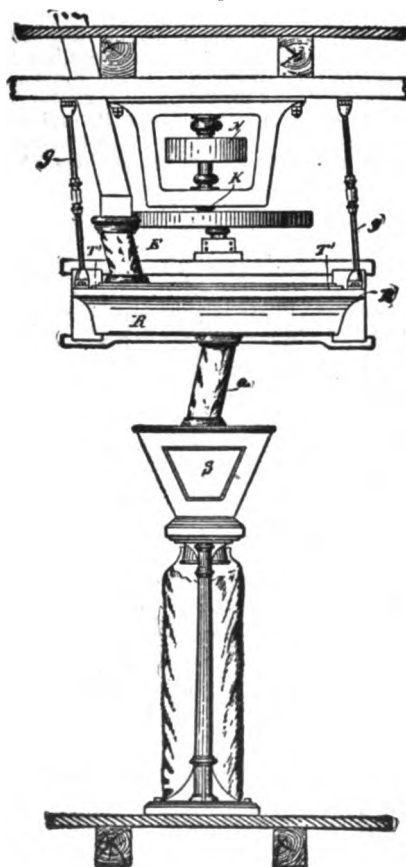


Fig. 2

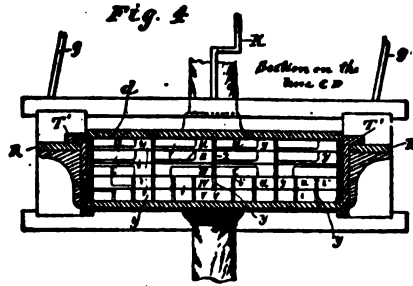
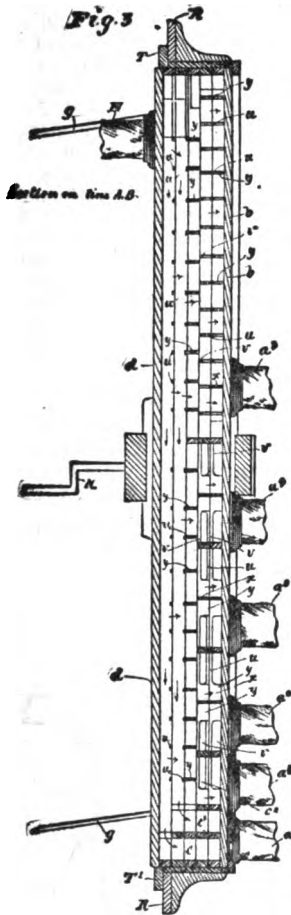
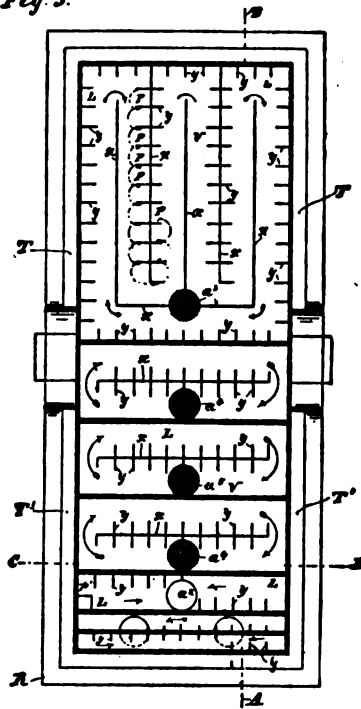


Fig. 5.



"The frames, I, II, III, IV, V, rest superposed upon the bottom, b, of the box, R, and are inclosed by the sides, T, T', and lld, d, secured together by any approved means. Each frame is provided with longitudinal guide slats, x, in line with the main direction of travel of the material, and with cross slats, y, at right angles to slats, x. For the purpose of turning over the material, every alternate slat, y, has a low ridge, u, extending from the end of it to the opposite slat, x, or to the box side. These ridges are of a height about equal to the depth of the material operated on, and are not shown in Figs. 5 to 9, to avoid confusion. Between every two ridges, u, the tops of the intervening slats, y, are extended to the opposite slat, x, or to the box side, forming bridges, v, and leaving a passage for the material under said bridges. These bridges strengthen the frames to which they are attached, and support the frames above them. The sifting surfaces, O, stretched under the frames, consist of perforated metal, or woven wire or silk fabric, while the collecting surfaces, L, consist of linen, or other similar close-woven or imperforate material. These surfaces are all fastened to the lower edges of

their respective frames. The traveling action of the slats, *y*, upon the material, is illustrated in Fig. 5. *P* are particles of material which are caused to move in the paths of the dotted semicircles by the circular oscillations of the surface on which they rest; the direction of their travel being determined by the side upon which the slats, *y*, are placed. These particles would move in circular paths; but, as soon as they have performed the first halves of their circular journeys, they meet the slats, *y*, which arrest their motion during the time they would be passing over the second halves of the circles, and only permit them to resume their journeys in the forward direction, as indicated by the arrows. By placing the slats, *y*, in appropriate positions, the particles can be caused to travel in any desired direction. The irregular shape and size of the particles, their friction against each other and against the sides and slats, and many other circumstances, all tend to modify the theoretical semicircular paths in which they should travel; but what is true of a single particle is also true with regard to the aggregate action of an immense number of particles when the surfaces over which they are caused to travel are sufficiently numerous, and the slats are arranged in a sufficiently complex manner, to meet all requirements. The ridges, *u*, turn over the material and the bridges, *v*, even it upon the surface of the sifters or collectors. Every particle is in turn brought in contact with some portion of the sifting surface, and the collecting surfaces, *L*, are for the purpose of conducting the material to certain desired parts of the remaining sifting surfaces beneath them. The longitudinal slats, *x*, keep the streams of material traveling in definite paths, and the arrangements of slats, *x* and *y*, may be varied to an almost unlimited extent to adapt the machine to different sorts of material. The sifting surfaces may also be combined with the collecting or conveying surfaces in many different ways."

The drawings in the other patent in issue (No. 428,908) are as follows:

FIG - 1 -

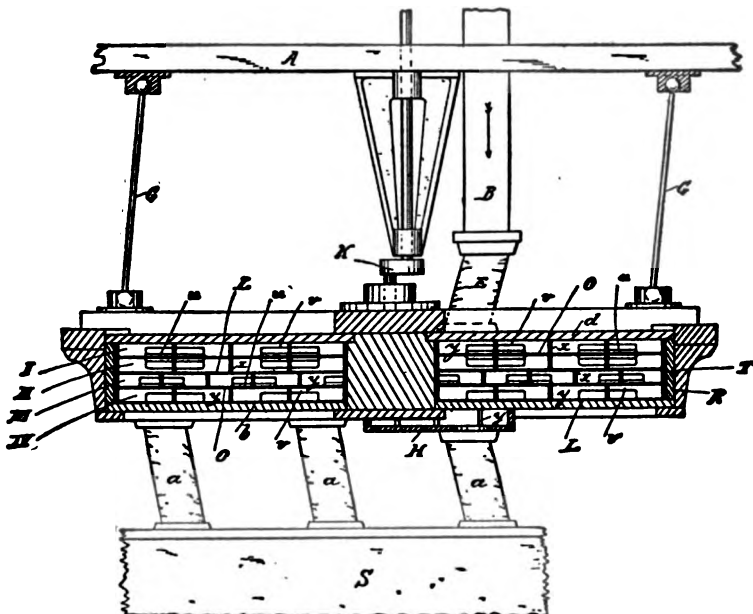


Fig. 2 -

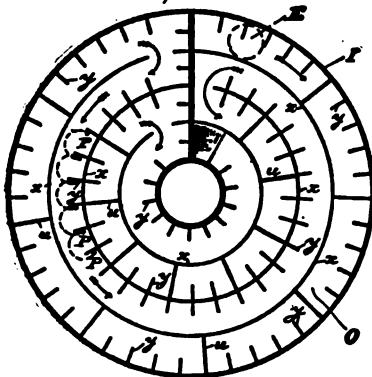


Fig. 3 -

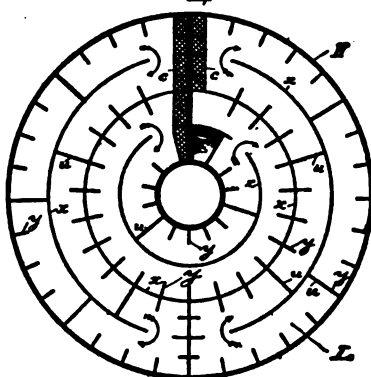


Fig. 4 -

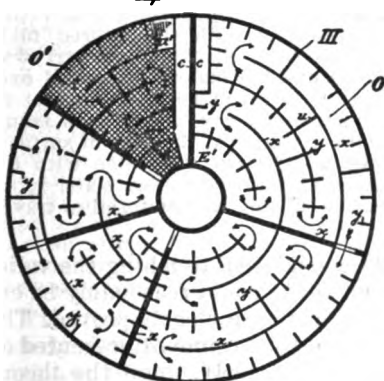
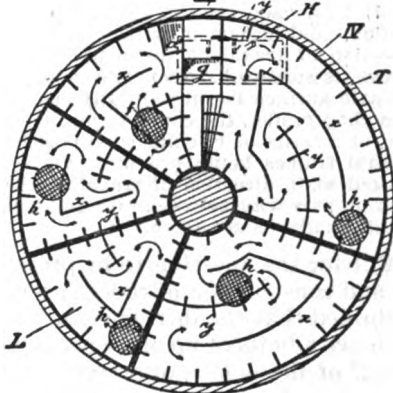


Fig. 5 -



Robert H. Parkinson, for complainant.
Homer Morris, for defendants.

DALLAS, Circuit Judge. The defendants are charged with infringement of two patents for "apparatus for sifting and sorting flour." The first of them was granted to the complainant May 27, 1890, as No. 428,907, and reissued June 28, 1892, as No. 11,252. The second (No. 428,908) was a division of the first. The claims of reissue No. 11,252, which are sued on, are as follows:

"(1) In a chop grader, a frame having a gyrating motion, and provided with guides in line with the desired main direction of travel of the material, and cross slats, y, extending part way across its surface between said guides, for causing the material to travel over the said surface, substantially as set forth. (2) In a chop grader, a frame having a gyrating motion, and provided with a sifting surface of perforate material, the guide slats, x, upon its sifting surface, in line with the desired main direction of travel of the material, and cross slats, y, extending part way between said slats, x, for causing

the material to travel, substantially as set forth." "(4) In a chop grader, the combination, with a frame box, provided with an inlet at its upper and outlets at its lower part, of rods pivotally supporting said box, a revoluble device, such as a crank, for imparting a continuous gyrating movement to said box, and a frame supported in said box, and provided with a perforate sifting surface, and with guide slats, x, and with cross slats, y, arranged on said surface, substantially as and for the purpose set forth. (5) In a chop grader, the combination, with a gyrating frame box, of a series of superposed frames in said box, said frames being provided with guide slats, x, and cross slats, y, for directing the material over their surfaces, and with openings through which the material may pass from the upper to the lower frames of the series, substantially as and for the purpose set forth. (6) In a chop grader, the combination, with a gyrating frame box, of a series of superposed frames in said box, some of said frames being provided with perforate sifting surfaces of various fineness for sifting and grading the material, and alternating with other frames having imperforate conveying surfaces, all of the said frames being provided with guide slats, x, and cross slats, y, for causing the material to travel over their surfaces, substantially as and for the purpose set forth." "(11) A sieve having a gyrating motion, and provided with line guides in the desired main direction of travel for determining the path or paths of the stock's travel, and with propelling surfaces between the said guides for effecting the travel of the stock under the gyrating motion of the sieve."

The claims of patent No. 428,908, which are sued on, are as follows:

"(1) In a chop grader, a frame having a substantially horizontal gyrating motion, and provided with curved guides in line with the desired main direction of travel of the material, and cross slats, y, extending part way across its surface between said guides, for causing the material to travel over the said surface in substantially circular paths, as hereinbefore set forth. (2) In a chop grader, the combination, with a horizontally gyrating circular frame box, of a series of circular superposed frames in said box, the bottom surfaces of said frames being provided with curved guide slats, x, in line with the desired main direction of travel of the material, and with cross slats, y, extending part way between said guide slats, for causing said material to travel, substantially as set forth."

But for the question to be presently considered, touching the validity and construction of these patents, no doubt could reasonably be entertained that the infringement charged has been clearly proved. The evidence admits of no other conclusion, and the argument presented on behalf of the defendants rests mainly, if not solely, upon the theory that noninfringement results from the interpretation of the claims for which they contend. I will dispose of the case with reference to the points made by their brief:

1. Defendants contend, with respect to the first claim of each patent, that the "cross slats, y," designated in both of these claims, should be taken to include, and were "intended to include, the additional parts, u and v, for turning over the material and evening it," in which case the defendants' device would not infringe. But the construction thus proposed is, I think, a forced and unreasonable one. It involves the importation into the claim of language which was not used, and which must be assumed to have been designedly omitted, for in claim No. 3 (not here involved) the parts now sought to be injected into these claims, namely, the ridge, u, or bridge, v, "for turning over and evening the material," are expressly included. The learned counsel of the defendants has argued that because some of the figures exhibit u and v in connection with, and seemingly as extensions of, the part, y, the latter should be understood as being inclusive of the former; but

the patent as a whole forbids acceptance of this understanding. The cross slats, y, and the other parts referred to, are distinctively mentioned, and their respective objects are plainly differentiated. The defense as to claim 2 of patent No. 11,252 has been enforced by the same course of reasoning as that applied to the first claim of each patent; and it is insisted that it maintains the proposition that "cross slat, y, means y with u," and that, therefore, the defendants "do not infringe claims 1 and 2 of No. 11,252, or claim 1 of No. 428, 908." I am, as I have said, unable to acquiesce in the reasoning referred to, and consequently cannot adopt the deduction supposed to be derived from it.

2. The defendants have adduced several patents in support of the defense of lack of novelty, and their learned counsel has in argument especially referred to the Robertson, the Jesse, the Hahn, and the Gilbert patents, but by none of these is there disclosed the invention of the presumptively valid patents in suit. Haggenmacher unquestionably produced a device by which a marked advance in the art was attained, and the testimony of the experts and practical millers is in substantial accord as to its novelty. As was said by an expert witness for the defendants, neither of the exhibits prior to the Haggenmacher patents embraces every feature of construction along with the special motion of the latter.

3. The attack made upon the validity of the reissue cannot prevail. It is, in my opinion, fully met and overcome by the argument submitted in the brief for complainant, from which I quote:

"While one of the two patents sued upon is a reissue, it is open to none of the attacks generally made upon reissued patents. Defendants' machine is equally within the claims of the original. All the claims of the patent, except the eleventh, are literally reproduced from the original. The eleventh is predicated on the same invention as the original patent; stating that invention in terms intended to express more clearly that which would, under the ordinary doctrine of equivalents, be the legal effect of the original."

That such a reissue is within the scope of the statute is, I think, clearly demonstrated by the authorities cited on behalf of the complainant, with which those cited for the defendants do not, upon examination, appear to conflict. *Reed v. Chase*, 25 Fed. 94; *Odell v. Stout*, 22 Fed. 159; *Powder Co. v. Powder Works*, 98 U. S. 126; *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *Walker v. City of Terre Haute*, 44 Fed. 70; *Marsh v. Seymour*, 97 U. S. 348. Decree for complainant.

UNITED STATES GLASS CO. v. ATLAS GLASS CO. et al.

(Circuit Court, W. D. Pennsylvania. April 13, 1896.)

1. PATENTS—CHARACTER OF INVENTION—PRIOR ART.

The question of the commercial success or failure of a prior patent is not controlling on the question of its relevancy, as illustrating the generic type of the patented machine in issue and the general process and path of development which the inventor claimed to follow.

2. SAME—EFFECT OF DISCLAIMER—CONSTRUCTION OF CLAIMS.

When an application is rejected as anticipated, and the applicant then files a narrower claim accompanied by a disclaimer, he is bound thereby,

even though, in the light of subsequent developments, it may appear that possibly a more restricted disclaimer could have been framed, and that the additional elements inserted in the claims were more specific than need be.

2. SAME—CONSTRUCTION OF CLAIMS—DEVELOPMENT OF ART.

A subsequent advance in the art may show that a claim had a more extended scope than was originally supposed; but, when it covers such advance, it is not because the claim has advanced or enlarged with the advance of the art, but because of its original generic character.

4. SAME.

When a claim, read in its common, ordinary meaning, is explicit and clear, there is no room for construction. Construction cannot be resorted to to create a doubt, and then a liberal interpretation be given to the doubt, in order to present to the patentee something he failed to claim.

5. SAME—INFRINGEMENT.

Changes of operation are not to be measured by mere words or terms, but by function and operative effect.

6. SAME—MANUFACTURE OF GLASSWARE.

The Arbogast patent, No. 260,819, for an improvement in the manufacture of glassware, construed, and held not infringed.

Geo. H. Christy and Marshall A. Christy, for complainant.

Wm. L. Pierce and Jas. I. Kay, for defendants.

BUFFINGTON, District Judge. The United States Glass Company, the owner of letters patent No. 260,819, granted July 11, 1882, to Philip Arbogast, files this bill against the respondents, the Atlas Glass Company and others. The patent is for an improvement in the manufacture of glassware, and infringement of its single claim is alleged. As complainant claims the patent is a pioneer one, and the claim should be given a broad and liberal construction, a reference to that part of the glass workers' art bearing on the question at issue will aid in fixing the patent's relative position in such art, and in determining the proper construction of the claim. Long prior to the patent in suit it was known that a finished hollow article of glassware could be formed by pressing, where the diameter of the vessel's mouth was equal to or greater than the interior diameter of every part of the body. This was done by a single operation. A large lump of molten glass of proper size was dropped into a mold, and a plunger thrust in, which caused the soft glass to distribute itself throughout the entire space between the plunger and mold, which cavity formed the contour of the article to be formed. It will thus be noted that the plunger and press mold were recognized and adopted as means for obtaining, in the shapes mentioned, a body of any desired form, one of uniform thickness, and with a finished top, as distinguished from the unfinished top left by off-hand blowing. The single process of pressing could not, however, produce a finished article where the body bulged. Such bulge could only be secured by blowing. It was also a recognized practice to produce, by skilled preparatory blowing and manipulation, a blank, which was a hollow bulb of a size approximating the desired form, and with an even distribution of the glass. This blank was then inserted in a blow mold, and expanded to the pattern of the mold by mere mechanical, as contrasted with skilled, blowing. It will thus be seen that while the final blowing was recognized as a mere mechanical process when a proper blank was initially prepared,

and while pressing was recognized as a means of obtaining, by mere mechanical force, a hollow glass body of such proportion and uniform thickness as were desired, no one seems to have seen the possibility of devising means for conjoining the two mechanical processes, and, by pressing, obtain the desired form of blank, and, by mold-blowing, expand it. The possibility of securing by pressing a preparatory condition suitable for blowing, to at least a limited extent, was soon recognized as feasible, and this is shown by the patent of Gillinder, No. 51,386, issued December 5, 1865. It is contended on one side that this patent shows, in theory and substance, a complete anticipation of the process of the patent in suit, while by the other side it is brushed aside as disclosing merely a particular form of blowpipe, and as having no bearing whatever on the Arbogast patent. We cannot agree with either of these diverse contentions. While the device claimed is a mere blowpipe, yet the manner of its use and the function performed by it in the process in which it was employed are highly significant to the discriminating student of the art. It pre-empted and appropriates in advance of Arbogast a part of that field which, to award him pioneership, he must have been the first to occupy. Such significance lies in the fact that the tools were used in, and made practical, a process in which, by mere mechanical pressing, a hollow glass blank was produced, the upper part of which was in final finished form, and the lower part prepared for the subsequent modifying action of the blowpipe. It is true the claims of the patent only covered the tool, and that the avowed purpose of the applicant was to provide such means for manipulation subsequent to pressing that a handle could be mechanically pressed on the vessel at the first stage, instead of being attached after the blowing and shaping process, as was the prior practice. But it goes without saying the claims made do not measure or limit the disclosure or teachings of the patent, and that the two significant features alluded to were embodied in the process in which the patented tool was used is proven by the patent itself, and by proof of extensive use of that process for many years prior to Arbogast's application. That the upper part of the vessel was in finished form is shown by the fact that the solid plunger was replaced by one of the same diameter, so that the initial upper form necessarily remained unchanged during the secondary process, and that the lower part was blown, or at least was affected or modified by blowing, is shown—First, by the fact that, the second plunger being shorter than the first, a cavity suitable for blowing was provided; second, by the fact a blowpipe was used; and, lastly, by the statements of the specifications following, to wit:

"It [the hollow plunger] is perforated or bored longitudinally through its center, and in this hole one end of the blowpipe, B, is fixed so that the mouth or open end of such vessel from the mold will fit over the plunger, A, in such manner that the operator can safely expose it to the heat of the furnace, and expand it by blowing into it through the said pipe, A. * * * The vessel being thus securely held by the snap, as set forth, the operator proceeds to expand and finish it by heating and blowing in the well-known manner. * * * It will thus be seen that by means of this blowpipe molded vessels can be more expeditiously, uniformly, and perfectly expanded and finished, with the handles on as parts of the same, than by the old modes."

In considering this patent, we have not overlooked complainant's contention that the Gillinder pressing was, so far as the wall thickness of the lower portion of the blank was concerned, a finalty; that such thickness was not diminished by the secondary process; and that this latter process was a mere reshaping one,—a shortening up of the vessel, and a formation of the bulge, not by blowing, but by pressure and manipulation. But this theory is negatived by testimony of equal, and, we think, of greater, weight, that expansion by blowing does take place during this process, by the contemporaneous statements of the specification noted, that expansion by blowing occurs, and by the evident fact that the offhand blowing by which complainant says the finishing was done was necessarily of a somewhat nonuniform character, and there must perforce have been more or less variation and expansion necessarily resulting from the use of a nonuniform force. Indeed, on the statement of complainant's principal witness, Mr. Ripley, it was common practice "to put an air pressure into articles during their manufacture for the purpose of resisting the pressure of the bulb on the outside, and expanding any portion that had been flattened during the manipulation of the article." But, on complainant's own construction, we have during the process a blank, finished at the top and of uniform thickness in the body. This is formed around a cavity, and is provided with a blowpipe. Now, if such a blowpipe was thus used within the cavity simply to counteract and co-operate with pressure from without to modify the vessel's contour, it is clear that the change from such negative resisting force exerted through the pipe to a positive expansive force by harder blowing, and to less or no pressure from without, would not seem so wide, so radical, and so inventive in its character as to stamp it of pioneer character. And while we have no positive evidence that blow molding (then well recognized, as we have seen, as a finishing process) was used with the Gillinder tool, yet the use of it in that connection would not seem to have been so radical a departure as to be styled a pioneer step.

The fact, disclosed by the file wrapper of the Arbogast application, that no reference was made to this patent by the examiner, can hardly be said to evidence the judgment of that office that it was not deemed pertinent to Arbogast's invention. The mere fact that it was for a tool only may possibly have assigned it to a different class, and it thus have escaped the examiner's attention. But, be this as it may, we regard this patent as disclosing facts pertinent and material to the just place of Arbogast's patent on the question of pioneership.

In the Atterbury patent of 1873 we first find a device for producing machine-made glass articles. It shows both a carrying forward of Gillinder's process and also a new and radical departure from his methods and from the natural carrying forward of his process. Gillinder secured pressing by mechanical means. Atterbury not only proposed to do that, but to extend the mechanical means to blowing as well. In this respect it was an advance in the same general direction. In another, however, it was a radical departure. In Gillinder the article was pressed, the mold was then opened, the article taken from it, the function of the press mold was ended, and, to what-

ever process the article was thereafter subjected, it was extra or separate from such press mold. It is manifest that the removal of the article from the press mold involved two dangers, contact with the atmosphere and breakage. Atterbury proposed to avoid removal, to provide such a press mold that he could confine the glass in it during the entire operation, and to use such mold in connection with other parts to form a blow mold. In Atterbury's combination mold and process, we thus have a step in a wholly different direction from the natural evolution and development of the Gillinder process. We emphasize these facts, because to us they are of importance in rightly determining the scope and effect of Arbogast's disclaimer. Briefly stated, the patent shows a shifting single mold. The press mold consists of the ordinary matrix sides, but with the ring mold integral with it, and the bottom adapted to drop into a press-mold cavity, and form the blow-mold bottom. A plunger, with a central blowpipe, was forced into the press mold, the movable bottom was then dropped to the foot of the blow mold, and the blank blown to shape. The process is thus described by the patentees:

"In our new process we only use one piece of glass—one glass wall—in the article, and we blow the same glass that we press, thus making glassware consisting of blown and pressed glass, either the blown or pressed part being a continuation simply of the other. We put the hot glass in the mold, and press, say the mouth, neck, and handle of a molasses pitcher, and by simply lowering the bottom plate we can and do blow the balance of the pitcher. We press the pressed part of the article quite heavy or thick in the bottom so as to have plenty of glass to expand with the pressure of the air to make the balance of the article. We believe this to be an entirely new process of working glass, and also a new manufacture of glassware."

Upon this application claims were granted for the process of pressing and blowing glassware in the same mold and for a new manufacture of glassware consisting of blown and pressed glass. Now, while bulging glass articles can be made in Atterbury's device by care and skill in its manipulation, yet it seems clear they cannot be commercially made, and consequently the machine was not a success. Yet the question of success or failure is not a controlling one upon the question of the relevancy of this patent to the present issue. It is not cited here as an anticipation of Arbogast, for while its disclosures were sufficient to defeat the broad generic claims which Arbogast originally made, and it was so held by the office, and such decision was acquiesced in by Arbogast restricting his claims accordingly, yet it was not, in our judgment, an anticipation of Arbogast's restricted claim. Its relevancy consists in illustrating the generic type of machine, and the general process and path of development which Arbogast disclaimed to follow.

If Atterbury's process was on wholly different lines from Gillinder's; if Arbogast's was a carrying forward of Gillinder's, an advance on the same general lines; if the respondents followed Atterbury, and remedied the defects in his device,—then it would seem that Arbogast's explicit disclaimer of Atterbury, his method and device, should inure to protect respondents from the charge of infringement.

Let us next consider what Arbogast disclosed and claimed. To the extent of his disclosure he was entitled to claim, but his right to protection is limited to what he did, not to what he might have claimed. In the state of the art outlined Arbogast applied for his patent in 1881. His summary of the prior art was as follows:

"In the manufacture of this class of articles, the body is first blown in a mold after having been roughly shaped in the 'marver.' Then the article is clamped on a tool, and softened at the mouth, after which it is given the desired finish with either a hand tool or press, in which operation some forms require the addition of a ring of extra glass to be stuck on. All these operations are laborious and costly, and require skilled labor."

From which it will be seen he made no mention of the preparatory press process of the Gillinder practice or of the combined press and mold process of Atterbury. Upon this application he made three claims, one of which we cite as illustrative of their breadth, viz.:

"(1) The herein-described improvement in the manufacture of glassware, consisting in pressing the mouth or neck to finished form with a dependent mass of glass, and then blowing said mass to form the body, substantially as described."

The application was rejected as fully anticipated by Atterbury, whereupon the claims made were withdrawn, and the disclaimer, statement, and claim following added and substituted, viz.:

"It is essential to the successful practice of the above invention that the plunger should be very quickly removed from the press mold, as otherwise either the plunger will get heated and adhere to the glass, or, if cool, will chill the glass, and preclude the possibility of subsequent blowing. It is equally essential that two separate and distinct molds be used, one for the pressing and one for the blowing, because the moment the gather is pressed, not only the plunger must be removed, but the gather must also be removed from its mold, as, if it be allowed to remain there, its outer surface becomes chilled from contact with the mold, and cannot be expanded or shaped further by blowing; so that unless the gather is thus removed from contact with both plunger and press mold, and placed in a separate mold for blowing, it is impossible to produce the finished ware. I am aware that it has been proposed to press the article in a mold which finishes one part of the same, and then, while the article is still in the mold, to blow the remainder of the article, a part of the mold being enlarged for such blowing, and the air passing through the plunger into the body of the article. I do not claim such process; but what I claim as my invention is the described improvement in the manufacture of glassware, consisting in pressing the mouth or neck to the finished form with a dependent mass of glass, then withdrawing the plunger, then removing the article from the press mold, and finally inserting it in a separate mold, and blowing to form the body, substantially as described."

As we read these proceedings, Arbogast at first made broad claims, sufficiently comprehensive to have made Atterbury an infringer, the only elements in the principal one being "pressing the mouth or neck to finished form with a dependent mass of glass," and "blowing said mass to form the body." To secure his patent he added these limitations, viz. "withdrawing the plunger," "removing the article from the press mold," and "inserting it in a separate mold." Now, when we consider the fact that the patent office regarded Atterbury as showing a single mold; had allowed him a claim for it as such, viz. "the process of pressing and blowing glassware in the same mold"; that Arbogast stated that it was essential to his invention "that two sep-

arate and distinct molds be used, one for pressing and one for blowing," and "my invention is different, and requires the use of two molds,—a press mold and a blow mold,"—can there be any doubt that his purpose was to withdraw and exclude himself from the broad field he had at first sought to pre-empt, differentiate his invention from the one-mold type of Atterbury, and by these superadded limitations to confine his claim to a process involving the use of these two separate, individual, and well-known appliances in the art, viz. a press mold and a blow mold? He knew Atterbury's suggested mold form was of a shifting type; that it was claimed to be adapted, according to the changed relations of its parts, to be used first as a press mold, and then as a blow mold; and that a broad claim, viz. for "the process of pressing and blowing glassware in the same mold," with no limitations as to details, had been granted. By his own statement, he deemed this system impracticable. He suggested no change or modification of it. Far from that, he differentiated his process from Atterbury by condemning the one-mold system; said the use of two separate molds was essential to his process; and, what is most material and controlling, he embodied these limitations in his claim. The claim was made, granted, and unchangeably fixed by the then conditions and facts, not by subsequent ones. In the light of what then existed, is there any doubt of the purpose of the patentee, of the extent of his disclosure, of the benefit he conferred on the public? Is there any doubt of the clear and unmistakable scope of his claim, of the significance and narrowing effect of the elements with which he ladened it? If, in the light of later developments, it should now appear that possibly a more restricted disclaimer could have been framed,—that the superadded elements of the claim were more specific than need be,—all this will not avail to change what was then done. Subsequent advance may demonstrate that a claim granted had a more extended application than was originally supposed, but it is powerless to change it. When the claim covers the advance, it does so, not because its boundaries have been advanced by the advance of the art, but because as made—as originally made—it was generic enough to cover such advance. Whether wisely or unwisely made, the limitations and disclaimer are there. They are facts. They can not be frittered away, their presence ignored, or their significance minimized. If it be conceded that the later-discovered device of a practical, shifting, telescopic, single mold, combining interchangeably the functions of both a press and blow mold, made possible a much wider application than Arbogast then conceived of the generic process on which his specific device was based, still his restriction of his invention to a limited sphere, and to specific, well-known mechanical appliances, and his embodiment of these limiting, narrowing, specific elements in his claim, did then and of right ought now to correspondingly limit and abridge the ground covered by such claim. As we have seen, Arbogast was no pioneer. True, he sought to place himself on that ground. His claims were broad and generic, but he was forced to abandon them. His claims, as made, would have unquestionably covered Atterbury's process and respondent's also. After the rejection of those claims,

and the grant of a narrower one, should his assignee be now permitted to turn, strain, and recast the granted claim, so as to cover as much as the former one would have?

A careful study of the art satisfies us that Arbogast was an improver on specific lines, not a pioneer; and a study of the file wrapper, that the process disclosed and claimed by him involved the use of the then well-known press mold and blow mold of the art, and that such molds were made separate, individual elements of his claim. Such conclusion is in line with the adjudged cases. "Where a patentee, on the rejection of his application, inserts in his specification, in consequence, limitation and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been if such limitations or restrictions were not contained in it." *Roemer v. Peddie*, 132 U. S. 317, 10 Sup. Ct. 98. "It is well known," says Mr. Justice Bradley in *Burns v. Meyer*, 100 U. S. 672, "that the terms of the claim in letters patent are carefully scrutinized in the patent office. Over this part of the specification the chief contest generally arises. It defines what the office, after a full examination of the previous inventions and the state of the art, determines the applicant is entitled to. The court, therefore, should be careful not to enlarge, by construction, the claim which the patent office has admitted, and in which the patentee has acquiesced, beyond the fair interpretation of its terms." "The patentee having imposed words of limitation upon himself in his claims, especially when so required by the patent office in taking out his reissue, is bound by such limitations in subsequent suits on the reissue patents." *Crawford v. Heysinger*, 123 U. S. 606, 8 Sup. Ct. 399. See, also, *Caster Co. v. Spiegel*, 133 U. S. 368, 10 Sup. Ct. 409; *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. 166; *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627.

We are urged to give this claim a liberal construction. So be it. In the true sense of the term, every claim should receive a liberal construction,—that is, the awarding to a patentee the full measure, in letter and spirit, of all he fairly disclosed and clearly claimed,—but when, under the guise of liberal construction, a claim is made to cover what it might have embraced, but was not made to embrace, such liberality is not construction, but reconstruction. Moreover, when a claim, read in its common, ordinary meaning, is explicit and clear,—when there is no apparent uncertainty,—there is no room for construction. *Rich v. Close*, 4 Fish. Pat. Cas. 279, Fed. Cas. No. 11,757. The province of construction is to solve doubt, not to create it. If the meaning is clear, construction is not to be resorted to to create doubt, and then a liberal interpretation given to the doubt, which results in presenting to a patentee not what he claimed, but what he failed to claim. A court discharges its duty and exhausts its power when it ascertains and declares what was claimed. It as clearly transcends its power when it reconstructs the claim to cover what the patentee did not, but might have, claimed had he been gifted with prescience.

Now, the press mold and blow mold were common and well-known

appliances in glass making at the date of this patent. Each had separate, individual functions. A plunger was used in the press mold and air in the blow mold. The teaching of the patent was clear and unmistakable that the use of these two forms of apparatus was indispensable, and the declaration of the patentee was that their successive use during the process was essential. This was the extent of Arbogast's disclosure and of his contribution to the art. The claim he made embodied the successive use of the two types of mold,—the use of one for an entire operation, to wit, pressing in the press mold, the removal of the article therefrom, and its insertion in the second form, the blow mold, and a different operation therein. As disclosed by the patent, and by the practice for many years under it, the process necessarily consisted of 24 acts, viz.: (1) Cutting off the gather into the press mold. (2) Sliding press mold into position, beneath the plunger. (3) Pressing the hot mass of glass. (4) Withdrawing the plunger. (5) Sliding the press mold forward from underneath the plunger. (6) Unkeying the press mold. (7) Lifting the pressed blow blank out of the press mold. (8) Carrying the pressed blow blank over to the blow mold. (9) Carefully inserting the pressed blow blank in the blow mold. (10) Sliding the blow mold under the blowing stem. (11) Pulling down the blowing stem to blow up the blank. (12) Raising the blowing stem. (13) Sliding the blow mold forward from under the blowing stem to a position where it can be opened. (14) Unkeying the ring of the blow mold. (15) Opening ring of the blow mold. (16) Lifting ring from blow mold and depositing same on press bed or press mold. (17) Unkeying the blow mold. (18) Opening the blow mold. (19) Removing finished article from blow mold. (20) Closing the blow mold. (21) Keying up the blow mold. (22) Closing ring or neck mold. (23) Keying ring or neck mold. (24) Keying up press mold ready for new operation.

We next turn to the question of infringement. This is alleged in the operation by the respondents of a machine to make Mason fruit jars. In it we find a revolving table carrying five telescopic molds, each of which produces a finished jar, wholly machine made, during each revolution of the table. These molds occupy five different positions during a table revolution which may be styled the charging, pressing, blowing, discharging, and rearranging positions. It will be noted the several operations are going on simultaneously, and several jars are subjected to different stages of the process, according to their respective locations on the table. Each mold consists of an outer open mouth and open-bottom shell, the upper part of which forms the finished neck of the jar, and the remainder the finished sides. Within this shell a smaller open-mouth and closed-bottom shell is nested, the bottom and sides of which form the press blank below the neck, and, in connection with the upper portion of the outer shell, form a press mold and neck ring. By the same motion of a lever, this inner shell is dropped below the outer one, and a moveable bottom, not before in use, is shifted over and forms the bottom for the outer shell. By this means the outer shell is adjusted to act as a blow mold of the old type, but having integral with it a

neck ring. The mold being in the charging position, properly keyed, and with the inner shell raised, the operation of making a jar consists of 10 operations, as follows: First. Charging. In this the gather is dropped in the mold and cut off. Second. Revolving table. Here the table is revolved one-fifth of its circumference, so as to carry the mold to the pressing position. This brings it under a plunger. It will be noted that this part revolution of the table has changed the position of all five molds. As we charge this revolution wholly to the single jar now being made, we will not charge the subsequent part revolutions to it, but wholly to each individual jar following it. Third. Pulling down the lever. By the action of this lever the pressing plunger is forced into this mold, and produces a press blank. It also brings down the blowing head to the preceding mold, automatically opens a valve, and mechanically blows the press blank to fill the matrix of the blow mold. Fourth. Raising the lever. This raises the plunger in the mold now under consideration, and also the blowing head from the mold preceding it. Fifth. Reforming the mold. By pulling a lever attached to the inner shell and the moveable bottom of the outer shell, the inner shell is dropped from within the outer shell, and from contact with the pressed blank, and the moveable bottom is brought into engagement with the outer shell, and forms, in connection with it, a blowing-mold cavity in which the press blank is suspended. A part revolution of the table now brings the mold to the third or pressing position, where the press blank is mechanically blown, as noted above. This done, the next part revolution brings the mold to the discharging position. In this position five operations are carried on, viz.: Sixth. The mold is unkeyed. Seventh. The mold is opened. Eighth. The finished jar is removed. Ninth. The mold is closed. Tenth. It is rekeyed. The next part revolution brings the mold to the rearranging position, and automatically rearranges the mold by a process the reverse of the fifth, namely, it removes the sliding bottom of the outer shell, and nests the inner within the outer shell, in shape for another round of operations.

There is a radical difference in operation and result between the process disclosed by Arbogast and the workings of this machine. The process of Arbogast is partly mechanical; the process in respondents' device is wholly so. Arbogast necessitates intermediate human manipulation during the process; respondents' process can dispense with it, and in point of fact does. The output of the latter is a new article of commerce in glass, viz. a machine-made one, and the output is at least threefold greater than by the Arbogast process. This remarkable difference in results, while not proving, would strongly suggest, the use of different means and methods to produce it, and that it is not a mere reversal of process, as is suggested. And such we find to prove the case on a critical comparison of the two; for, waiving for the present the fact that respondents' mold, not being known in the arts at the date of Arbogast's patent, could not be adjudged an equivalent (see *Manufacturing Co. v. Forgie*, 59 Fed. 775, 8 C. C. A. 261), we are of opinion that, both structurally and in operative principle, the respondents' device is different from

Arbogast's, and the single telescopic interchangeable mold of the one is not the equivalent of the other.

In Arbogast's we find a press mold consisting of two hinged parts, and provided with a key, which must be used every time the mold is. It is adapted for use solely as a press mold, and is susceptible of no rearrangement or adaptation to any other or different function. If the article to be treated in it is to be subjected to another process, it must necessarily be physically and manually removed therefrom. Dealing with so fragile a subject as glass, and that in a susceptible condition, no means were known at the date of the patent, and the 16 years' use of the process have evolved none, by which the glass can be removed from it by any other than manual manipulation. Nor could it even thus be manually removed from it in commercial practice save by unkeying the mold and opening it upon its hinges.

We find also a blow mold which consists of two hinged parts, and provided with a key, which must be used twice every time the mold is used. It also is adapted for use solely as a blow mold, and is susceptible of no rearrangement or adaptation for any different or other function. If the article to be treated in it is to be subjected to any other process, it must be done before it is placed in this mold. From the inherent nature of things, the blow mold must be hinged and actually open to admit bringing the article to be affected into engagement with it, and no means were known at the date of the patent, and in the protracted use of that mold none have been discovered, by which a glass blank could be placed within a blow mold without opening it. It will be noted, too, that a hinged-ring mold, provided with a key, was necessary to the successful use of the press mold; that it was removed therefrom to the blow mold, and was necessary to its successful use, also. In the successive use of these two molds conjointly we find three adverse, inimical factors, so to speak; two of them dangers peculiar to the glass makers' art, viz.: Contact with the atmosphere; contact with some irrefragible object; and loss of time and added work in the unkeying and opening of the press mold, the transfer of the glass, and the closing and keying of the blow mold.

Now, in the respondents' device we find means have been found by which two of these elements have been eliminated, and the third practically minimized. It is said these means are but a reversal of Arbogast's method; that he removed the glass from one mold, and placed it in another, while respondents leave the glass in one position, take away one mold, and replace it with another. In our judgment, there is no such reversal of method. Changes of operation are not to be measured by mere words or terms, but by function and operative effect. If the dangers, drawbacks, and waste of the removal of Arbogast have been eliminated in the respondents' removal, so-called, then, while they are the same in name, it is in name only, and not in nature. Now, what have respondents done? They show means by which transfer, manipulation, and care for the articles have been dispensed with. Practically a mass of molten glass is dropped into the slot of a sealed shell, a lever is dropped and raised,

a table is rotated, and a finished, useful article of commerce is produced. Manifestly, a large part of this is due to the successful application of mechanical power and agents, but the essence consists in the process and means by which this has been made mechanically possible. They have found means by which glass could be initially, and once for all, placed within a blow mold; by which it could be pressed while in the blow mold; means by which the press blank and the press mold could be removed from engagement with each other without opening or unkeying such mold; and the press mold withdrawn from the blow-mold cavity. Their press mold may be called such, but it is not the press mold of the old art. It is a single compact structure, while that had two hinged sections. It has no hinge to permit its opening, and needs no key to secure its closing. So their blow mold may be called such, but it is not the blow mold of the old art. Instead of being a separate, integral structure, whose functions came into play only after the press mold had finished its work, it enters into combination and conjoint operation with the press mold from the first, and performs the entire function of a ring mold as well. It initially forms a sleeve or shell to keep the press mold at a continuous uniform temperature; it serves as a close-fitting support for the mold during the pressing, and in that pressing it gives, by a part of its own structure, a finished form to the neck or mouth of the article, and in such part it retains and holds the article through the pressing and blowing process,—functions which the ordinary blow mold could not exert. If we are warranted in styling this portion of the device the blow mold of the old type, there would seem to be greater reason for styling it the ring mold, since its function more closely follows that article. In point of fact, it is neither. It is a composite structure, combining the functions of both. Nor does the difference of molds end here. In the old art the press and blow molds were adapted to separate and simultaneous use to fulfill their several functions. Here they cannot be simultaneously used, but the use of the one suspends the functional capacity of the other. The use of the mold as a press mold deprives the blow mold of bottom and hollow cavity; its use as a blow mold covers and seals up the press mold.

Measured by these tests, it is clear that respondents' mold is not the equivalent of either of Arbogast's molds considered separately, or of the two jointly. In its machine-made jar the respondents' machine produces a different article of commerce, not different because it is machine made, but because Arbogast's disclosed process, by its inherent limitations, cannot be mechanically used to produce such an article. It accomplishes that result by different means, and those means were not known at the date of Arbogast's patent.

In view of the radical differences between the two processes, in means, method, and product, it is clear to us that infringement has not been shown, and the bill must be dismissed.

WESTERN ELECTRIC CO. v. MILLHEIM ELECTRIC TEL. CO. et al.

(Circuit Court, W. D. Pennsylvania. July 18, 1898.)

1. PATENTS—NOVELTY AND PATENTABILITY—PATENT AS EVIDENCE.

The grant of a patent is *prima facie* proof of novelty and patentability, and, in the absence of countervailing proof, this *prima facie* must prevail.

2. SAME—ANTICIPATION—COMBINATIONS.

To find in the prior art each element in isolation is not to anticipate the work of a patentee who, by inventive act, first evolves a new combination of these elements, which by their conjoined functions produce a new result.

3. SAME—ANTICIPATION—PRIOR PUBLICATIONS.

A prior publication, such as will defeat a patent, must contain a description of the complete and operative art or instrument so precise and particular that any one skilled in the art to which the invention belongs can construct and operate it without experiments or the exercise of inventive skill.

4. SAME—TELEPHONE CIRCUIT AND APPARATUS.

The Carty patent, No. 449,106, for telephone circuit and apparatus, *held* not anticipated, valid, and infringed.

Barton & Brown, for complainant.

Stanley S. Stout, for defendants.

BUFFINGTON, District Judge. This is a bill filed by the Western Electric Company against the Millheim Electric Telephone Company et al. for alleged infringement of letters patent No. 449,106, issued March 31, 1891, to John J. Carty, for telephone circuit and apparatus, and now owned by complainant. The defenses are lack of novelty and patentability. These defenses failing, infringement is conceded. The apparatus in question was designed primarily for use on a multiple line. Prior to this patent it was customary to connect the call-bell magnets at the several stations in series in the main-line circuit together with a normally shunted call-sending generator, and at each station to provide a switch, which, when at rest, maintained the continuity of the main circuit through all the call-bell magnets, and kept the circuit of the local transmitter battery open. When, however, the switch was changed,—which was done when the receiver was taken from the hook for use,—it disconnected or short-circuited the bell magnet or generator from the line, and introduced in place thereof the telephonic transmitting and receiving instruments, and closed the local battery circuit of the former. Though this switch change at the two communicating stations removed the bell magnets at such stations from the circuit, no such action took place at the other stations. Consequently, the voice current had to traverse all the other magnet helices in the line, and was much weakened, not only by the resistance of such magnets, but also by the counter electro-motive forces or inductive resistances developed in each. These were so active and energetic as to hinder conversation; yet it was necessary that all bell magnets should be connected with the circuit, otherwise the several stations cannot signal each other. It will be noted that in this system, which is called a "series circuit," the component parts are so arranged that the current must pass through all its parts, one after another. It is so styled in contradistinction to a "multiple circuit," which is one having two or

more of its parts so arranged that the current divides, portions of it passing through parallel paths afforded by the several parts. The two systems may be thus illustrated: When incandescent lights are connected in multiple circuit, the current passes to one terminal of each of the lamps which are connected to one side of a circuit, and then divides up, a portion passing through each lamp to the other side of the circuit, where all these portions are reunited. Where such lamps are connected in series, all the current must flow into the terminal of the first lamp, and out at the other, and so on through the successive lamps.

It also appeared impossible to obtain a perfect inductive balance in a metallic telephone circuit when the bell magnets and telephone were connected in series, and such inductive disturbances manifested themselves generally in annoyances, and sometimes were so intense as to prevent conversation. Now, it would seem that if, instead of the series circuit connection for both call magnets and telephones, a multiple circuit or bridging connection after the manner of the simplest form of incandescent lighting was substituted, these difficulties would be avoided; but the conditions were different, since in a telephone circuit each station is both a generating and a utilizing one at the same time. Therefore the generating currents are likely to be short-circuited by the nearest bridge connection, and thus fail to reach the more distant station which it is desired to signal. The additional fact that two diverse uses are to be made of the current at the same station, viz. signaling and transmission of sound, and that they are to be used interchangeably between all the stations, renders necessary the addition of other means and factors to simple mere parallel arrangements. To overcome these difficulties, the patentee suggested a simple and efficient remedy. He adopted the multiple circuit plan, and at each station placed a permanent bridge, in which he seated a bell magnet, with a high co-efficient of self-induction and of marked impedance. He also provided two other bridges, which were normally open, and closed only when the station was in use. The generator bridge circuit was adapted to be closed while a call was being sent. The third or telephone bridge circuit was open when not in use, but closed in multiple arc with its own bell magnet, and, of course, with all others in the line, when in use. When the call generator is used at a station, it forms a second bridge or cross connection between the wires in parallel circuit with the permanently closed bridge circuit of its own bell and all other bells on the line. Now, the natural tendency of the ringing current would be to short-circuit through its home call-bell bridge, and possibly through the nearest other call-bell bridges. This, of course, is highly undesirable, as it is necessary that all of the call bells of the system should be operated by the call generator of each station. The tendency of the current to thus short-circuit is counteracted in Carty's system by the high self-induction and impedance of the bell magnet which opposes the passage of the call current, and effects a more even distribution of it through the bell magnets of the system. By virtue of numerous windings of the wire in the bell magnets, the small portion of the call current passing exerts a marked magnify-

ing effect on the cores, and thus secures a more spirited working of the call signal. The means employed in the device and the mode of operation are clearly stated by respondents' witness, Mr. Miller, who says:

"I am acquainted with this patent. It shows and describes a method of attaching telephone instruments in multiple between the two sides of a line, whether this line be a metallic circuit or a grounded line. The call bells are each permanently bridged between the two sides of the line, and are made of high resistance and retardation. The generator at each instrument is in a separate bridge circuit, which is normally open, but closed when the generator is operated. The telephonic apparatus proper is in a third bridge circuit, which, like the generator circuit, is normally open. The telephone circuit of each instrument is automatically closed when the receiver is removed from its hook for use; and this operation also closes a local circuit containing the primary of the induction coil, the local battery, and the transmitter. In order that there shall not be an undue leakage of the voice currents through the permanently bridged call-bell circuits, the magnets of these call bells are wound to a high resistance (usually 1,000 ohms), and are also constructed in such manner that they will have a high co-efficient of self-induction. When a generator at any one station is operated, it is connected across the two sides of the line in parallel with all of the call-bell magnets on the line. Part of the currents in this generator will therefore pass through each of the call-bell magnets on the line, thus causing them all to operate if the amount of the current generated is sufficient to accomplish this result. The successful operation of this system depends on the fact that a coil possessing a high co-efficient of self-induction will transmit with comparative ease alternating or pulsating currents of low frequency, while it will form a practical barrier to similar currents having a very high frequency. The currents generated by the calling generator at any station are of sufficiently low frequency to pass with comparative ease through the call-bell magnets arranged along the line, while the rapidly alternating voice currents impressed upon the line by the telephonic apparatus at any station will be compelled to pass over the main line to the receiving station without being materially weakened by leakage through the call-bell magnets. At the receiving station, these voice currents will pass through the telephone receiver and secondary coil of the induction coil, these being connected across the line at that station by virtue of the receiver being off its hook. This path through the receiving instrument is of comparatively low resistance and retardation, and thus practically takes all of the current from the distant station."

As we have stated, the patent is assailed as lacking novelty and patentability. The grant of this patent is *prima facie* proof of the novelty and patentability of the invention therein disclosed (see *Seymour v. Osborne*, 11 Wall. 516, and cases cited in note to 3 Rob. Pat. § 1016), and, in absence of countervailing proof to the contrary, its *prima facies* must prevail. An examination of the many alleged anticipations does not disclose the particular combination here shown, or overcome such *prima facies*. If any or all of them might have suggested a combination of means and the placing of them in the relation shown in the device, it is not proven that any one so placed them. None of the elements composing the combination are in themselves claimed to be new. It is the combination of them in new relations, and the securing a new and useful result thereby, that constitutes the basis on which the patent rests. It goes without saying that if each element of the combination can be found in the old art,—if all of them, abstractly and separately considered, perform the same function they did in the old art,—this will not tend to defeat the patent if the old individual elements are here

brought into novel combination with each other, and their conjoined functions produce a new result. Such novelty, if the change involves patentability, constitutes ground for a valid patent. It follows, therefore, that to find in the prior art each element in isolation is not to anticipate the work of a patentee who, by the inventive act, first evolves combination out of isolation. In discussing the prior art, Mr. Miller, after describing the working of Carty's device as we have quoted, says:

"I find the principles governing the effects of coils having a high co-efficient of self-induction upon currents of high and low frequencies to be very clearly stated in various text-books and patents prior to the filing of Mr. Carty's application."

The critical and intelligent analysis of the prior art by Mr. Miller warrants that conclusion, but it by no means follows that knowledge of those principles is an anticipation of a combination wherein those abstract principles are used in new concrete relations, and thus made to produce new results.

Now, none of these alleged anticipations show the device of Carty. Varley's English patent, No. 1,044, of 1870, simply states a principle made use of by Carty, but concededly old; and it is clear that Varley's application of that principle would not suggest to a mere improver the device of Carty. The German publication, "Das Telephon," of 1886, shows, without reference to detail of construction, two sets of telephones,—one connected in series, the other in multiple. Without reference to other matters, it is sufficient to say that no use of high impedance bells is shown, and, beyond the principle of multiple connection, it has no inherently necessary feature in common with Carty.

Attention is next called to the publication, "The Telephone," by Pierce & Maier, London, 1889. Among other essential requirements to constitute such a prior publication as will defeat a patent, it is essential that it contain a description of the complete and operative art or instrument so precise and particular that any person skilled in the art to which the invention belongs can construct and operate it without experiments, and without the exercise of inventive skill. Unless a publication possesses all these characteristics, it does not place the invention in the possession of the public, nor defeat the claim of the inventor to a patent. *Cohn v. Corset Co.*, 12 Blatchf. 225, Fed. Cas. No. 2,969; *Seymour v. Osborne*, 11 Wall. 516. And the descriptions must be read in the light of the then knowledge. *Betts v. Neilson*, 3 Ch. App. 429.

Tested by these standards, it is quite clear that this publication will not and should not avail to defeat this patent. It does not disclose the device of Carty. While it speaks of the electrical difficulties as "very easily overcome by means of properly proportioned fixed resistance coils placed in the different sections of the circuit"; that "the electro-magnet inertia of the apparatus itself is here utilized"; and that "it operates the receiver; it chokes the current across the bridge, and so makes the working currents pass along the line,"—yet, when we come to examine, we find these "properly proportioned fixed resistance coils" to be a very different thing from Carty's call-

bell magnets. The former are only determined by tedious calculations made by technical men, and must be adjusted to each individual line, while the high impedance bell of Carty can be installed on any suitable line without reference to its length, or to the number or location of stations. Moreover, the book or its drawings do not disclose how the telephone transmitting and receiving devices or the call-current generator or the signal-receiving apparatus are used or adjusted with relation to each other, or to the entire system. It is quite manifest from a detailed examination of the work that Carty's device was not given to the world by this publication, and it is equally clear from the statements of the authors themselves in a subsequent edition that they did not regard their system as anticipating or disclosing Carty's, if such statements were to be regarded as competent.

The other devices which are stated by respondent's witness to most nearly approach the Carty device are the divided circuit for clearing out annunciators, No. 300,144, of Scribner, and the Van Ryersburghe devices, for combined telegraphic and telephonic service, patents Nos. 306,665 and 323,239. Using the method pointed out in the Scribner patent, we are unable to find any anticipation of Carty's device. Scribner's device was for effecting a connection in series between two subscribers through an exchange station, and affording means for signaling such exchange when the conversation was finished, that the connection might be broken. This connection was through a clearing-out drop, and this was of as low impedance as possible. Nowhere is the use of a high impedance bell suggested, and the proof is, if it were substituted for the magnet of Scribner's device, it would render talking impracticable. The bridging system of the Carty patent involved a definite and peculiar arrangement of different apparatus, operating in an original combination, to effect one specific result; while the Scribner device showed normally and designedly a different arrangement of apparatus in a wholly different mode of operation, to secure a result wholly different. Scribner's device was not intended for bridging a party-line system. To be forced to use the elements Scribner used in such reformed, variant, and abnormal relations as are not fairly disclosed by his patent, in order to approach to anything akin to likeness of Carty, tends to prove absence rather than presence of anticipation in the earlier patent. The Van Ryersburghe patents refer to a joint telephonic and telegraphic system. We do not find the Carty combination there employed. The system shows no call-signaling apparatus whatever. On this point complainant's expert says:

"The telephone instrument, 20, here shown, is represented by a receiver only, but there can be no question whatever but that a battery transmitter is also used, and very probably additional signaling instruments for those telephone instruments also."

But to show anticipation, and strike down a patent, we should have something more certain than probabilities. The call-signaling apparatus of the Carty system is so vital to its use that either it or its substantial equivalent should be found in the alleged anticipation, to constitute it a real anticipation. It would seem that the two sys-

tems were for different purposes, and their methods were diverse in detail. Moreover, the Van Ryersburghe system was for the simultaneous transmission of telephone voice currents and telegraphic signaling currents. The Carty system of sending call signals could not be used in connection with Van Ryersburghe's systems. It is therefore apparent that in no fair sense can it be said that Carty's device was anticipated and given to the world by Van Ryersburghe's. Being therefore of opinion that the defenses alleged have not been made good, a decree should be prepared in favor of the complainant.

EVERETT PIANO CO. v. GOEPEL

(Circuit Court, S. D. New York. July 7, 1898.)

PATENTS—CONSTRUCTION OF CLAIM—INFRINGEMENT—PIANOS.

The French and Nalence patent, No. 515,426, for a piano attachment, whereby a nonresonant flexible strip, carrying a metallic striker, is interposed between the hammer and the string, so that the hammer strikes the strip on one side of the striker, for the purpose of modifying the tone to resemble that of a guitar, mandolin, zither, etc., by means of a secondary or double stroke on the string, *held* not anticipated, valid, and infringed.

This cause comes here on final hearing upon pleadings and proofs. The suit is brought for infringement by defendant of the three claims of letters patent No. 515,426, granted February 27, 1894, to French and Nalence, for improvements in piano attachments.

Charles E. Pickard and M. B. Philipp, for complainant.

W. C. Hauff, for defendant.

LACOMBE, Circuit Judge. The specification thus describes the invention:

"Our invention relates to piano attachments for changing the tone of a piano, causing it to resemble a guitar, mandolin, zither, etc. To this end we arrange on the piano a series of strips of flexible material, each having on it a metallic striker. These strips are connected to a bar operated by a pedal, by which they can be moved so that the ordinary hammer of the piano will strike the flexible strip. The strip thus kills the tone which would otherwise be produced by the string, but the metallic striker on the strip striking the string produces the modified tone which we desire. A reverse movement of the pedal withdraws the strips, leaving the hammers free to strike the strings in the ordinary manner, and produce the ordinary tone of the piano."

Then follows a description of the drawings and of the mode of operation of the parts, in which it is stated that:

"The hammers strike the material of the strips above the striker [i. e. between the striker and the point of attachment of the strip], and press it against the strings. The soft strip kills the effect of the blow of the hammer on the string, but the hard striker is thrown against the string and produces a tone. By the use of a metallic striker, we secure a characteristic tone produced by the metal striking the metal strings."

The claims are:

- "(1) In a piano, in combination with the strings, a series of nonresonant, soft, flexible strips having hard strikers or buttons on that face next to the strings, and hammers to act upon the strips to one side of the said buttons.
- (2) In a piano, the combination with the strings of a series of nonresonant,

soft, flexible strips having hard metallic buttons or strikers on that face next to the strings, and hammers to act upon the strips on one side of the said buttons. (3) In a piano, the combination with the strings of a series of flexible strips having on that face next the strings hard buttons or contacts, and a series of hammers adapted to strike the strips to one side of the said buttons."

While the application was pending in the patent office, and in order to avoid references cited by the examiner, the words, "non-resonant, soft," were inserted as qualifications of the "flexible strips" in the first two claims; and in the same claims there were also added the words, "to one side of the said buttons," as a qualification of the striking action of the hammers. The third claim was also inserted pending application, and it was conceded upon the argument, by complainant's counsel, that, if this third claim is to be sustained against prior patents, the words, "nonresonant, soft," must be implied from the description as qualifying the flexible strips. As thus construed, it is substantially identical with the first claim, and may be disregarded as superfluous. The second claim differs from the first, in that it calls for a "striker" which is not only "hard," but also "metallic."

This patent was before the circuit court for the Northern district of Illinois in *Piano Co. v. Bent*, 79 Fed. 79, and its patentability sustained. Referring to the devices of the prior art, which were in evidence in that case, Judge Showalter says:

"In each instance the interposed medium for modifying the vibration of the string, and so changing the tone, is directly between the hammer and the string. In the case of the patent in suit, what is called the 'metallic button' in one place in the specification, and the 'hard button' in another and in the claims, is not interposed so that the stroke of the hammer is directly against such button. The idea of modifying the tone by a secondary or double stroke on the string, in the manner described in the patent in suit, is not found in the prior art. The novelty of this construction is rather emphasized than otherwise by the prior devices. In the structure complained of, the leather tongue, at its lower extremity, is tightly folded and secured around a small metallic cylinder placed transversely. The stroke of the hammer is against the tongue and above this leather-covered cylinder. The mode of operation and effect are substantially the same as in the patent in suit."

Inasmuch as in Bent's striker the metallic cylinder was surrounded by the leather of the tongue, the court did not find infringement of the second claim, which is confined to a "metallic" striker. In the suit at bar the metallic cylinder is attached at the end of the tongue, and uncovered. This structure, which is in all other respects similar to Bent's, is within the first and second claims. The only question presented here is whether an English patent, which was not before the court in the Illinois case, is such an anticipation as to induce a different conclusion from that reached by Judge Showalter.

This English patent is No. 19,237 of 1890 (accepted October 24, 1891), to William H. D. Downe. It covers a rail to which are attached a series of depending tongues, which, by lateral movements of the rail, are interposed between the hammers and the strings or withdrawn therefrom. These depending tongues are—

"Fine springs bent in angular form, and placed exactly over the space between each hammer. The springs are secured to the bottom side of the rail with a screw and washer, and are continued to within $\frac{1}{8}$ in. of the piano-forte strings. They are then bent down so as to fall about 1 in. below the

face of the hammer when it is near the string, the ends of the springs which are bent for striking purposes standing away from the strings $1\frac{1}{4}$ in. When the rail is at rest, the hammers pass freely through the springs, producing the ordinary tone. When the rail is moved to the right, the springs are brought immediately before the hammers, and, receiving the full force of the blow, the ends of the springs are sent quickly to the strings, and produce a tone resembling the zither. When the rail is released, a spiral spring, attached to the left end, causes it to fall back into its former position. To suit the requirements of the pianoforte, the rail may be placed below the hammers instead of above, and the springs may be bent to any shape or form, up or down, so long as the principle remains,—that, when a key is struck, the springs receiving a blow are sent into swift contact with the pianoforte strings."

This patent does undoubtedly disclose the "secondary or double stroke" referred to in Judge Showalter's opinion as a characteristic of complainant's patent. The tongues, however, being metal springs, apparently are not adapted to discharge the other function of the "nonresonant, soft," flexible strip, which, as the specification points out, "kills the tone which would otherwise be produced by the string," or, as it is elsewhere said, "kills the effect of the blow of the hammer on the string." The patent is an extremely narrow one, and must be confined to a combination which will include the flipped-out hard striker and the soft nonresonant deadening strip, both of which seem to be necessary to a successful result, and, in combination, novel. Inasmuch as the defendant's device infringes this combination as covered by first and second claims, complainant is entitled to the usual decree.

HAWORTH v. STARK et al.

(Circuit Court, S. D. New York. July 5, 1898.)

1. PATENTS—PRIOR USE—EVIDENCE.

While evidence of prior use is always to be closely scrutinized, and accepted with caution, yet the measure of affirmative proof required to establish the defense will be less when, on the conceded facts as to the prior state of the art, it would seem an almost irresistible inference that the patented method was in fact used prior to the date of the alleged invention.

2. SAME—SHIPPING CASES.

The Haworth patent, No. 496,157, for devices for securing packing, storing, and shipping boxes against surreptitious opening and plundering, is void because of prior use.

This was a case in equity by William H. Haworth against Lazar Stark and others, praying an injunction and accounting for alleged infringement of a patent. Final hearing on pleadings and proofs.

Herbert H. Walker, for complainant.
Joseph L. Levy, for defendants.

LACOMBE, Circuit Judge. This is a suit upon letters patent No. 496,157, dated April 25, 1893, to complainant. The specification says:

"My invention relates to packing, storing, and shipping cases, and has especial reference to devices for securing the same against surreptitious opening and plundering. * * * In Fig. 1, A indicates the case, formed of

boards, a, a, properly nailed or otherwise secured together. B denotes a strap around the end of the box. A series of small holes, c, c, are made through the boards, entirely around the case; there being two holes in each board. D is the cord, which, for purposes of security, passes continuously in and out through said holes around the case. The ends of the cords are drawn tightly together and secured, usually by a leaden seal. A cord protection has heretofore been attempted, in which the cord was passed into a hole, as c', and out again through a hole, as c, in the adjacent board; thus crossing the seam, e, between the boards underneath the same, and within the box. But this method has proven to be ineffective, as the cord has been easily cut by a knife or thin file thrust in through the seam, e. Then, when the contents of the box have been removed, the ends of the cord have been tacked to the underside of the boards, so that when they have been replaced upon the box the cord appeared to be intact. In my invention the cord is passed in through a hole, c, and out through a hole, c', in the same board; then is crossed over the seam, e, on the other side of the box, and into the hole, c, in the next board. In like manner the joint at the edge of the box, which has been greatly exposed, is protected equally with the sides of the box. In my system, however, the cord at the edges is liable to injury from abrasion in handling. This difficulty I avoid by making notches or indentations, d, at each edge, in which the cord may lie."

The claims are:

"(1) In a packing and shipping case, a securing cord interlaced through each board, and crossing each seam only on the outer side of the case; its ends being tightly drawn together, and sealed in any manner preferred, as herein described. (2) In a packing and shipping case, a securing device, consisting in a series of holes around the case, and a cord passing in and out through said holes and notches, and continuously around the case, crossing each seam between the boards on the outside of the case, and having its ends drawn tightly together and sealed."

The patent was applied for October 13, 1892, but Haworth described his method of lacing some 18 months earlier to one of the officers in the steamship company where he was employed; and that company and some of its associated lines, approving such method, have sought to enforce it by charging higher rates for freight on boxes not secured in the manner set forth in the patent. Complainant fixes the date of his invention as May 18, 1891, when his attention was drawn to a packing case (containing cigars) which had been laced with the cords crossing seams on the inside, and had been tampered with in the way pointed out in the patent. Efforts to secure such boxes against similar tampering had been going on for years. From the statements in the patent, and from the evidence of complainant's own witnesses, it is manifest that prior to his alleged invention the art had progressed so far that boxes were in common use which had two holes bored in each board to receive a securing cord, and it was also common to lace the cord through each and every hole, into one hole and out of the next. The utmost extent of complainant's alleged invention consists, therefore, in so beginning the operation of lacing that when such operation is completed the securing cord will cross each seam on the outside. This is manifestly an extremely narrow invention, and defendants contend that it is not patentable, but it is not necessary to enter into any discussion upon that branch of the case. The evidence as to prior use seems to be sufficient to defeat the patent. Three witnesses are called who testify that for some time

prior to 1891 packing boxes were occasionally laced so as to cross seams on the outside. One of these is a defendant. Cross-examination brings out some contradictions in the testimony of the other two. The rule is well settled that evidence of prior use must always be closely scrutinized, and accepted with caution. Nevertheless this court is convinced that boxes were occasionally thus laced before May, 1891. The measure of proof required to establish any proposition must necessarily vary with its degree of probability. Here, upon the testimony of complainant's own witnesses, and on the conceded facts, it would seem to be an almost irresistible inference, even without any more direct proof, that boxes were so laced to secure them against thieves. It appears that the only purpose of cording was to obtain such security; that cording, of one sort or another, had been used for years; that, as one of complainant's witnesses states, it was in the early 80's when a series of holes (two to each board), and a cord passing in and out of those holes, came into use. Witness after witness testifies that during the period prior to 1891 packing boxes were "corded in different manners"; "different shippers had different methods"; there was "no systematic way of cording"; "no rule for any special system"; "no standard method"; that "a shipper was guided by his own judgment." When Fig. 1 is referred to, and it is borne in mind that the cord will cross the seams inside or outside according as it is first inserted into one particular hole or the adjacent one, or according as the operation of lacing is begun from the outside or the inside of the box, and that the result may even depend upon whether the man who does the lacing is right or left handed, it surely ought not to require much affirmative proof to establish the proposition that boxes during that period were sometimes laced with the cord crossing seams on the outside. Complainant's witness Walker says:

"There were two holes in each board. By starting the cord in one way, and bringing it out of the same board through the other hole, the cord passed across the cracks inside the case. By reversing the lacing, the cord passed over the cracks on the outside of the case."

Complainant's witness McKeon says:

"Now, to start the cord on the inside of the case, up through one hole, down through the other, would bring the cord over the seam on the inside of the case. On the other hand, if we start the cord on the outside of the case (that is, going down through one hole, and up through the other), it would bring the cord over the seams on the outside of the case."

Surely, before the steamship company prescribed a definite method of lacing, it must have been wholly a matter of chance whether a box was laced the one way or the other; and for that reason the evidence of complainant's witnesses, receiving clerks in freight lines, that they do not recollect seeing, prior to 1891, any boxes so laced that the cord crossed seams on the outside, is not particularly persuasive. The evidence of defendants' witnesses, on the contrary, confirms what the court might almost assume without proof. The bill is dismissed.

WYCKOFF et al. v. WAGNER TYPEWRITER CO.

(Circuit Court, S. D. New York. July 9, 1898.)

1. PATENT SUITS—PLEADING.

An averment that complainant has reason to believe that, unless defendant is enjoined, he "will continue to make and to use and to sell large numbers of the aforesaid typewriting machines, and thereby will cause great and irreparable loss, damage, and injury to your orator's aforesaid exclusive rights," is a sufficient averment of irreparable injury to maintain a bill for injunction.

2. SAME—ALLEGATION OF TIME OF INFRINGEMENT.

An averment of infringement "after the issuing of the letters patent as aforesaid, and after the 2d day of July, 1892, and before the commencement of this suit" (December, 1897), does not import that defendant has continuously, and ever since the date named, infringed the patent, and hence does not make the bill demurrable for laches.

3. SAME—EQUITY JURISDICTION.

A bill in equity for injunction and accounting may be maintained without averring that complainant has ever put, or allowed others to put, the invention in use, or that the validity of the patent has been acquiesced in, or established by an action at law.

4. SAME—AVERMENT OF INFRINGEMENT.

An averment that "said defendant * * * did, as your orator is informed and believes, without the license," etc., " * * * in infringement of the aforesaid letters patent, * * * make * * * and vend the said invention and patentable improvements," is defective, in that it lacks any positive charge that defendant does infringe. The correct form is, "that plaintiff has been informed and believes, and therefore avers," etc.

This was a suit in equity by Wyckoff, Seamans & Benedict against the Wagner Typewriter Company to restrain the alleged infringement of letters patent No. 466,947, issued to Horace K. Lamb January 12, 1892, for a typewriting machine. The cause was heard on demurrer to the bill for want of equity.

H. D. Donnelly, for complainants.

Arthur v. Briesen, for defendant.

LACOMBE, Circuit Judge. The ground of demurrer assigned is "that it appears upon the face of the said bill that the complainant is not entitled to any relief against this defendant in a court of equity." The various propositions upon which it is sought to maintain this demurrer may be separately considered:

1. It is contended that there is not any sufficient averment of irreparable injury. The language of the bill is that:

"Your orator fears, and has reason to fear and believe, that, unless the said defendant is restrained by a writ of injunction, * * * it will continue to make and to use and to sell large numbers of the aforesaid typewriting machines [i. e. Underwood typewriters, already averred in the bill to be infringing machines], and thereby will cause great and irreparable loss, damage, and injury to your orator's aforesaid exclusive rights."

This averment is in the usual form, and no authorities are cited holding it to be insufficient. The cases upon the brief are not patent causes, and go only to the extent of supporting the elementary proposition that a mere allegation that "complainant will suffer irreparable injury" is insufficient, without facts to sup-

port it. Here, however, the facts are alleged, viz. that defendant, if not enjoined, will continue to infringe the patent, leaving plaintiff to the unsatisfactory remedy of repeated actions for damages. This would seem to be a sufficient averment of fact to warrant the prayer for relief. *Manufacturing Co. v. Booth*, 24 C. C. A. 378, 78 Fed. 878.

2. The bill avers infringement "after the issuing of the letters patent as aforesaid, and after the 2d day of July, 1892, and before the commencement of this suit." Defendant contends that this sentence should be construed as charging infringement on and after July 2, 1892; and, since the suit was not begun until December, 1897, it further contends that the unexplained delay of five years should be sufficient to warrant dismissal of the bill on the ground of complainant's laches. That the phraseology of the averment above quoted does not import that defendant has continuously, and ever since the date named therein, infringed the patent, was expressly held in this circuit in *Brush Electric Co. v. Ball Electric Co.*, 43 Fed. 899, where precisely similar language was used in the bill. The objection must therefore be held unsound.

3. The contention mainly relied on by defendant is that the bill does not allege that complainant has ever put, or allowed others to put, the invention into use, by any manufacture, sale, or use thereof, nor that the rights of the owner of the patent have been acquiesced in, or its validity determined in an action at law. In support of the proposition that a patentee who does not manufacture, sell, or license under his patent is not entitled to injunction, defendant cites the case of *Hoe v. Knap*, 27 Fed. 204, in the Seventh circuit, and a dictum of one of the judges concurring in the decision of the circuit court of appeals in the First circuit in *New York Paper-Bag Mach. & Mfg. Co. v. Hollingsworth & Whitney Co.*, 5 U. S. App. 327, 5 C. C. A. 490, and 56 Fed. 224. In *Germain v. Wilgus*, 29 U. S. App. 564, 14 C. C. A. 561, and 67 Fed. 597, the court of appeals, in the Ninth circuit, held that there was no equity in a bill for injunction and accounting in a patent suit which contained "no allegations showing that this patent right had been long recognized by the public; no allegations showing that its validity had ever been determined in an action at law." The rule thus laid down would seem to introduce a most cumbersome, dilatory, and unsatisfactory practice. In cases where infringements commenced as soon as the patent was published to the world, it would be impossible for the patentee to show long-continued acquiescence by the public, and he could obtain no relief against infringements until after he had secured a verdict from a jury sustaining the validity of his patent. However valuable may be the conclusions of a jury in ordinary causes, it certainly seems to be the universal opinion of the bar in this circuit, as it undoubtedly is of this court, that such a method of determining the issues of fact in patent causes is most unsatisfactory. During the 11 years the writer has sat on the circuit bench, there has not been in this court a single jury trial in a patent cause. When one remembers the careful study of intricate machinery, the manip-

ulation of models, the reading and re-reading of technical evidence, the elaborate comparison of documents couched in language which certainly is not that of common speech, the close, hard thinking, sometimes prolonged for weeks, which, in the case of a complicated patent, has to be gone through with, before a judge, however long his experience with such causes, is able to reach a conclusion on the issues of fact, which, even if erroneous, presents at least the appearance of a logical train of reasoning in its support, it seems safe to say, a priori, that the decision of such questions by an ordinary jury, imprisoned for a few hours, with nought but their vague recollections of the evidence, would be a lottery. Their verdict might sometimes be correct, but it would rarely be intelligent. For these reasons this court is averse to rendering a decision which would introduce such a practice into this circuit, until constrained so to do by controlling authority. The points raised by the defendant were decided adversely to their proponent in this circuit in *Wirt v. Hicks*, 46 Fed. 71, and that decision will be followed here. See, also, *Campbell Printing-Press & Mfg. Co. v. Manhattan Ry. Co.*, 49 Fed. 930, and *Mill Co. v. Coombs*, 39 Fed. 803.

4. As to infringement, the averment of the bill is:

"Said defendant * * * did, as your orator is informed and believes, without the license," etc., " * * * in infringement of the aforesaid letters patent, * * * make * * * and vend the said invention and patented improvements."

It is suggested that there is lacking here any positive charge that defendant does infringe. The bill is open to this criticism. The correct form of averment is that set forth in *Story, Eq. Pl.* (8th Ed.) p. 249, viz. "that plaintiff has been informed and believes, and therefore avers." The objection is rather hypercritical, but appears to be sound. The demurrer is therefore sustained, with leave to complainant to amend, but without costs.

KELLER v. STRAUSS et al.

(Circuit Court, S. D. New York. July 11, 1898.)

PATENT SUITS—INTERROGATORIES.

Interrogatories requiring defendant to state how many of the alleged infringing articles he has manufactured since a given date, and how many he now has on hand for sale, are too broad. They should be confined to the inquiry whether he manufactured, used, or sold any of such articles, and whether he had any now on hand for sale. For complainant has no right to ask for the details of defendant's business until he has established the validity of his patent, and shown a right to an accounting.

This was a suit in equity by Arthur H. Keller against Jacob Strauss and Carl Strauss for alleged infringement of a patent. The cause was heard on exceptions to the answer for insufficiency, for that defendants have not answered interrogatories numbered 1 and 2.

Briesen & Knauth, for complainant.
Murry & Metcalf, for defendants.

LACOMBE, Circuit Judge. The suit is for infringement of a patent. The interrogatories are as follows:

"(1) How many toys of the construction of the toy hereto annexed and herewith filed, and marked 'Exhibit A,' did you manufacture, use, or sell, within the United States of America, since the 8th day of October, 1895, and before the commencement of this action? (2) How many such toys have you now on hand for sale?"

The toy, Exhibit A, is the patented article, and the date of the patent is October 8, 1895.

The complainant relies upon *Coop v. Development Inst.*, 47 Fed. 899, *Same v. Same*, 48 Fed. 239, and especially *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 83 Fed. 26. The practice sustained in these decisions is one to be encouraged, and there would be no objection to complainant's motion, if he had so confined his interrogatories as to propound the questions material to be decided upon the issues presented by the bill and answer, viz. whether defendants had infringed, and whether future infringements by them may be anticipated. Had he asked whether defendants had manufactured, used, or sold any toys of the kind claimed to be an infringement, and had any of such toys now on hand for sale, the answers called for would have been material, and, if answered in the affirmative, would have been sufficient to establish infringement and threatened infringement. But complainant has so expanded his interrogatories as to ask for details of defendants' business with which he has no concern until he shall succeed, at final hearing, in establishing the validity of his patent, and showing his right to an accounting. It is wholly immaterial to the issues raised by the pleadings how many infringing articles defendants may have made, used, and sold. The distinction here suggested apparently was not called to the attention of Judge Adams in the case in 83 Fed., but objection was made to the interrogatory as a whole, without any concession that the first half of it was entirely proper and material on the question of infringement. Complainant refers to a recent memorandum of Judge Wallace in *Regina Music Box Co. v. Paillard*. It contains nothing to indicate that proof of a single bona fide sale, under circumstances fairly warranting the inference that, unless restrained by injunction, defendant may be expected to continue infringement, is not sufficient to warrant the relief prayed for. Proof of a single sale was held sufficient in this circuit in *De Florez v. Reynolds*, 14 Blatchf. 505, Fed. Cas. No. 3,742. That case has been repeatedly followed, and never overruled. Certainly the memorandum in *Regina Music Box Co. v. Paillard* does not lay down any different rule. Probably, if the evidence in that case were examined, it would be found that there were some other defects in complainant's proof of infringement. The exceptions are overruled.

SCHWARTZ v. HOUSMAN.

(Circuit Court, E. D. New York. July 8, 1898.)

1. PROCESS PATENTS—INFRINGEMENT.

Infringement of a patent for a process of manufacture must be shown by satisfactory proof that defendant uses the process. Similarity or even identity of appearance in the product will not suffice.

2. SAME—INFRINGEMENT—METHOD OF EMBOSSED PAPER.

The Schwartz patent, No. 332,444, for an improvement in embossing plastic material, is confined to cards on which the whole surface sheet has been applied before the process of embossing begins, and does not cover any process for cutting letters or figures out of sheets of paper, and thereafter affixing them to the surface of the card.

3. SAME.

The Schwartz patent, No. 389,589, for an improvement in the art of "ornamenting cardboard with letters or designs, or both, for forming show, gift, or sign cards," in which the only novel feature claimed by the patentee is in so arranging the various operations that the same movement of the die cuts the letter out, and presses it upon the surface where it is to be affixed, is void for want of invention.

This is a suit in equity by Charles Schwartz against Moses Housman for infringement of two patents relating to the forming and embossing of cards, etc. Final hearing upon pleadings and proofs.

H. A. West, for complainant.

Wilton D. Donn, for defendant.

LACOMBE, Circuit Judge. This suit is brought upon two patents, both issued to complainant. The first (No. 332,444), dated December 15, 1885, is for an improvement in embossing plastic material. The specification sets forth that the invention—

"Relates more especially to a new method of embossing paper, and it has for its object to prevent the surface of the raised portions of the paper from cracking, as with the ordinary method, which gives the work a ragged and unfinished appearance. The invention consists in incising the upper surface of the sheet or card to be embossed with the outline of the letters or figures to be raised; the incisions being made relatively to the dies, and of sufficient depth only to pass through the upper layer or surface of the sheet, so that, when the sheet or card is submitted to pressure between the dies, the stretching of the fibers will not break or tear the surfaces encompassed by the incisions. * * * The sheet to be embossed has a thin facing sheet, usually of ornamental paper. Before submitting the sheet of cardboard to pressure between the embossing dies, I outline with a sharp instrument on the facing sheet the figures or letters to be raised in embossing the sheet. By the use of the sharp instrument the facing sheet is cut through, so as to sever from the remainder of the sheet the portion of the sheet which will be raised in embossing. In this manner the stretching of the fibers at [the edge of the raised portions] when the sheet is embossed does not break or tear the [raised] portions of the sheet, as by the old method, but leaves them flat and continuous, so that they form a perfectly smooth and continuous surface or finish for the raised faces of the letters or figures."

The claim is:

"The method herein described of embossing paper and other plastic substances, which consists in incising the upper surface of the sheet to be embossed in outline of the figure to be raised; and then subjecting the sheet to pressure in embossing dies, and raising the material along the lines of incision, substantially as and for the purposes set forth."

It is manifest that this patent does not cover any process for cutting letters or figures out of sheets of paper, the letters or figures being thereafter affixed to the surface of the card. On the contrary, the process of the patent is confined to cards on which the whole surface sheet had been applied before the process of embossing began. The very difficulty which the patentee sought to remedy arose because the surface sheet was already affixed to the card, wherefore the material was exposed to strains when letters or figures were embossed; the material forced outward by the bosses pulling away from the rest of the material rigidly fastened to the surface of the card, and thus producing cracks and tears. If the surface sheet were not attached to the card, no such difficulty would occur. Complainant's patent therefore must be confined to a sheet or card already surfaced. It will be noted, also, that the process is twofold: first ("before submitting the * * * cardboard to pressure between the embossing dies"), the letters or figures are outlined with "a sharp instrument" (apparently not the embossing die) on the facing sheet, the facing sheet being cut through so as to sever the portion "which will be" raised in embossing from the rest of the sheet; second, the sheet to be embossed is "then" (i. e. after the incisions) subjected to pressure in the embossing dies. An alternative method is pointed out, whereby the letters are partly cut out of the rest of the surface sheet before such sheet is applied to the card. In both methods the letters or figures are cut in whole or in part, and the whole surface material, including so much as is embraced in the letters and figures, and also the rest of the surface sheet, is secured to the card before the embossing process begins. Or, in other words, the process is one whereby the surfacing or surface or upper layer of a card may be itself embossed, along with the card, without showing any evidences of distortion either on its flat or on its elevated surface.

Inasmuch as the claim is for a process of manufacture, infringement must be shown by satisfactory proof that defendant uses the process of the patent. Similarity or even identity of appearance in the product will not suffice. The evidence upon which the complainant relies to show infringement is as follows: The defendant admitted that a certain ornamental cardboard sign, known as the "Cartridge Sign," was made by him. Complainant testified that his experience as a sign maker enabled him to say from mere inspection that it had been made by the methods described in his two patents. Cross-examination, however, deprives this testimony of any weight, since the witness admits, as to another similar sign, which he, in like manner, at first decided to be an infringement, that, when he was assured it was not made according to his process, he thought he must be mistaken. Finally he admits that the cartridge sign could have been made without the use of his process. John Schafer testified that since 1885 he has made for defendant both embossing and stamping dies for show cards, according to design, including embossing dies similar in design to the lettering of the cartridge sign; that he supposed the die was intended to be heated when in use, but that nothing was said about that; that all embossing dies have a cutting edge surrounding the outlines of the letter or figure; and

that he "thinks it likely" the embossing die used in the manufacture of the cartridge sign was used hot, so as to melt the size, and cause letters or figures to adhere to the card. Lizzie Carroll testified that she worked in defendant's factory. She seems to have had very little to do with anything outside of her own duties (putting on size), and evidently knew nothing about the cartridge sign. She said, however, that, in the making of embossed signs, they used to put the paper they used to stamp by on the cards, and then used to take them, and put them into the press and emboss them; that there was a die in the press, heated by steam, and after the stamping was done in the press they "took them out, and pulled the papers off, and embossed them, and then would have the letters formed"; that she "thinks" they used paste on the paper they put in the press; that the die cut out the letters and applied them to the card at the same time; when the card was put in the press, there "was nothing only paper" between it and the die. This is not very clear, but it seems to indicate a process by which a letter or figure is embossed on the cardboard; and upon such letter or figure, as its surface layer, there is affixed a piece of paper which had been cut in the required shape out of a sheet of paper, which sheet, as a whole, never became a surface layer at all, within the terms of the patent. Jacob Klebanaky, another employé of defendant, was either extremely stupid, or did not understand the English language sufficiently to answer intelligently. He was very positive that a certain sign, known as the "Rubber-Shoe Sign," was of defendant's make, but gave absolutely no information as to how it was made. Julia Hart, another employé of defendant, called by complainant, testified: That the show cards made by defendant were stamped in a press; paper and gold and silver leaf were put on the cards,—“just pasted on.” Then, when the cards are sized ready for the leaf, they laid the leaf on, and then they were stamped. That the paper, which was of a different color from the color of the cardboard, was cut out by means of a chisel, and pasted on the cardboard by hand. William Sochefsky, another employé of defendant, testified as to a certain sign known as the "Stocking Sign," and produced the die with which it was made. The process he thus described:

"The die was fastened to the press; a counter was made for same; the card embossed, colored paper laid on same, and re-embossed; the outside of the stocking which was cut out by the embossing removed. * * * The black paper representing the stocking is laid on the card, and put in press. The pressing of the die cuts off the edges, adheres the stocking part, and the remainder is removed. The edge of the die on the outside forms a depression around the edge of the stocking at the time of embossing. Q. Was it done at the same time with the cutting out of the black representation of a stocking? A. It was done with the first impression, and redone with the second. Q. What was the purpose of the first impression? A. To press down the cardboard so that, when the second impression is done, that the black paper will bend over such impression, and cover the edges of the same, thereby inserting the edges of the paper into the board; preventing same from being injured easily on the edges or removed."

In all this there is no indication of a process of preserving the surface layer of the card from cracking or tearing by cutting such surface layer through on the outlines of the letters and figures, and

thereafter, by means of embossing dies, elevating so much of such surface layer as is included within the cuts, leaving the rest of the surface layer in situ. So far as appears from the testimony of this last witness, the process employed cut the stocking entirely out, and pasted the cut-out stocking to the card after such card had been embossed by the "first impression"; the rest of the sheet of paper out of which the stocking was cut being entirely removed, and never at any time properly within the description "upper layer or surface of the card." The testimony is insufficient to establish infringement of the process of the first patent in suit.

The second patent, No. 389,589, dated August 28, 1888, is for an improvement in the art of—

"Ornamenting cardboard with letters or designs, or both, for forming show, gift, or sign cards; and the invention consists in cutting the ornament in a die, and at the same time applying it to the surface of the main card."

The claim is for:

"The method herein described of ornamenting cards in relief, which consists in placing a sheet of ornamental paper, coated with adhesive material, in a die having raised letters or ornaments, with sharp and raised cutting edges, then placing the sheet to be ornamented upon the coated surface of the ornamental paper, and subjecting both to a heavy pressure; thus cutting and sticking the latter to the sheet all at one and the same operation."

The patentee invented no new machine; he merely used the old instrumentalities, so supplemented and directed by manual operations as to reach the result aimed at; and it is only the method or process of overlaying described in the patent which the patent covers. It was old to cut letters out of paper of one color, and paste them on cardboard surfaced with paper of a different color. It was old to cover the paper with adhesive material before the letters were cut out. It was old to affix the cut-out letters by pressure. It was old to cut out letters by means of sharp-edged dies pressed down upon the paper. It was old to use dies in combination with a press. The only novel feature which the patentee claims to have introduced consists in so arranging the various operations that the same movement of the die cuts the letter out, and presses it upon the surface where it is to be affixed. It would seem not to require the exercise of any inventive faculty to devise such a process; and when it appears that a similar synchronizing of movement and function was well known in the art of inlaying wood (Chinnoek's patent, No. 133,697, December 10, 1872), and of cutting labels out of printed or lithographed sheets and affixing them to the ends of bobbins (English patent to Paterson, No. 42, of 1871), it is difficult to find in the process described by the patentee invention sufficient to sustain a patent. Decree for defendant on both patents.

THE RITA.

(District Court, S. D. New York. June 27, 1898.)

SALVAGE—DELAWARE BREAKWATER—EXTREME PERIL—SHORT SERVICE.

The R., having drifted within 50 or 100 yards of Delaware breakwater in a northeast storm, and being in extreme peril in case of any increase in the storm, was rescued by the tug P. in a few hours' service. One-eighth of the values saved was awarded, being \$3,466.

This was a libel in rem by William J. Minford and another against the bark Rita, her cargo and freight, to recover compensation for salvage services.

Peter S. Carter, for libelants.

Cowen, Wing, Putnam & Burlingham, for claimant.

BROWN, District Judge. The salvage compensation claimed in the above libel is for services rendered to the bark Rita by the steam-tug Protector in the forenoon of April 28, 1898, in coming to the relief of the Rita not far from the East Lighthouse at the Delaware breakwater during a severe storm, and towing her inside the breakwater. The towage service was altogether from one to two hours, from 9:30 to 11:30 a. m., although the tug lay by the Rita during the afternoon until about 6 p. m. A severe northeasterly gale had been raging for about two days previous. The tug Protector bound north with a tow had put in to the Delaware breakwater two days before. The Rita had come to anchor about a half mile outside of the breakwater, and up to midnight, preceding the salvage service, she had drifted to within about 50 or 100 yards of the breakwater, having lost most of her anchors. She had set signals of distress and was in a perilous position. Had she continued to drift and reached the breakwater wall before the storm subsided, there is no doubt that both ship and cargo would have been a total loss and that more or less of the crew must have lost their lives. In her behalf it is strenuously claimed that she was not drifting after midnight preceding the salvage service, and that her starboard anchor, the force of the storm having somewhat abated, was sufficient to hold her. The libelants have given some testimony to the effect that she was still drifting in the flood tide at the time when the Protector went to her relief at 9:30 a. m. The wind was then hauling to the northward and by the next morning it was northwest. This favored the Rita, and if not drifting when the Protector reached her, she would doubtless have escaped running upon the breakwater without help.

As respects the very important but controverted question whether the Rita was drifting when the Protector reached her, I am inclined to give superior credit to the testimony of the Rita's master and officers. Their opportunities for observing and knowing the exact truth were far superior to those of the libelants' witnesses, most of whom were not in a position to judge upon this point with accuracy. Had the Rita moreover been observed by the Protector to be drifting towards the shore from about 5 o'clock in the morning, when she first became visible to the Protector, it is not probable that the Pro-

pector would have delayed making earlier and more persistent endeavors to reach her. It is said that the Protector waited until the sea somewhat abated; and this partial subsidence of the storm makes more probable the truth of the testimony of the officers of the Rita, that she was not then drifting.

The situation of the Rita was nevertheless one of extreme peril, in case the violence of the storm should be renewed; and the help rendered to her was most timely and efficacious. She was rescued without loss.

The value of the Protector was \$20,000. She was insured for only about \$12,000. The value of the Rita, with stores and freight, was about \$5,000; and her cargo of sugar was valued at \$22,727, all of which must have been a total loss had she drifted upon the breakwater. In rendering the salvage service the Protector sustained no loss; but she was exposed to some sea perils. Taking all the circumstances into account, I think an allowance of one-eighth of the values saved will be an appropriate, liberal and just compensation, and in consonance with the principles on which salvage awards should be based, as expressed by Mr. Justice Bradley in the passage so often quoted from the case of *The Suliste*, 5 Fed. 102. Of the award, one-third should go to the master and crew and the residue to the owners. One hundred dollars should be first paid to the master from the one-third, and the rest divided among the master and crew in proportion to their wages.

Decree accordingly with costs.

THE VICTORIA.

(District Court, S. D. New York. May 10, 1898.)

TUG AND TOW—DUTY TO LAND TOW CAREFULLY—PROOF OF VIOLENCE.

A loaded canal boat was landed by the V. at night at the end of Rockland Pier. Soon afterwards she leaked so that she had to be beached. The crash of the landing was heard. The blow threw dishes from the cabin cupboard, and two planks were found cracked and a third sprung off at one end of the canal boat. *Held*, sufficient evidence of a violent landing to make the tug liable for loss of the cargo.

This was a libel in rem by Horatio G. Craig & Co. against the steam-tug Victoria, to recover damages resulting from alleged negligent towage.

James J. Macklin, for libelants.

Amos Van Etten, for claimant.

BROWN, District Judge. There is no doubt that tugs in undertaking the towage of canal boats as well as of any other craft, are entitled to assume, in the absence of notice to the contrary, that the boats are in reasonably sound condition and able to receive without damage all the usual and ordinary contacts of navigation, whether in making up or shifting the tow, or in landing the boats at the piers. But this rule in no way justifies any rude, rough or indif-

ferent handling of boats, nor absolves the tug from the duty of navigating with reasonable care, so as to avoid contracts that may become injurious. In every case the question of liability for damage must be determined from all the circumstances in evidence, depending on whether the blow was one of unnecessary violence, and therefore indicative of lack of reasonable care, under the circumstances of the case.

The Victoria in this case took the libelants' canal boat from the tow in mid river, a little above Rockland Lake, for the purpose of landing her at the end of the dock at that point, whence she might afterwards proceed across the river to Tarrytown. There was nothing in the circumstances of the wind or weather, the wind being from the westward, to make the landing at the Rockland Lake Dock at this time difficult, or in any wise different from ordinary landings at night. The tug came down nearly in line with the dock, on the last of the flood tide, and the starboard bow of the canal boat struck the spring piles at the upper corner of the dock. In a few moments afterwards she was found to be leaking so badly that she had to be beached in the basin. Subsequent examination showed that two planks in her starboard bow at about the light water line were cracked, and that another plank lower down and running from the stem obliquely downwards and partly beneath the bottom, was sprung off at the lower end, so as to admit water freely. A disinterested witness inside the basin and asleep upon his boat, was awakened by the crash; and the blow was sufficient to burst open the door of the cupboard in the cabin of the canal boat and throw the dishes out upon the floor. This is certainly not an ordinary mode of landing. The circumstances seem to me to indicate very clearly a too rapid approach to the pier, and a landing altogether unjustifiable where there are no special circumstances of difficulty from wind, waves or weather.

There is some difference in the testimony concerning the proper respiking of the planks of this boat that ran underneath the water line. There is some evidence supporting the captain's testimony that the boat had been respiked since she was built in 1891; but there is no distinct evidence that more than one new spike was placed in the plank that started off. This new spike however was in the end that started off, and all the spikes both new and old in that part of the plank, were broken by the blow.

It is unnecessary to make any finding as regards the perfect sufficiency of the spiking of the plank in question, since the canal boat is not a party to this action. I cannot avoid finding upon the evidence that the contact was one of unnecessary violence, and without reasonable excuse; and that the tug is, therefore, answerable for the damage resulting to the cargo.

Decree accordingly.

LINKLATER v. HOWELL et al.

(District Court, S. D. New York. May 10, 1898.)

1. CHARTER PARTY—CONSTRUCTION OF DUNNAGE CLAUSE.

The provision that a charterer shall "furnish rattans, sapan wood and bamboos at charterer's option as much as required by the master" does not require the master to call for or use such woods when the ship already has a sufficient supply of customary wood dunnage.

2. SUGAR CARGO—SHORT DELIVERY—SEA PERILS—CUSTOM-HOUSE WEIGHTS—FREIGHT PAYABLE.

Of a cargo of 14,263 baskets of sugar shipped in Java, 52 were broken up or missing on delivery at New York: of the 52, 27 could be identified by pieces; the remaining 25 were represented by a heap of small fragments. The vessel met heavy weather, and in a part of the cargo many bags had burst and there had evidently been much working and breakage from rolling and pitching. On arrival the weight was carefully taken by the custom-house authorities, showing less than the ordinary loss of weight as compared with that given by the bills of lading, but considerably less than the weights taken by unofficial weighers, 15 months afterwards. *Held*, that the custom-house weight was entitled to superior credit as to the weight on arrival, and that freight should be computed on that weight; that the evidence indicated a delivery by the ship of all the sugar received on board, and that the 25 missing baskets were sufficiently accounted for by sea perils and the promiscuous fragments, and that no shortage was established.

This was a libel in personam by William Linklater against Benjamin H. Howell and others to recover freight under a charter party.

Convers & Kirlin, for libelant.

Butler, Notman, Joline & Mynderse, for respondents.

BROWN, District Judge. The questions at issue are whether the consignees of the sugar should pay freight according to the weight as determined by the custom-house weighers, or as indicated upon a long subsequent weight, as well as pay damages for the nondelivery of 31 baskets of sugar.

I have examined the evidence and the briefs with care. It will be sufficient to state my conclusions without a discussion of the very numerous and complicated details involved, or a specific reference to the arguments of counsel.

1. The weight of evidence clearly establishes that the dunnage was sufficient and in accordance with the customary practice for such cargoes.

2. The provision of the charter party that the charterer should furnish rattans, sapan wood or bamboos at charterer's option "as much as required by the master" was not designed to dispense with the use of such ordinary wood dunnage as the ship might have, but only to require the charterer to make good any deficiencies in what the ship had by a supply of dunnage of the kinds specified, those being the kinds most easily obtainable in Java. As the ship had a sufficient supply of ordinary wood dunnage, the master had no right to demand of the charterers a supply of additional dunnage, nor did he do so; and the charterers did not offer to furnish any bamboo dunnage to be used in place of the ordinary wood dunnage, which the ship

already had. This is evidence of the practical construction placed on this clause by both parties.

3. The number of baskets broken and destroyed was unusually large. The parts of 27 baskets were identified, and are thus specifically accounted for. Of the number mentioned in the bill of lading, 6 being noted as disputed and one being lost overboard, there remain 25 represented only by promiscuous fragments. It is impossible to say however that the large heap of débris, including the fragments of baskets so much ground up or broken as to be incapable of being put together as baskets, is not sufficient to represent the missing 25; and if the weight of the custom-house weighers is to be accepted as correct, the result shows much less than the usual loss of weight in the transportation of such a cargo; so there would be no sufficient ground to suspect from the absence of complete identification of all the baskets that the ship had not delivered all the sugar she had received on board. There is general evidence that she did deliver all she received except one basket lost in discharging.

Doubtless a reasonable account must be given for the failure to deliver the requisite number of baskets in specie. *Kerruish v. Refining Co.*, 42 Fed. 511, and 49 Fed. 280. But I think this is sufficiently done. The bark encountered heavy weather. In one gale nearly half her sails were blown away, and she rolled heavily for about 30 days. The baskets were from different districts and of different degrees of strength. When affected by dry rot they become brittle. The whole number of baskets was 14,263. The evidence shows that the principal loss of baskets was in the second, third and fourth tiers from the bottom, in the forward part of the hold. This indicates the probability that that portion of the shipment might have been in baskets of inferior quality; and when once some vacant spaces were made by the bursting of some baskets, others next to them of quality similar would be likely to be broken, and afterwards in the continuous working of the cargo during long-continued heavy rolling the broken baskets would naturally be more or less ground up into fragments incapable of being pieced together. The small number of only 25 that became indistinguishable except as fragments in a cargo of upwards of 14,000, seems to me in no way incredible or improbable under the circumstances proved, and not indicative of any appropriation of the baskets on the part of the ship or her crew. I think, therefore, that the broken unidentified baskets are sufficiently accounted for by the circumstances of the voyage and included in the excepted sea perils. See *The Warren Adams*, 20 C. C. A. 487, 74 Fed. 415, 416; *The Sandfield*, 79 Fed. 375; *The Mauna Loa*, 76 Fed. 837.

4. The custom-house weight of the sugar taken on the discharge of the cargo shows a less percentage of loss than usual on such voyages. But the testimony on both sides is strong as to the care and accuracy of the custom-house weighers; and the percentage of loss on such voyages varies greatly under different circumstances.

5. The weights taken subsequently, after 15 months' storage at Hoboken including two summers, cannot be accepted as evidence of the weight of the sugar on arrival 15 months before, superior to

the evidence of the custom-house weighers, who carefully took the weight at the time; certainly not in the absence of any positive proof as respects the care of the sugar meantime, and the possible causes of loss of weight in the interval. Freight was payable on delivery and according to the weight. No objection was made to the custom-house weight at the time of discharge, but only to the failure to produce the 25 or 30 missing baskets; and the proofs, as I have said, sufficiently account for these. Had any exception been taken by the consignees to the custom-house weight, it should have been made at the time of discharge. It is said that the cost of reweighing would always exceed any probable error. If that is so, it confirms what is otherwise indicated as the practice and the understanding of both parties when freight is to be paid according to the weight of sugar delivered, viz. that the custom-house weight should be accepted for the purpose of computing the freight due. As the ship is entitled to the payment of freight on delivery, and the consignee is not entitled to delivery except on payment of freight, if either party is dissatisfied with the official weight, steps should be at once taken to ascertain the true weight in order that the ship may receive her freight and the consignee his goods. If this is not done, and delivery of the sugar is made and accepted upon the basis of the custom-house returns without objection at the time, such weight should be regarded as the agreed weight, not to be subsequently set aside except upon very clear and conclusive evidence of mistake. Here there is no such clear evidence. There are too many doubtful circumstances to give the subsequent weighing any superior credit. There may have been loss during the interval of 15 months through repeated handling of the sugar, or by pilfering or theft; the heat of two summers in a Hoboken warehouse would naturally dry out the sugar; the additional loss of weight during those 15 months, even if the subsequent weighings were accurate, was at about the same rate only as the loss arising during the 6 months that the sugar was in the ship's hold subject to much less drying influences; and the subsequent weighing may have been less exact, the testimony being that the weights returned by private weighers are usually somewhat smaller than the returns of the custom-house weights.

The libellant is, I think, entitled to the amount claimed, less the value of the basket lost overboard.

TRINIDAD SHIPPING & TRADING CO. v. FRAME, ALSTON & CO. et al.

(District Court, S. D. New York. February 23, 1898.)

GENERAL AVERAGE—STRANDING—FAILURE TO SUPPLY PROPER CHARTS.

The steamship I. stranded on Nevis Island far outside of the direct course to New York, and the line of the sailing directions. She was not fully supplied with proper charts, and was directed by the owners to skirt the Windward Islands for the entertainment of passengers. *Held* that the owners were responsible for the lack of charts and for the risks of the course they directed, and could not claim general average against the cargo for the expenses caused by the stranding.

This was a libel in personam by the Trinidad Shipping & Trading Company against Frame, Alston & Co. and the Marine Insurance Company to enforce a claim for general average.

Cowen, Wing, Putnam & Burlingham, for libelants.

Butler, Notman, Joline & Mynderse, for respondents.

BROWN, District Judge. In the afternoon of March 23, 1896, in clear, calm weather, the Irrawaddy, an iron steamship 350 feet long, 1,697 tons net register and drawing $21\frac{1}{2}$ feet, while on a voyage from Granada to New York, with general cargo and about 20 passengers, struck on a coral reef near the southwestern part of Nevis Island, one of the Windward Isles. In about 10 days, and after removing part of the cargo, she was pumped out and hauled off, towed into St. Kitts, and repaired sufficiently to complete her voyage to New York. A general average statement was then made up, in which the respondents as cargo owners were charged with \$3,459.93. Of this sum \$1,594.93 was on account of the loss and damage to the shipowners, the residue was for the damage to cargo. The respondents paid the amount assessed on account of the cargo, but refused to pay the amount assessed in respect to the alleged sacrifices of the shipowners, on the ground that the accident arose through the improper and negligent navigation of the ship too close to Nevis Island under instructions from the libelants, and also because the ship was not equipped with sufficient charts and sailing directions for navigation in those waters, nor was the master acquainted therewith. The libel was filed to recover the balance of the general average assessment.

The place of the stranding is approximately fixed by the testimony of the master of the Irrawaddy, who states that the southern extremity of Nevis bore from the ship E. $\frac{1}{4}$ S. The ship was stranded upon two ridges of rock rising about 6 feet from the bottom running about E. and W., 30 feet apart, and each about 12 feet wide and about 60 feet long. While the ship lay stranded the master took soundings and found five or six fathoms of water for a considerable distance around. The distance to the shore was not measured, but was estimated at about three-quarters of a mile. The master had not previously been in these waters.

The vessel was one of a line, known as the Christall Line, running between New York and the Windward Isles. She had taken on cargo at Trinidad, proceeded to Granada where she completed her loading, and left Granada bound for New York without further stop. In the direct course of such a voyage, she would not naturally approach Nevis within 10 or 15 miles in following the sailing directions, or the special charts of that region. The superintendent of the line, however, had given instructions, and it was common practice for vessels, to go much nearer to the islands along the route, for the entertainment of the passengers, and the line was advertised to run in this way. A few minutes before the ship struck, the captain had consulted his blue print chart, which he testifies was the only chart supplied to him. This chart was upon a small scale, and gave no indication of reefs or shoals. The enlarged special charts of the Windward Isles indicate the proper course to New York, and refer to reefs and shoals

along the west side of these Islands which are to be avoided. The printed sailing directions supplied to the master do state that "the south coast of Nevis should not be approached nearer than a depth of 12 fathoms." The island is of volcanic origin, and coral reefs are known to skirt its borders. The master states that the reefs on which he ran were known to fishermen. He himself was not familiar with the waters; but was told of the usage to run within one-half a mile of the shore, and from evidence on the libelants' part, it appears that other masters were accustomed at times to go near the shore for its interest to passengers.

There is some evidence tending to show that a copy of the enlarged map was on board the Irrawaddy, brought on board by the previous master, Capt. Legg. His testimony on this point, however, is not positive; and the explicit statement of Capt. McMillan, that he had no other chart than the blue print should, I think, be accepted as correct. The enlarged chart shows an irregular contour line about the south-west portion of Nevis with an elbow-like projection marked on the chart $3\frac{1}{4}$ fathoms within 1,000 feet of the very spot marked by Capt. McMillan as the place where he stranded. Upon so small a difference as that, in the absence of exact measurement of the reef from shore, I am by no means certain that the reefs on which the vessel struck are not designed to be marked by the projection of the three fathom contour line above referred to. Had such a map been before the master, showing such an irregular contour line, of $3\frac{1}{4}$ fathoms at this point, which was $3\frac{1}{4}$ feet less than his draft, it is scarcely conceivable that a prudent master, even under general instructions to give passengers a view of the shore of Nevis, would have ventured so near as within 1,000 feet of this projecting point. The absence of the enlarged chart, which the respondents' testimony shows ought to be in the hands of every navigator in those waters, I must therefore regard as directly contributing to the accident; and that for the want of it the libelants are responsible.

Aside from this, I am of the opinion that the instructions of the company to pursue navigation so widely deviating from the safe routes and so near to islands skirted with coral reefs, involves them in responsibility such as to exclude them from making general average charges for their own indemnity. The positive sailing directions that the south coast should not be approached nearer than a depth of 12 fathoms, as well as the chart referring to the shoals, clearly points out the path of safety, and the danger of a near approach to these islands, and it should have been observed by all concerned, in the absence of thorough soundings, and of maps precisely locating the places of all reefs. The testimony on the part of the libelants seems to me wholly insufficient to establish the reasonable safety of the course taken, or to make it consistent with prudent navigation such as can rightfully charge cargo owners with the risks attending it, as risks properly belonging to the class of sea perils or dangers of the sea.

For these reasons I must hold the respondents discharged of any obligation to pay a general average assessment merely as indemnity to the owners for their own losses. In the recent case of *Chrystall v. Flint*, 82 Fed. 472, it was held that where, under the provisions of

the Harter act, the owner is exempted from responsibility for a negligent stranding, he might recover in general average for his own indemnity. This was upon the ground that in such cases the faults of navigation are no longer imputed by law to the owner as his own faults. The case has no application where the owners have failed to supply the master with proper charts for the voyage, or where by particular instructions they have contributed to the imprudent navigation that led to the disaster. In such cases the owners are themselves in fault, and under the general rule are, therefore, precluded from having a general average charge for their own indemnity. The Ontario, 37 Fed. 222; Van den Toorn v. Leeming, 70 Fed. 251.

The libel is therefore dismissed with costs.

THE PRUSSIA.

(District Court, E. D. New York. June 23, 1898.)

CARRIAGE BY SEA—PRESERVATION OF REFRIGERATED MEAT—BILL OF LADING.

The storage and preservation of dressed meat in a refrigerator during the transportation thereof by a vessel is no part of the usual duty of a common carrier, and his obligation concerning the same may be a matter of contract; but, in the absence of contract, the law implies that a person contracting to furnish cold storage has used reasonable care and skill to provide suitable refrigerating machinery and plant, and that he will observe like care and skill to properly maintain and operate the same during the voyage. A person so furnishing cold storage may stipulate his precise duty and obligation, even to the extent of entirely relieving himself of liability, but law will not interpret a contract, so as to exempt such person from the exercise of due and reasonable care, unless such exemption is plainly and unequivocally stipulated. A provision in a bill of lading that the risk of due refrigeration shall be borne by the shipper, even though damage be caused by the neglect of the carrier's servants, does not excuse the carrier from the exercise of reasonable care to provide a proper plant for that purpose. Although a stipulation for exemption from liability be in part in contravention of law, and hence void, yet such portion as is otherwise valid may be preserved and enforced.

(Syllabus by the Court.)

This was a libel in rem by the Insurance Company of North America against the steamship Prussia to recover for loss occasioned by deterioration of refrigerated meat while in course of transportation by said vessel.

Wheeler & Cortis, for claimant.

Black & Kneeland, for libellant.

THOMAS, District Judge. The question presented in this action is as follows: Competent persons were employed by her builders to place in a new ship an apparatus which, when in order, and properly operated, sufficiently reduced the temperature in a room appropriated to carrying dressed meat so that such commodity might be carried safely. Previous trials of the machinery, first by the owners, and later, on May 29, 1894, under the supervision of the representatives of the makers, builders of the ship, and of the present shipowners, successfully tested its efficiency and mechanical working, and it did

in fact operate properly from Belfast to Hamburg, and from Hamburg to New York, where, on or about July 14, 1894, a full cargo was for the first time subjected to it; but on the second day out from New York the efficiency of the machinery was impaired, because a small piece of leather, from an unknown cause, was present in one of the valves, interrupting due action, and allowing the temperature to rise to such an extent that the meat deteriorated.

By what rule of law is the case governed? A common carrier warrants that he will deliver safely at their destination all goods whose carriage he undertakes, loss or injury from inevitable accident, or irresistible force, and lawfully exempted causes, excepted. But this warranty has never been thought to cover injury to goods from every cause, but rather to insure against any or all injuries, acts, and conditions extrinsic to the goods themselves. Against any or all injury resulting alone from the quality or constituent elements of the goods, it does not insure. For every outward act or agency save those excepted by law or contract, it is absolutely responsible; but for deterioration of quality, arising from the nature of the thing, it is not liable. If the damage proceeds "from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight," unless the masters and owners are in fault, or unless their contract of shipment contains an insurance or warranty against such an event. *Clark v. Barnwell*, 12 How. U. S. 272, 282, where the damage done to cotton thread by dampness of the hold of the vessel, not occasioned by bad stowage, or any negligence of the master or mariners, was held to be an "accident of navigation," within the exception of the bill of lading. Hence loss from evaporation or leakage of liquids (*Nelson v. Woodruff*, 1 Black, 156, 161; *Warden v. Greer*, 6 Watts, 424; *Ang. Carr. c. 6*, 215), from intrinsic acidity and fermentation (*Nelson v. Woodruff*, 1 Black, 156, 161; *Farrar v. Adams*, Bull., N. P. 69) liquefaction of solids and consequent expansion, loosening the hoops of the containing vessel or barrel (*Nelson v. Woodruff*, 1 Black, 156, 166), are not within the warranty of the carrier.

In *Carv. Carr. by Sea*, §§ 12, 13, the rule is stated as follows:

"A further exception at common law, which was not expressly stated in the earlier cases, but is well established, is that a carrier is not responsible for a loss or damage which has resulted from an inherent quality or defect of the thing carried. For example, in the case of animals, he is not responsible for the progress of disease in them, or for injuries arising from their own vice or timidity,"—citing *Nugent v. Smith*, 1 C. P. Div. 423; *Blower v. Railroad Co.*, L. R. 7 C. P. 655; *Kendall v. Railway Co.*, L. R. 7 Exch. 373; *Williams v. Lloyd*, W. Jones, 179.

See, also, *Clarke v. Railroad Co.*, 14 N. Y. 570; *Bissell v. Railroad Co.*, 25 N. Y. 445; *Cragin v. Railroad Co.*, 51 N. Y. 61; *Mynard v. Railroad*, 71 N. Y. 180; *Evans v. Railroad Co.*, 111 Mass. 142; *Wheeler*, Mod. Law, Carr. 98, and the cases there cited.

The same author continues:

"So in the case of perishable goods, such as fruit and hides, he does not answer for their decay or deterioration; nor for the heating or weeviling of

grain; nor for fermentation, acidity, or effervescence in fluids, when these changes are the results of ordinary processes going on in the things themselves, without the aid of causes introduced by the shipowner. * * * Where, however, a loss which may be traced to an inherent quality or defect of the goods has arisen, not from the ordinary development of that quality or defect, but from adventitious causes introduced by the carrier, the same rule does not apply. So that, if the ordinary consequences have been aggravated by the manner in which the goods have been stowed in the ship, the shipowner is responsible, though it may not appear that there was any negligence in so stowing them."

This statement seems quite correct, save the suggestion that the carrier may be liable for adventitious causes, although no negligence appear. The liability of a common carrier can arise from an absolute obligation to carry safely at all events, or from default in not exercising proper care and diligence respecting the thing carried. *Mynard v. Railroad Co.*, 71 N. Y. 180. Hence, if the carrier, by his negligence, introduces or permits the existence of adventitious causes, whereby the action of the inherent quality is detrimentally promoted, the carrier is liable. In other words, the duty of exercising some diligence rests upon the carrier, and this care must have reference to the nature of the goods carried. Goods of known tendencies to deteriorate should not be stowed or so exposed or so handled as to give activity to the harmful propensity. But how far must the carrier go in the direction of affirmative care? Goods prone to become damp, and to be injured thereby, should be placed in a dry hold; goods likely to be injured by absorbing foreign odors should be classed in stowage so as to escape deleterious contacts; goods of recognized peculiarity to injury from particular conditions should be removed from associations tending to produce such injury; goods that deteriorate from heat or cold should not be exposed unnecessarily to such influences. It may very well be that whatever has a tendency to be injured by heat or by cold should be assigned to a place, in the distribution of the cargo, where its disposition would not be excited; but this would not require the carrier to create an artificial climate adapted to the preservation of goods, and to warrant that the heat or cold thus furnished should be unvarying and efficient. Such an obligation upon a common carrier never existed, and there is no judicial suggestion of its propriety. Assume, then, that a carrier undertakes to add the business of cold storage to his regular occupation. Here is a duty not imposed by law, a duty totally unknown to the peculiar obligations of common carriers. The principle which imposes the obligation of an insurer upon a common carrier has no relation to it. Dressed meat has a tendency to decay. It is the primary duty of the shipper to make such provisions as shall arrest such tendency, or take the risk of the tendency. It is the primary duty of a common carrier, to the extent above stated, to introduce or to permit the introduction of no agency which will excite or develop such tendency. Aside from this he takes no risk. If the carrier undertakes the duty of the shipper, and thereby relieves the latter, the obligation must rest entirely upon contract, as the obligation of a common carrier does not require him to do so. This contract is quite collateral to the obligation of a common carrier, and hence may im-

pose such full or qualified obligations upon the bailee as the parties to it determine. In the present case, the business of refrigerating meat is superadded by the carrier. In the carriage of food supplies of this kind from the vast grazing countries of the world for distribution in different ports such a system of refrigeration is necessary from a commercial standpoint. Without it, the freight would, indeed, be carried in the usual undressed form, provided the cost of transportation and dressing at the port of delivery, or other place, rendered the commerce profitable. But the convenience or necessities of the shippers, and the markets supplied by them, justify and demand transportation of dressed meat, and to effect this result the minds of the shipper and carrier must meet in contract respecting the refrigeration. Such contract for cold storage on ship is of the same precise nature, and has the same latitude, as a contract for a similar purpose on land. It may take the form of an absolute undertaking, whereby the carrier—not as such, but as a bailee for hire—insures the shipper that until delivery of the meat its tendency to deteriorate should be arrested; or the bailee may warrant that he carries a refrigerator of a certain description and efficiency, in working order, and that the meat shall be placed and kept under its influence. Such was *Sansinena v. Houston*, 7 Asp. 150; *Id.* 311. In one case there is a warranty of safe delivery; in the other a warranty of the proper action of a suitable refrigerating plant. In the third case, the contract might be that the carrier would use reasonable diligence to provide and keep in efficient operation proper facilities for preserving the meat. See *Townsend v. Rich* (Minn.) 60 N. W. 545.

At this point it may be considered whether the carrier could engage in the business of cold storage and yet place the risk of the due construction and operation of the plant entirely upon the shipper, in which case the carrier would not be liable, (1) for any lack of care in the construction or existence of proper devices for preserving the freight; (2) for any lack of care in the operation of such appliances. Logically, it is not apparent why two persons, at liberty to make or decline a contract, should not be free to stipulate just what should be provided, and what, if any, care should be used in regard to the thing provided. Negligence, in such a case, would arise from the breach of a contractual duty; and, as the carrier would be under no obligation to contract, he could, with the concurrence of the other party, appoint the duty which he was required to fulfill. If he did not assume duties, there could be no breach of them, and hence no liability. It is impossible to conceive that a person not obligated to do an act or to render a service may not contract with reference to it, with such limitation upon his liability as he may state with the consent of the other party. Where a common carrier is bound by law to carry, he may not absolve himself from all liability for due carriage, for he thereby negatives his duty to do what the law commands. But when the law commands nothing, the carrier, by contracting qualifiedly, denies nothing that the law requires of him. However, the law will not readily ascribe to a shipper the utter folly of contracting to send dressed meat by ship fitted with a refrigerator, and

at the same time of stipulating to take all the risk of the due construction and operation of the same. It has been considered that when a person offers facilities for cold storage, and receives goods for preservation, the law implies that such person warrants the provision of proper facilities, and the sufficient operation thereof. The *Maori King v. Hughes* [1895] 2 Q. B. 550; *Queensland Nat. Bank v. Peninsular, etc., Co.* [1898] 1 Q. B. 567, and cases there cited. *Warehouse Co. v. Maxfield*, 8 Misc. Rep. 308, 28 N. Y. Supp. 732, may also be consulted. However, in the absence of an express contract warranting safe stowage, it is consonant with the usual obligations of bailments of this nature that the law should imply that the bailee will use such reasonable care in the preparation of the refrigerating machinery and the operation thereof as a good business man, who undertook to preserve the meat, would exercise under the circumstances. The bill of lading in the present case stipulates that the Hamburg-American Packet Company had received from the shippers, to be transported by the steamship Prussia (in refrigerator), 600 quarters dressed meat, to be delivered in the like good order and condition as received at the port of Hamburg; and that the carrier should not be liable for loss or damage occasioned by heat, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods, or the insufficiency of the packages. Stamped upon the bill of lading was the following:

"Dressed Meat Clause.

"It is expressly agreed that the goods named herein are shipped and carried at the sole risk of the shippers or owners thereof, and that the shipowners shall in no case be responsible for any loss or damage thereof, or in any wise relating thereto, whether such loss or damage arise from defects or insufficiency either before or after shipment, in the hull of said steamer, or in her machinery, boilers, or refrigerating chambers machinery, or in any part of the refrigerating apparatus, or in any material, or the supply or use thereof, used in the process of refrigeration, and whether such loss or damage, however arising, be caused by the negligence, default, error in judgment of the pilot, master, officers, engineers, mariners, refrigerating engineers, or other servants of the shipowners or persons for whom they are responsible, or by negligence in stowage."

If the bill of lading were construed to contain a stipulation to deliver the meat in good order, this clause of exemption would relieve it, save so far as loss might arise from the bailee's negligence; for it will be observed that the stipulation, so far as it attempts to relieve the carrier from the results of negligence, concerns the negligence of those to whom the carrier stands in a relation of respondeat superior, and does not purport to relieve the carrier from injuries arising from its own negligence. Hence, if the injury resulted from the carrier's own negligence, it is liable. The duty relates to the furnishing of a proper refrigerating machine. This was a duty belonging to the principal, and was not remitted, so far as appears, to its servants. Before it can be known whether the bailee was negligent in discharging this duty, it must be ascertained what degree of care it was obliged to use to prevent defects of the kind existing in the present case. The advocate for the libellant likens the care to that required of a common carrier of passengers. Such a contention

cannot be sustained. The highest degree of diligence and skill is exacted of a common carrier of passengers because highly dangerous agencies are employed for the purposes of transportation, and the slightest misuse of the same may be destructive of human lives. There is no similitude between such a bailment and one to carry dressed meat in a refrigerator, when, in the absence of a warranty, only such reasonable care would be required as a good business man would observe under the circumstances. Men of high repute for skill and diligence were employed to construct the plant, and experts were provided to test it. The system itself was approved and satisfactory. The coils were, before the parts were marshaled, tested by currents of air and water passed through them. The combined machine was tested before the ship sailed from Belfast. It was operated between Belfast and Hamburg, and between Hamburg and New York, and there was no failure, and so for two days out from New York it worked unexceptionally. Meanwhile the little piece of leather had reached the valve, whose action it interrupted. An expert sent out by the manufacturer was present, but his skill was unavailing to discover the difficulty, and it was only after a prolonged examination after the ship came to port that the true cause of the interrupted function was revealed. In all this there was no lack of reasonable diligence. But how did the leather find its way in the coils of the tube? Was there any negligence in that regard? There is no evidence on this subject. It is conjectured that the leather might have come into the tubing while it was in the shop, or might have been disconnected from a leather washer by the action of the machine. This leaves nothing but the unexplained presence of the bit of leather from which to infer negligence. Does the condition itself indicate negligence? This would involve an application of the doctrine of *res ipsa loquitur*. But such doctrine has no application to the present case, and it is never correctly applied save "(1) where the relation of carrier and passenger exists, and the accident arises from some abnormal condition in the department of actual transportation. (2) Where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property, and is so tortious in its quality, as, in the first instance, at least to permit no inference save that of negligence on the part of the person in the control of the injurious agency. This second class principally concerns injuries to people in the street from flying or falling missiles, obstructions, excavations, and the like, but may also include casualties in any relation where the elements stated in the definition are present." Thomas, Neg. p. 574. Moreover, it must be considered that great care and repeated experiments were had to discover whether there was any cause likely to impair the mechanical action. It is therefore concluded that the claimants were not negligent, and, as it has already been found that they lawfully stipulated against any contract of warranty, their liability is not established.

In reaching this conclusion, the argument of the learned advocate for the libellant has been studiously considered. As has been stated, the claimant, in providing a refrigerator, was not acting as a common

carrier. This stipulation for exemption in this regard did not concern its duty as a common carrier, but was a mere collateral undertaking, respecting which its liability would be measured by the terms of the contract made. The stipulation in some of its parts is inoperative, but such illegal limitation does not impair the valid provisions. It is not a rule, in the interpretation of contracts, that all is void because a part is prohibited; rather the valid should be separated from the invalid portions, and saved, if no injustice be thereby done to the contracting parties.

It is urged that The Maori King, *supra*, presents the law of this case. It is quite clear that The Maori King was decided upon the finding that the bill of lading contained an express warranty—and, that in any case, the law would imply one—that refrigerating machinery was fit to preserve the goods, and that the accompanying stipulation, sufficient to relieve the carrier after the voyage began, did not modify the warranty that the refrigerating machinery was, at the time of shipment, fit to carry the frozen meat in good condition. The stipulation in the case at bar distinctly provides for just such exemption, but does not relieve the claimants from the result of their own negligence, which, however, is not found to exist.

It may be proper to add that, in the opinion of the court, the Harter act has no necessary connection with this case, save so far as the third section thereof affirms the ever undoubted law that the carrier is not liable for losses arising from "the inherent defect, quality, or vice of the thing carried." The Harter act was intended to effect in some inscrutable way the liability of common carriers as such; to declare what common carriers, as such, could do, and what they could not do, and what their diligence in certain cases should avail them. It was not intended to control common carriers respecting duties entirely beyond their obligations as common carriers, which they might assume by contract. The libel must be dismissed, with costs.

THE GEORG DUMOIS.

(District Court, E. D. New York. June 23, 1898.)

CARRIAGE BY SEA—BANANA CARGO—UNSEAWORTHINESS.

A vessel, chartered, in part, for the transportation of bananas, and employed substantially for that purpose between New York and Port Limon, left the former port on her eleventh trip in such condition that her boilers failed, and she was compelled to put into an intermediate port for repair. This delayed her arrival at Port Limon, and bananas, cut according to a practice theretofore observed in the use of this vessel, in anticipation of her due arrival, were thereby too much ripened for safe shipment and delivery in New York, and were greatly damaged upon arrival at such port. The failure of the boilers resulted from the negligence of the owners, and the deterioration of the bananas was the natural consequence of such negligence.

Ward, Hayden & Satterlee, for claimants.
Black & Kneeland, for libelants.

THOMAS, District Judge. On the 20th day of July, 1895, the libelants, as co-partners, under the firm name of Ellinger Bros., entered into a charter party, for the charter of the steamship *Georg Dumois*, for six months or more, in case of a renewal, at a price named per month. It was stipulated that the vessel, with her full complement of officers, seamen, engineers, and firemen, should be delivered at Port Limon, "ready to receive cargo, and being tight, staunch, strong, and in every way fitted for the service," which was the carriage of merchandise and passengers between ports in North America and ports in the West Indies, Central America, and South America. The charter party further provided:

"(1) That the owners shall provide and pay for all provisions, wages, and consular shipping and discharging fees of captain, officers, engineers, firemen, and crew; shall pay for the insurance of the vessel; also for all engine room and deck stores; and maintain her in a thoroughly efficient state, in hull and machinery, for and during the services, guarantying to maintain the boilers in a condition to bear the working pressure of at least 60 pounds (and this pressure to be carried continuously) during the whole term of this charter. * * * (4) * * * That the captain shall prosecute his voyages with the utmost dispatch. * * * (7) That, in the event of loss of time from deficiency of men and stores, breakdown of machinery, or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service; * * * also if any loss of time from crew or stores not being on board in time, or from repairs to hull and machinery, which are for owners' account, not being complete after cargo and coals are on board and hour of sailing has been fixed by charterers, and notice given to captain, the time lost is for the steamer's account. (8) * * * The act of God, the enemies, fire, restraints of princes, rulers, and people, and all other dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation throughout this charter party always excepted. * * * (12) * * * That, on account of the perishable nature of the cargoes that this steamer is intended to carry, she is not allowed to stop to pick up any wreck, or in any way assist or tow any vessel, especially when by so doing she is liable to be detained, only in order to save human life."

The charter party also provided as follows:

"It is understood [that the] steamer is built for banana trade, has steam pipes, side ports, large ventilators, holds lined with charcoal, fruit decks, saloon on deck amidships," etc.

Previous to the voyage involved in this action, the vessel had made 10 trips, under the charter party, between New York and Port Limon, according to a practice whereby she left the former port on Wednesday, arrived at the latter port on Friday of the following week, leaving on her return trip on Saturday, and arriving at New York on Monday or Tuesday morning of the second week following. On Wednesday, July 15, 1896, the vessel left New York. On July 21st two stay bolts, extending between the combustion chamber and the back of the boiler, and intended to prevent a collapse of either, were leaking so that the water came out into the fire room. The chief engineer of the vessel thus describes the situation:

"On the 21st of July the stay bolts gave way. It was hard to keep the water in the boiler after the stay bolts gave way, because there was considerable leak. * * * The bolts did not really break. It was the packing under the washer that gave way, and the thread was so corroded that, when I came to make it up again, there was no thread for the nut. * * *"

The engineer's log was as follows:

"Tuesday, the 21st of July, 1896, sprung a leak in main boiler. The leak increased more and more, so it was impossible to hold the water at its proper level with the feed open. At the same time the high-pressure valve broke, so we were obliged to seek harbor for repairs. The water got lower and lower. The first leak was observed Tuesday morning at 2:30. Proceeded at slow speed to 5:30 afternoon same day, and steam became so low that we could not keep more than 80 pounds. Arrived at Barracoa, Tuesday afternoon, 5:30, to commence repairs."

The engineer also testified:

"Q. After the leak began it kept on increasing till you anchored at Barracoa? A. Yes; it leaked so much that after we hauled the fires there was no water in the glasses. Q. But is it safe to keep the fire under the boiler when the water disappears from the glasses? A. It is not safe. Q. What would happen if that were done? A. There would be an explosion."

The captain testified as follows:

"We left here the 15th, and we had some head wind and head sea coming out for the first two days,—about that,—and we noticed that it was very hard to get up high pressure in the boiler, but we accounted the reason to be bad coals and new firemen, because there were new men. Nothing happened until I had the bearing of the lighthouse in Cuba. Q. What light? A. Cape Mays; and at 2½ a. m. the engineer came up and told me that the boiler was so leaky that the firemen could hardly stand there and shovel the coal; and I went down there myself, and I just put my feet coming down in this boiling water. The ship was rolling, and this boiling water was, maybe, three inches high, you see; so that we first thought we had to go into Barracoa, but then there came a report that the leak was decreasing. * * * And then the report was again, 'Now it gets worse.'"

The vessel remained at Barracoa until 5 o'clock on the morning of Friday, July 24th, making necessary repairs, and then sailed, arriving at Port Limon at noon on the following Monday, July 27th. While at Port Limon, one or two of the stay bolts, one of them not of those repaired at Barracoa, began to leak; but such bolts were repaired, and the vessel was loaded and ready for sea at 1 o'clock on Tuesday afternoon, July 28th, but was detained by libelants' agent waiting to ascertain whether the cargo could be carried to New Orleans, which it could not be on account of the quarantine. But on Wednesday, July 29th, at 10 a. m., the vessel sailed for New York. Some of the stay bolts leaked on the way to New York, but her passage, in point of time, was somewhat better than the outward time. The length of the voyage from New York to Port Limon was 2 days and 13 hours longer than the longest voyage, and 3 days and 15 hours longer than the shortest voyage. The vessel had previously made between those ports. The period of variation between her longest and shortest voyages was 1 day 2¼ hours. To economize time, the charterers had been in the habit of telegraphing to Port Limon the date of the probable arrival of the steamer there, and thereupon the shippers of bananas would have the green bananas cut and carried down to the wharf so as to be there on the arrival of the vessel, it being necessary that the bananas should be shipped green to prevent their ripening too much on the voyage to New York. That course was pursued in this case, and, on the arrival of the vessel, the bananas, which had been on the pier awaiting her arrival for three days, were not fit to be sent to New York, and

would not stand the trip, of which the libelants were advised by telegraph, and the captain protested that he could not be accountable for them. The libelants increased the delay, as above stated, by some hours, in an effort to ascertain whether the ship could not go to New Orleans, but was finally ordered to New York. Upon the arrival at such port, it was found that a very large part of the bananas was unmarketable. It is for the loss of these bananas, and deterioration in price of the others, that this libel is brought.

The liability of a common carrier of goods does not, primarily, at least, rest on the contract to carry, but is implied by law, having its foundation in the policy of the law, and it is by reason of this legal obligation that a carrier is charged with the loss of, or injury to, property intrusted to it for carriage. *Railroad v. Swift*, 12 Wall. 262; *Merritt v. Earle*, 29 N. Y. 115; *Carroll v. Railroad Co.*, 58 N. Y. 126.

Subject to such modifications as have been ingrafted by statute upon the rule, or are lawfully stipulated in charter parties, bills of lading, or other contracts of shipment, persons operating ships and vessels, to the same extent as other common carriers, are liable for the safe custody, safe transport, and right delivery of goods and merchandise which they receive and undertake to transport, loss or injury arising from inevitable accident or irresistible force excepted. *The Commander in Chief*, 1 Wall. 43, 51; *The Lady Pike*, 21 Wall. 1; *The Niagara v. Cordes*, 21 How. 7, 23, 26, 29; *Elliott v. Rossell*, 10 Johns. 1, 8; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 437, 9 Sup. Ct. 469.

The initial duty of a common carrier by water is to provide a seaworthy vessel, well furnished with proper motive power, and furniture necessary for the journey. Necessary equipment is as requisite as that the hull of the vessel should be staunch and strong. *The Lady Pike*, 21 Wall. 1, 14; *The Niagara v. Cordes*, 21 How. 7, 23.

The warranty of the safe carriage and delivery of goods does not extend to the case of delay in delivering them, provided the freight be actually delivered in good condition, for in that case the question is simply one of reasonable diligence (*Parsons v. Hardy*, 14 Wend. 215; *Wibert v. Railroad Co.*, 12 N. Y. 245, 251; *Blackstock v. Railroad*, 20 N. Y. 50; *Geismer v. Railway Co.*, 102 N. Y. 563, 7 N. E. 828), unless there be a stipulation for delivery by a time certain, for even inevitable accident or unforeseen contingency will not excuse the fulfillment of such covenant (*Harmony v. Bingham*, 12 N. Y. 99).

As has been stated, the legal obligation of a carrier may, to some extent, be modified by stipulation, contained either in the form of a charter party, bill of lading, or a contract. In the present case a charter party exists. A charter party is not a demise of the ship itself, as contradistinguished from a right to have goods carried by the vessel (*Hagar v. Clark*, 78 N. Y. 45), but is a mere affreightment sounding in covenant (*Robinson v. Chittenden*, 7 Hun, 133). As has been stated, the law places upon the carrier the absolute obligation to make the ship seaworthy at the time of the commencement of the voyage. *The Carib Prince*, 18 Sup. Ct. 753 (decided May 23, 1898; No. 44, Oct. Term, 1897); *The Caledonia*, 157 U. S. 124, 15

Sup. Ct. 537. And where the owner of a vessel chartered her, there arises, unless the contrary be shown, an implied contract on his part that she is seaworthy and suitable for the service in which she is to be employed. He is therefore bound, unless prevented by perils of the sea or inevitable accident, to keep her in proper repair, and is not excused for any defects, known or unknown. *Work v. Leathers*, 97 U. S. 379. Such is the implied contract, where no express stipulation appears. *Putnam v. Wood*, 3 Mass. 481; 3 Kent, Comm. 305. By such charter party, however, the common carrier may exempt himself from his usual obligation, so far as he is insurer of the safe delivery of the goods intrusted to him, but may not exempt himself from liability for injury caused by his negligence. And, on the other hand, the carrier may assume obligations beyond those primarily imposed by law, or other than those which usually pertain to common carriers, or obligations which usually pertain to common carriers, but from the observance of which the statute has released them. *Hine v. New York & Bermudez Co.*, 68 Fed. 920, affirmed 20 C. C. A. 63, 73 Fed. 852; *The Silvia*, 15 C. C. A. 362, 68 Fed. 230.

The next question is whether there is anything in the present charter party that modifies the obligation implied by law. The failure in the present case is of the motive power. The stay bolts leaked to such an extent that the vessel could not be operated. There was no motive power. She left New York on July 15th, at which time repairs, alleged to have been most thoroughly made, were completed. It is said that, while the boilers were repaired in other respects, the stay bolts were not disturbed, as a most thorough and sufficient inspection indicated no leakage; but, after four days out, no accountable cause intervening, two of the bolts leaked to such an extent as to deprive the vessel of operating power; and, after repairs at Barracoa, she proceeded to Port Limon, where the stay bolts again leaked; and, although these were repaired, there was leakage on the way to New York, and when the stay bolts, 28 in all, were removed after her arrival, it was found that the thread of the bolts was corroded, and that the plates were so impaired where the bolts entered that they were reamed out, and larger bolts necessarily used.

In *Dupont De Nemours & Co. v. Vance*, 19 How. 162, 167, it is said:

"To constitute seaworthiness of the hull of the vessel in respect to cargo, the hull must be so tight, staunch, and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck. If a vessel, during the voyage, has leaked so much as to injure the cargo, or render a jettison of it necessary, one mode of testing seaworthiness is to ascertain what defects, occasioning the leakage, were found in the vessel at the end of the voyage, and then to inquire which of those defects are attributable to perils of the seas encountered during the voyage, and which, if any, existed when it was begun; and, if any of the latter be found, the remaining inquiry is whether they were such as to render the vessel incompetent to resist the ordinary attacks of the sea, in the course of a particular voyage, without damage or loss of cargo."

Under such a system of testing the question, the vessel in the case at bar was unseaworthy; and, moreover, it seems evident that such an accident, for which no immediate cause can be given, indi-

cates that the means of inspection employed in New York were imperfect, and that the inspection itself was negligent and insufficient. There is nothing in the charter party that relieves the owners from liability for this condition. As has been shown, suitable motive power is assured, although, in the case at bar, it is apparent that it did not exist, and proper care was not taken to provide it. The first subdivision of the charter party provides that the owners shall "maintain her in a thoroughly efficient state, in hull and machinery, for and during the service." This stipulation certainly does not modify the duty prescribed by law, but reiterates it. However, the stipulation continues: "Guarantying to maintain the boilers in a condition to bear the working pressure of at least sixty pounds (and this pressure to be carried continuously) during the whole term of this charter." When the pressure was 80 pounds, the vessel went into port, because the motive power had failed, and it was necessary to haul the fires for fear of an explosion. Such a provision is not understandable. It conflicts with every term of the charter party, with its purpose, and, if observed, excuses any navigation of the ship, as 60 pounds pressure would not start the engines. The advocates explain that it was a part of an old form, applicable before triple-expansion engines were used, and that the conservatism of those making charter parties is such that this harmful and vain clause has been retained, with the result of confusing, or, if literally applied, avoiding, the contract. It eliminates from the charter party all its life, and is so repugnant to the law and to the spirit and the remaining terms of the charter party that it must be disregarded. The exemption clause does not operate to exculpate the owners for this defect. Subdivision 8 provides that "the act of God, the enemies, fire, restraints of princes, rulers of the people, and all other dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation throughout this charter party always excepted." If the leakage of the boilers was due to their defective condition at the time the voyage commenced, it does not fall within the exception. *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537; *The Carib Prince*, supra. Moreover, the stipulation does not, and could not, except from liability from causes resulting from the negligence of the owners, and such negligence obviously exists in the present case.

It is contended by the claimant that the third section of the Harter act relieves it from liability, inasmuch as the owners "exercised due diligence to make the said vessel in all respects seaworthy, and the injury to the bananas resulted from their inherent defect, quality, or vice." 27 Stat. 445. However, it does not seem to the court that the owners did exercise due diligence, and, moreover, they seem to have warranted the due maintenance of the machinery in the charter party, as they had a right to do, as above shown.

It must be held that the owners did not fulfill the warranty of seaworthiness, or their duty to use due care, at the time the vessel left New York. If so, for what are they liable? The voyage was made from Port Limon to New York in due time. No act was done, and no omission was suffered, during that time—no defect existed

during that time—that caused the injury. The delay was during the voyage from New York to Port Limon, and it is that delay that, as it is urged, caused the damage and resulted in liability. But during that time the goods were not in the possession of the vessel, nor had they been delivered to it, or to its owners or their agents, actually or constructively. The liability of a common carrier, as such, usually begins when goods are delivered to him, at the place appointed or provided for their reception, in a proper condition and ready for immediate transportation. *London & L. Fire Ins. Co. v. Rome, W. & O. R. Co.*, 144 N. Y. 200, 39 N. E. 79. There is no evidence that the goods had been received by the carrier until the arrival of the vessel at Port Limon, and after that time it acted with due expedition. It is a sufficiently drastic rule that a carrier insures the safe carriage of goods received by it for carriage. In the absence of some contractual duty, this rule should not be extended to goods which the shipper might have earlier delivered to it, if the carrier had not been delayed. In such case the claim would be this: A carrier by sea between A. and B. and return insures that his vessel is seaworthy upon leaving A., and if his ship be unseaworthy, and he be delayed in going to B., he insures the safe delivery, in sound condition, of all goods carried by him from B. to A. This makes him liable for injury to goods in his possession, arising from delay in conveying them, and for goods not in his possession, and not even delivered to him, during such delay. Surely, nothing in this primary law relating to the liability of common carriers justifies such a rule of liability. Carriers by rail operate under such conditions that the law requires carriage within reasonable time, and, if the carriers fix a schedule time of leaving and arrival, such times are presumptively reasonable. But, even in such cases, only reasonable care is required to fulfill the established schedule. 2 Wood, Ry. Law, p. 1174, § 312; Thomas, Neg. p. 307. It certainly cannot be contended that the carrier, by any implication of law, insures against such delay as to such goods so undelivered to it, and, if liable at all, it should be liable only to use ordinary care.

But does the charter party change the obligation? The charter party suggests several considerations not otherwise involved: (1) The owners knew of and stipulated the use of the vessel for the banana trade. (2) The perishable nature of the freight was recognized. (3) The charter party stipulated for the utmost dispatch. (4) The whole time of the vessel was given to the charterers. (5) Under the charter party, a definite practice of going and coming between two fixed ports was inaugurated and observed, except in the case here involved. (6) The custom of cutting the bananas so as to have them ready for the boat on arrival was instituted, recognized, and followed. (7) The owners knew that, if they sent out an unseaworthy vessel, the cargo which it was sent to bring would probably be lost.

It will be observed that the practice of cutting fruit before and in anticipation of the arrival of the ship on a day certain is not shown to be a general custom; and in *The Curlew*, 5 C. C. A. 386, 55 Fed. 1003, 1005, it is stated that an attempt to show such custom, in an

action very similar to the one at bar, failed. It does appear, however, that such practice was observed by the charterers in the use of the present ship. This is important, inasmuch as the ship was at the disposition of the charterers, and any regulation prescribed and pursued by them in the use of her,—that is, a custom of the charterers' own creation,—subsequent to the charter party, could not, like the general custom, be related to and incorporated in the charter party, for the purpose of construing its obligations. Yet the charter party did contemplate that the ship should go to southern ports and take cargoes of bananas, and that the voyages should be made with the utmost dispatch, and a duty was placed upon the carrier to use some care to have his vessel in a condition to make the voyage with dispatch. Therefore, when the vessel left New York, on July 15th, the carrier knew that she was expected to go with dispatch to Port Limon; that the charterers' agents would be advised of the date of her sailing from New York; and the time occupied on her 10 former trips pointed to the day of her arrival. Hence the charter party, and the acts done under it, entitle the charterers to have the ship sailing from New York, July 15th, in such good condition that she should arrive at Port Limon and take her cargo on Friday of the following week, so far as the exercise of reasonable care could effect this result, and it was the privilege of the charterers to rely on the proper fulfillment of this duty by the carrier, and have his cargo ready.

The claimants' position is that, while the ship was in the service of the charterers and receiving compensation, and while she was due at a certain port by a certain day, yet, as her owners might send her out in such unseaworthy condition that she could not reach the port in such time, the charterers should not prepare perishable cargo until it was known whether the owners' default or negligence would operate to detain the ship. The result of such position is that the charterers must pay for the ship at Port Limon, while she was lying still during the several days lost in collecting cargo; that is, the charterers are paying for time necessary to gather the cargo after the ship's arrival, to protect the owners against their own possible failure to do their duty, and in apprehension that they may not do it. It seems to be a sounder doctrine that, when the ship sails from New York, her departure is notice to the charterers that she is in a condition to make her voyage and arrive in due time, and that her cargo may be prepared for her on the presumption that the owners have fulfilled their duty, and that such preparation of cargo need not be withheld upon the expectation that the owners had not done their duty, and that the ship will break down in consequence.

The position of the claimants is well stated by Mr. Commissioner Taft in *The Ceres*, hereafter considered:

"That the libelants should either have assumed that there would be a breach of the guaranty by the owners and withheld their bananas from the risk of it, or otherwise have taken the risk upon themselves of the damage in case such breach should occur."

The view prevailing in this opinion gives the charterers the full use of the ship. The opposite view allows her to lie at the dock, at the expense of the charterers, while the cargo is gathered,—a prac-

tice that would be founded solely on the apprehension that the owner, by his own negligence or default, might not have the ship at the port at the time his duty required him to have it lie there; and yet, withal, the question as to whether the damages are the natural result of the owner's default is not readily settled.

In *The Curlew*, 5 C. C. A. 386, 55 Fed. 1003, Judge Hughes, in a case presenting similar facts, held (1) that the interruption of the outward voyage was without fault of the carrier; and (2) "that the order * * * sent by the appellees to Jamaica, that the bananas could be cut and brought to the place of shipment in advance of the steamer's actual arrival, was imprudent, contrary to the custom of the trade, and was the real cause of the premature decay of the fruit, and of the loss which resulted to them, for which loss the steamer is in no manner responsible." It will be noticed that the ship is there exonerated because not in fault, and because, as stated in the opinion, in no other case was it shown that the bananas were cut in anticipation of the arrival of the ship. The findings in the case at bar are precisely the reverse, viz. there was a breach of the warranty in sending out the ship in an unseaworthy condition, and the owners did not use even reasonable care to make her seaworthy; and in addition, on the previous sailings, the practice had been inaugurated of cutting the bananas previous to the arrival of the ship, and it was well known that it was the intention to observe such practice on this voyage.

The same question arose, but the facts are obscurely presented, in *The Ceres*, 61 Fed. 701, 19 C. C. A. 243, and 72 Fed. 936. The decision of Judge Brown that there had been a breach of contract obligation to make the stipulated speed, and that the failure to arrive at the port where the bananas were to be taken on board, and where they had been gathered in anticipation of the arrival of the ship in due time, and their consequent premature decay before delivery in New York, made the owners liable for the injury thereby resulting, was affirmed by the circuit court of appeals. Judge Shipman, writing the opinion, states:

"The important question in this part of the case is whether the damages to the cargo can be regarded as the natural consequences of a breach of the contract which were within the contemplation of the parties, or whether the damages, in the event of a breach, must be considered as confined to the increased consumption of coal, loss of time, and that class of damage. If this guaranty had been contained in an ordinary charter party, by which the vessel was to be used for general purposes, the position of the owners would have been sound, and the guaranty would be construed to have reference to the value of the vessel to the charterers, in respect to economy of time, wages, supplies, hire, and the like general particulars which are immediately connected with the ship itself. But the charter party bore upon its face that it was a form for a fruit charter. The owner, by its agent, and the charterers, understood that the vessel was wanted for a particular use, and the warranty of speed had reference to the adaptedness or fitness of the vessel for that use. The charter party was entered into in view of the necessities of speed in the business in which the vessel was to engage, so that the damage to a perishable cargo, which directly occurred from a failure to make the requisite speed, must have naturally been in the mind and contemplation of the owner's agent when the contract was executed."

The opposite view of Judge Wallace will be found in a dissenting opinion, wherein he holds that:

"The libelants have been awarded damages for a loss which was not such a probable and necessary consequence of a breach of the warranty as may fairly be supposed to have entered into the contemplation of the parties when the contract was made. Such a recovery is not sanctioned by authority. *Griffin v. Colver*, 16 N. Y. 489; *Baldwin v. Telegraph Co.*, 45 N. Y. 744; *Murdock v. Railroad Co.*, 133 Mass. 15; *Pennypacker v. Jones*, 106 Pa. 8t. 237; *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500."

In *The Giulio*, 34 Fed. 909, it appeared that a vessel chartered for a voyage from New York to Gibraltar and Malta, and thence for return cargo back to New York, from Oran, duly arrived and discharged her cargo, and being ordered to Oran, on the north coast of Africa, left Malta, and put into an Italian port, where she remained unnecessarily long, and did not arrive at Oran within due time. As a consequence there was a delay in the delivery of the cargo at New York, and for this delay, resulting in a diminished market value, a recovery was permitted. In the opinion (page 911) the court said:

"The liability of the vessel for the loss of a market during the period of negligent delay, after the goods have been taken on board, has been often decided in the courts of this country. *The Success*, 7 Blatchf. 551, Fed. Cas. No. 13,586; *The City of Dublin*, 1 Ben. 46, Fed. Cas. No. 12,094; *The Golden Rule*, 9 Fed. 334; *Page v. Munro*, 1 Holmes, 233, Fed. Cas. No. 10,665; *Desty, Shipp. & Adm.* § 256. I see no reason why the same rule should not be applied, though the delay arose before the cargo was shipped, where the delay was voluntary, and arose in the course of the voyage contracted by the charter, and after it had been entered upon. The charterers assuredly had the right to count upon the ship's proceeding to Oran, pursuant to orders, with reasonable dispatch, as it was her duty to do."

The conclusions of the court in the case at bar, and the authority of the circuit court of appeals, as enunciated in *The Ceres*, require a decree for the libelants for the damages to the bananas, with costs. Some question was raised as to the libelants' right to recover for these bananas. Should there be any defect in that regard, it can be raised on exception to the commissioner's report.

THE ANTONIO ZAMBRANA.

(District Court, E. D. New York. July 11, 1898.)

1. WHARFAGE—STATUTORY CHARGES.

When a vessel in charge of the marshal is sent to a wharf, without any contract as to the charges, the wharfinger is entitled to the maximum rate fixed by the state statute (*Laws N. Y. 1877, c. 315*).

2. CONSTRUCTION OF STATUTES—REGULATION OF CHARGES FOR PUBLIC SERVICE.

When a statute states that for a given service a person having a public relation may charge a specific sum, he is entitled to receive such sum, in the absence of a contract for a less amount, though the actual market rates are much lower.

This was a petition by Mary A. Eldridge and others against the proceeds of the steamship Antonio Zambrana to obtain payment of wharfage.

Ward, Hayden & Satterlee, for claimant.
Alex. Van Wagoner, for petitioners.

THOMAS, District Judge. The petitioners ask the court to decree the payment of \$205.11 from money arising from the sale of the steamship Antonio Zambrana, and now in the registry of this court, for the use of the petitioners' wharf while the ship was in the hands of the marshal, from the 13th of February to the 27th of March, 1893, being 43 days, at the rate of \$4.47 per day. The ship is of 505 tons gross tonnage, and the rate charged is said to be the maximum rate allowed by chapter 315 of the Laws of New York for the year 1877. The evidence discloses that the charge is largely in excess of that made for similar services by the petitioners and others concerned in the business. This is important, as bearing upon the question of the fair market value of the services, if such question be involved. The petitioners contend that such usual or customary charges arise out of agreements, and hence are not evidence of market value. It appears, however, that agreements, with rare exceptions, are made; and therefore the sums which wharfingers are willing to accept, and shipowners are willing to pay, for wharfage, are the strongest indications of the value of the services. But it is urged by the petitioners that the court must not be governed by the market value, but, in the absence of agreement, by the highest rate permitted by the statute of the state. If this contention be correct, the statute fixes the amount which this court must order paid from its registry, whatever the relation thereof be to the services rendered, and however unconscionable the charge. In other words, it is urged that, in the absence of contract, the rates mentioned in the statute are the just market rates. The court is constrained, against its will, under the facts in this particular case, to interpret the statute in accordance with the petitioners' contention. When a statute states that for a given service a person having a public relation may charge and receive a specific sum, it does not lie in the power of another to assert that such person shall not charge and receive such sum for such service, but shall charge and receive a sum computed upon some other basis, or ascertained according to current or customary charges. The statute is supreme, and confers a right; and unless the person upon whom the right is conferred waives it, by contract or otherwise, a court is technically barred from declaring that the exercise of the right is unlawful. The statute is crude and ungrammatical, but it was the evident intent of the state to declare what should be due wharfingers for facilities afforded to vessels; and the fact that wharfingers, or even the wharfingers in question, do not customarily avail themselves of the statutory rates, does not estop the petitioners from claiming the benefit of the statute in any given instance, unless persons dealing with them have been misled by the previous conduct of the business. In the present case the ship was carried to the wharf and left with utter disregard of the expense of wharfage, and without any attempt to protect the money in the care of the court from the statutory charge by means of agreement, which is freely and usually made by wharfingers with their customers. Indeed, the evidence discloses that wharfingers seldom charge according to the statutory rates, for the simple reason that such rates are not the market rates, and no one will pay them, unless, from accident, ig-

norance, or design, he has failed to stipulate the rate. It is suggested that the obvious duty of making such an agreement be observed in the future by officers having vessels in charge. The explanation offered concerning the system of keeping his books, wherein the petitioners' superintendent has stated the rate of wharfage in this case to be \$1.50 per day, is of doubtful credit; but there does not appear to be sufficient in such entry to enable the court to affirm that the petitioners have waived the right conferred by the statute.

It must be decided that the petitioners are entitled to the statutory rate for the wharfage furnished, but a decree therefor shall not be entered until the court shall have been furnished with the computation, and shall have approved the same. It is probable that the rate should be upon the registered, and not gross, tonnage. The Craigendoran, 31 Fed. 87. There will also be presented to the court a statement of the expenses of this proceeding, and it will be determined to what extent, if any, the fund in the registry of the court shall be further depleted on account of this claim, wherein the wharfingers, pursuing their technical right, have seen fit to discriminate in their charges against property in the care of this court.

THE MARIA DOLORES.

(District Court, D. South Carolina. June 30, 1898.)

PRIZE—ENEMY'S PROPERTY.

A vessel and cargo whose papers, supported by the testimony, show that both belonged to a subject of the king of Spain, *held* lawful prize of war, having been captured by a United States cruiser while on a voyage from one port of the enemy to another.

This was a libel in behalf of the United States against the *Maria Dolores* to procure her condemnation as prize of war.

A. Lathrop, U. S. Dist. Atty.

BRAWLEY, District Judge. This is a cause of prize arising out of the capture of the Spanish bark *Maria Dolores* by the United States cruiser *Minneapolis*. The libel was filed June 10, 1898. No claimant has appeared, and the testimony taken by the prize commissioners, and an examination of the ship's papers, show that the *Maria Dolores* is a bark of 375 tons, owned by Tomas de Gorosica, a subject of the king of Spain; that she was manned by a crew of 11 persons, and under the command of Buenaventura Ferrer, master. She sailed from San Sebastian, in ballast, about the end of March, and on the last days of March and the first days of April, 1898, she took on a cargo consisting of 250 tons of bituminous coal and 250 tons of patent fuel at Avilas, a port of the kingdom of Spain, whence she sailed early in April for San Juan, a port in the island of Puerto Rico; both ship and cargo being consigned to Sobrinos de Azguia, Spanish subjects at the last-named port. She was captured in the early morning of May 21, 1898, about 12 miles from San Juan, by the United States cruiser *Minneapolis*, commanded by Captain Jewell, of

the United States navy, and was sent to this port in charge of a prize crew for condemnation. Upon hearing the testimony, and after consideration thereof, it is adjudged and decreed that the bark *Maria Dolores*, with her tackle, apparel, and furniture, and her cargo of coal, be condemned, forfeited, and sold as lawful prize of war; and a decree will be entered forthwith directing the marshal of this district to sell the same after due advertisement.

THE ROBERT H. RATHBUN.

(District Court, S. D. New York. March 23, 1898.)

COLLISION—TOW AND SAIL VESSEL—LEEWAY—REEFING.

The small schooner *G.* meeting the tug *R.* with a tow 4,000 feet long in Long Island Sound went on the tow's windward side in a fresh breeze, and lowered her mainsail shortly before collision for the purpose of reefing, causing her to make unusual leeway, so that though she passed the tug 200 feet distant, she fouled the fourth and fifth boats of the tow. *Held* that the tug was to blame for not starboarding earlier, and the *G.* for reefing so near to windward, or not keeping off.

This was a libel in rem by John Gibson against the steam tug Robert H. Rathbun to recover damages resulting from a collision.

Cowen, Wing, Putnam & Burlingham, for libelant.
Alexander & Green and Mr. Hough, for respondent.

BROWN, District Judge. At about 10 o'clock in the evening of October 9, 1897, as the libellant's small schooner *Genista* was making her way westerly in Long Island Sound bound from Nova Scotia to New Haven, she came in collision with the fourth and fifth barges of a long tow coming eastward, in charge of the tug Robert H. Rathbun, by which the schooner and the barges were all somewhat damaged. The libel and cross libel were filed to recover the damages. The wind was fresh from the north. The schooner was on her starboard tack, heading about W. N. W. Shortly before the collision her mainsail had been lowered for the purpose of reefing. The master was forward as lookout, and the steward at the wheel. The testimony on her part is that the lights of the tug and tow were seen about a mile distant, one or two points on the schooner's port bow; that the schooner kept her course of W. N. W. without change, and at all times had the lights of the tug and tow on her port bow and never on her starboard bow; that she passed to windward of the tug from 50 to 200 feet distant, passed the first and second barges at about the same distance, and the third a little less, but came in collision with the fourth barge by a glancing blow, scraped along her side, and along the hawser connecting with the fifth barge, and that the boat came in contact with the bow of the fifth barge, broke the hawser and passed out to leeward of the rest of the tow. The tug and tow were in all about 4,000 feet long. The boats averaged about 30 feet in length and the hawsers separating them from 80 to 100 fathoms each. The testimony of the different witnesses for the

tug is not wholly in accord. The captain of the tug testifies that there were many other sailing vessels in the Sound that night; that he passed two others a little before the collision, namely, one on each side of him, and that he did not see the Genista's lights until she was within about one-half a mile of him; that his course was E. by S., and that he saw first the schooner's green light, almost immediately both lights, and that soon afterwards the green light was shut in and the red light alone was seen, which at that time was about ahead and about 500 feet distant; that he then sounded the alarm whistles and put his wheel hard-aport; that this was done fearing a collision between the schooner and the tug; that under his port wheel the tug hauled about two points to the southward when the schooner passed abreast of him on the port side at a distance of about 400 feet; that he continued to haul to the southward until his heading was about S. E.; that as the schooner passed him, he did not at first apprehend collision with the barges; that the collision was nearly one-half a mile astern of him, and that he was apprised of it by the blast of a horn from one of the barges, as well as by seeing the shaking of the lights.

The wheelsman, who was in the pilot house with the captain of the tug, states that the red light of the schooner was first seen by him and reported to the captain, who was sitting on a stool in the pilot house; that soon after he saw the red and green light; that when the alarm was given both lights were visible, and that the order to port was given awhile after that, and that he saw three changes in the lights of the schooner.

On consideration of the whole testimony I find that the schooner when seen from the tug was about ahead, and not showing her green light alone, so as to afford any ground of expectation to the tug that her course was to leeward of the tug's course; and that it was therefore the duty of the tug to go to starboard earlier than she did; since the duty was upon her to keep out of the way of the schooner.

I also find the schooner in part to blame because she did not keep a steady course, and for bad management. The evidence indicates that she passed the tug about 200 feet off; and good management, unless the schooner was in part disabled, would have prevented fouling the fourth and fifth barges. The captain saw that the tow was a long one, and he knew that he was making one-half a point leeway, i. e., one foot in ten, or 200 feet in going 2,000 feet. But as the mainsail had been lowered for reefing, I have no doubt the schooner's course was more unsteady and her leeway more on that account. It is that leeway which finally caused collision. When it became necessary to tack to keep away from the hinder boats of the tow, the schooner was unable to do so with her mainsail down. This in part disabled her. It was bad management to lower the mainsail unnecessarily when near the tug; and having done this, it should have prevented her from going near to the tow on the windward side where she was likely to make unusual leeway.

Decree for half damages.

THE TRANSFER NO. 8.

(District Court, S. D. New York. April 14, 1898.)

COLLISION—DAMAGES FROM SUBSEQUENT NEGLIGENCE, NOT PROXIMATE.

The barge M. being damaged so as to be in a sinking condition by the mutual fault of No. 8 and the W., and being thereafter taken by the W. two miles with other boats in deep water, where she sank, a total loss of boat and cargo and damaging the W.'s propeller as she went down, *held* that the W. had such notice of the M.'s condition as to require the W. to beach her, as might have been done; and that for failure to do so the W. should alone bear \$1,000 of the total loss, as chargeable to the W.'s subsequent negligence, and not the proximate result of the collision.

These were libels in rem brought, respectively, by the Philadelphia & Reading Railway Company and the Thames Towboat Company against the steam tug Transfer No. 8.

James Armstrong, for libellant.

Henry W. Taft, for Transfer No. 8.

Carpenter & Park, for the Waterman.

BROWN, District Judge. Under the usual order of reference upon an interlocutory decree for damages in a case of collision, it is open to the defendant to show that any part of the damages claimed resulted through negligence or inattention subsequent to the collision; since damages caused by such subsequent negligence are not the proximate results of the collision itself. In behalf of Transfer No. 8 in the present case, it is contended that the total loss of the barge Maine and her cargo by sinking in deep water at Port Morris, two miles from the place of collision, is not the proximate result of the collision alone, but was due to the failure of the Waterman, which had the Maine in tow, to beach her properly in shallow water, where at least the cargo might have been mostly saved, even if the barge were a total loss. The entire damage reported by the commissioner for the loss of cargo was \$2,392, and the value of the barge and her furniture and outfit \$2,679.80. In the libel, however, of the owner of the Waterman against Transfer No. 8 for injuries to the Waterman through the sinking of the Maine at Port Morris, an interlocutory decree has been entered adjudging each vessel to pay one-half the damage. This decree was entered without any controversy on the point now raised; but so long as it stands it is none the less an adjudication, and necessarily involves the finding that the damage by the sinking at Port Morris, as well as the injury to the Waterman at the same time, were the proximate results of the previous collision; and both causes being before the court at the same time, the adjudication in the Waterman case, so long as it stands unopened, is a technical bar to the reopening of the question whether those damages are to be excluded, as arising through subsequent negligence, or not.

Notwithstanding this situation, a large amount of testimony was taken on this very question in the hearing before the commissioner; and upon the argument of the exceptions before me I have understood

that the parties have given all the evidence that either desired to give on that subject, and that the court was desired to determine the above question, aside from the technical bar above referred to, upon the understanding that the decree in the Waterman case should be reopened if the court should be of the opinion that on the merits any part of the loss of the Maine and her cargo should be deemed justly attributable to the subsequent fault of the Waterman.

The testimony on this subject is very conflicting and contradictory. The conclusion to which I have come is, that though the master of the Waterman made no examination of the Maine to ascertain immediately after the collision whether the Maine was in a fit condition to be able probably to make the trip to Port Morris in deep water, yet that he very soon afterwards, at least by the time the vessels were at Hogsback, where some of the vessels grounded, knew that the Maine was in a sinking condition and could not possibly hold out much longer. He saw those on board abandoning her; and this, with the fact that she was gradually sinking, was sufficient notice to him that she must speedily go down and could not probably reach Port Morris creek. It was his duty, therefore, either to endeavor to beach her at once, or else to cast her off and suffer her to drift ashore, where at least a part of her cargo might have been saved. No attempt was made to do either. I am satisfied upon the evidence that this might and should have been done; and that the presence of the other boats in tow did not prevent one or the other of those measures.

As the amount of additional damage through the total loss of the cargo arising from sinking in deep water at Port Morris, must necessarily be chiefly a matter of estimate, I do not think it advisable to send the matter back for further evidence, unless that course be desired. The barge if allowed to drift ashore would doubtless have become a total loss; the saving of the cargo of coal would have been attended with considerable expense, the coal saved would have been subject to some depreciation in value, and the loss of the Waterman's propeller would have been avoided. The net saving in loss could not well have been less than \$1,000. So much of this loss should, therefore, be charged, I think, to the Waterman alone; and the residue of the amount of the damages reported should be divided equally between the two vessels, as the proximate result of the collision.

If either party is dissatisfied with the above estimate, an order may be taken referring the matter again to the same commissioner, the party entering the order, to bear the expense of the reference, unless a more favorable report is obtained.

THE GEORGE L. GARLICK.

THE STUYVESANT.

(District Court, E. D. New York. June 20, 1898.)

1. COLLISION—STEAMER AND SAIL.

Courts view with some suspicion the exculpatory allegation of a steamer that a sailing vessel changed her course, and a claim by a tug that a gust of wind came with such nice punctuality as to make an involuntary change of eight points in the course of a schooner, and carry her, against her navigator's intention, into a passing barge, which should have kept out of her way, is an improbable coincidence, not to be adopted when not supported by a preponderance of the evidence.

2. SAME.

It being the duty of a steamer to keep out of the way of a sailing vessel, she cannot exculpate herself, in case of a collision, by the plea that the fault alleged against her indicates negligence so gross as to be improbable, unless her own explanation of the cause of the accident is probable, and such probability is established by the preponderance of the evidence.

This was a libel in rem by Felix Clancy and Ann Brophy against the steam tug George L. Garlick and the barge Stuyvesant to recover damages resulting from a collision.

Alexander & Ash, for libelants.

Carpenter & Park and R. D. Benedict, for the George L. Garlick.

THOMAS, District Judge. The course of the Hudson river at the point of the collision involved in this action is N. N. E. and S. S. W. The wind was nearly N. W. The schooner Washburn was sailing nearly straight down the river, under a jib and two-reef mainsail. Going up the river to the westward of the schooner was the tug Niagara, with a long fleet of canal boats. While the schooner was passing the tow, the tug Garlick, towing by a hawser the barge Stuyvesant, bound up the river, passed the schooner's bow, and the following barge struck the schooner on the latter's port side, whereby both vessels were carried around to the westward, and collided with the Niagara's tow, whereupon the schooner sank; hence the claim for damages in this action. The schooner and the Garlick were both east of the Niagara's tow, but each claims to have been the nearer to the said tow, and to have been proceeding on a course about parallel with it, and each claims that the other suddenly changed her course to the westward, and caused the collision. It was the duty of the Garlick to avoid the schooner, whether she was to eastward or westward of her. If the Garlick, being to the eastward, crossed the schooner's bow, the former was negligent; if the schooner was on the starboard hand of the Garlick, the latter was still the more bound to keep out of her way. But the Garlick, in exculpation, claims that while she was going northerly on a course laid between the Niagara's tow and the Washburn, the latter suddenly went partially about, and began sailing to the westward, and that this was caused by a sudden gust of wind, as the night had been tempestuous, and the wind continued strong and fitful. The exemption of the Garlick

from liability depends upon the acceptance of this explanation, for the rules of the road operate against her.

In considering this question it must be remembered that the burden of proving herself free from fault is with the steam vessel. It does not seem to the court that she has discharged this burden. Courts view with some suspicion the exculpatory allegation of a steamer that a sailing vessel changed her course; and the claim that a gust of wind came with such nice punctuality as to make an involuntary change of eight points in the schooner's course, and carry her, against her navigator's intention, into a passing barge, which should have been kept out of the schooner's way, seems an improbable coincidence. To this it may be answered with considerable reason, that it is alike incredible that the Garlick should have shifted her course from one of a general northerly direction to the westward, sharply across the schooner's bow, and directly towards the Niagara's tow. It is probable that the Garlick did not cross so definitely to the west as the evidence of some of the schooner's witnesses would indicate; but, in any case, the law places the steamer in the wrong, and she cannot exculpate herself by the plea that the fault alleged against her indicates negligence so gross as to be improbable, unless her own explanation of the cause of the accident is probable, and such probability is established by the preponderance of evidence. The captain of the schooner, the lookout, and three others of her crew, and the captain and pilot of the Komuk, a tug aiding the Niagara's tow, and the captain of the Niagara, give evidence tending to support the schooner's and condemn the Garlick's contention. The evidence of these witnesses is not harmonious, and their statements, in some important details, are not free from discrepancies and improbabilities. But opposed to them is the evidence of the captain, deckhand, and engineer of the Garlick, and Nelson, the captain of the barge Stuyvesant, and Terrell, the captain of a canal boat in the Niagara's tow. These witnesses, in appearance, intelligence, recollection, accuracy of observation, and manifestations of integrity, were not superior to the witnesses of the libelants, and did not carry conviction to the mind of the court. This is by no means a case of perfection of proof on one side and total deficiency on the other. Taken one by one, the libelants' witnesses escape, with greatly diminished credit, from the criticisms of the claimant's advocate; but their collective evidence, in quality and quantity, considered in connection with the rules of navigation, is preferred by the court. When events are entangled in the confusion that results from unintelligent and inaccurate observation and perverse and careless statements, no conclusion, at all points logically defensible, can be attained, and an element of doubt accompanies and survives the decision. Such seems to be the persistent condition of actions involving collisions between vessels. Hence the court must consider and weigh the evidence and probabilities, and strike such balance as his judgment and the rules of law require. Let a decree be entered in favor of the libelants for the damages that shall be ascertained to have been suffered by the schooner on account of the collision, with costs.

THE ETRURIA.

(District Court, S. D. New York. March 23, 1898.)

COLLISION—MAKING BERTH—SMALL BOATS TO GIVE WAY ON NOTICE.

When large vessels in making a berth must necessarily swing with the tide against the ends of the piers below, it is the duty of small boats to move temporarily from the ends of such piers on reasonable notice, and to make use of such means as are offered or may be available to them to do so, or take the risk of damage from contact. The libellant's boat not being moved after notice and the offer of help, the libel for damage was dismissed.

This was a libel in rem by the New York Central & Hudson River Railroad Company against the steamship Etruria to recover damages resulting from a collision between the steamship and a barge belonging to libellant.

James J. Macklin, for libellant.

Lord, Day & Lord, for claimant.

BROWN, District Judge. The necessary use by great steamers of the ends of adjacent piers for a few moments while making a berth, must be allowed equally with the rights of other craft to the use of the ends of the piers as a place for temporary mooring. These uses are attended with some danger, and the obligations of reasonable prudence and care rest upon each alike. The large steamers cannot make a berth against the strong ebb tide without swinging against two piers below the slip they intend to enter. Smaller craft, which are unable to withstand even the gentle pressure of such great steamers as the Etruria, a steamer of 8,000 tons displacement, must therefore, on reasonable notice, give way temporarily during the short period required for the large steamer to make her berth, or take the risk of damage. The testimony of Capt. Watson shows a practice compatible with every legal requirement; namely, to give timely notice to any craft lying at the end of the piers and likely to be endangered by the berthing of the incoming steamer, and to supply a tug, if desired, to remove such craft temporarily and take them back again as soon as the steamer is berthed.

The evidence shows that this practice was pursued in this case. About an hour before the Etruria arrived notice was sent to piers 38 and 39, a tug being employed for that purpose; and again half an hour before her arrival. The libellant's barge had been consigned to the slip between piers 38 and 39. Finding the slip full, she was obliged to moor temporarily at the end of pier 38, outside of two other barges; and shortly after mooring, a small lighter wedged in from below, between her and the boat next inside. The barge arrived there after the first notice of the Etruria's coming had been given. The tug that brought her there went into the slip for the purpose of removing two of the boats there in order to make room for the libellant's barge; and about 15 minutes afterwards, when the tug was ready to come out with the boats, she found the entrance closed by the presence of the Etruria, and not long afterwards the

barge was somewhat injured by the swinging of the Etruria against her.

The pilot of the tug that gave the notices, saw a tug and barge come to pier 38 not long before the Etruria arrived, and immediately went to give the barge notice. He says that the tug was still lashed to her; and that in reply to his notice to the man on the barge he was told to go to h—l. He testifies also that one barge dropped astern from the end of that pier. The man in charge of the barge denies receiving any such notice; but he admits that he was told by the captain of another tug who was passing, that he was in a dangerous place there, and should move on account of the Etruria, and that he himself as the Etruria came nearer, recognized the danger. He says that he slackened his lines; but that his barge would not drop astern for the reason that the lower end of his boat was canted to the westward by the lighter wedged in from below, and that the ebb tide pressed the lighter's bow so strongly against the inside boat that the barge would not move astern.

There is no indication of any inattention or lack of suitable care and skill on the part of the Etruria. I think the barge had timely and sufficient notice of the need of giving way briefly for the berthing of the Etruria, and had means to do so. At the time the notice was given, her own tug was alongside and could have removed her without difficulty. And later, when the Etruria approached and outside cautions were given, the bargeman apparently could still have called upon his own tug, which was in the slip close by, to remove him temporarily. He seems to have chosen to remain and take the chances of dropping astern until too late.

The libel is dismissed.

THE NEW YORK.

(District Court, S. D. New York. February 17, 1898.)

COLLISION IN SLIP—CANAL BOAT IMPALED ON PROPELLER—WARPING—NOTICE.

While the steamer New York was being carefully warped across the slip where she had been moored, a canal boat was found to be impaled upon one of the steamer's propeller blades, and was freed by some backward turning of the propeller; *held* (1) that upon the contradictory testimony the damage did not arise from any careless or improper handling of the steamer, but from the incautious movements of the canal boat; (2) that the warping of the steamer was not naturally calculated to do damage, and that no prior notice of intent to move her was necessary.

This was a libel in rem by James I. Collins against the steamship New York to recover for damages occasioned to a canal boat and cargo by becoming impaled on the steamship's propeller in her slip.

Carpenter & Park, for libellant.

Robinson, Biddle & Ward, for claimant.

BROWN, District Judge. On the 16th day of September, 1896, between 3 and 4 o'clock in the afternoon, when the large twin screw steamship New York, 564 feet long, was being pulled sideways across the slip from pier 15 towards pier 14 North river, bow in, it was

found that the canal boat Pat Bowen, laden with 765 barrels of cement, was being pulled across with the steamship. Subsequent examination showed that although the steamer's propeller had not been moved, the canal boat was impaled upon one of the blades of the steamer's port propeller, on her port side, and that the end of the propeller blade had passed through the bottom of the canal boat, making a cut about 4 feet long at right angles with the keel, 12 feet aft of the stem, and beginning at a point about four inches from the edge of the bottom on the starboard side. She could not be pulled off, and was extricated by turning the propeller back a little, but before she could be beached she sank. The above libel was filed to recover the damages, which it is alleged arose through the negligence of the steamship. The answer denies any negligence on her part.

There is no direct or positive proof how the accident came about. Two theories are suggested. The defendant argues that the canal boat came along side of pier 15, running up between the dock and the floating logs which guarded the steamer's propeller, forced the logs aside and finished her loading while lying over the end of the port propeller blade, and by the increased draught in loading drove the propeller blade through her bottom. The libelant contends that the canal boat was not at any time lying over the blade of the propeller, and argues that the accident could not have arisen in that way, because, upon the estimate of the defendant's expert, the end of the propeller blade would be about 14 inches deeper in the water than the canal boat when fully loaded. The libelant's theory is, that in the operation of hauling the steamship across the slip, she dropped back, and by hauling on the bow sooner than upon the stern, her stern was swung towards pier 15, so that the propeller blade was thereby carried beneath the canal boat, and that the strain of the hawser when the subsequent pulling on the stern commenced, caused the steamer to careen a little to starboard, sufficiently to lift the port propeller blade and thrust it through the bottom of the canal boat.

Both of these theories are physically possible. Either of them would account for the accident, and either might be adopted if the facts were sufficient to sustain it. But the evidence is so doubtful that I find it impossible to arrive at a positive finding as to either. The burden of proof rests upon the libelant to show negligence in the steamer. So far as the alleged negligence consists in the supposed dropping astern, and the swinging of the propeller under the canal boat, I think the clear weight of proof is to the contrary. Great pains, it was testified on the part of the ship, were taken to move her evenly; a range was observed and care taken to slacken, if either end of the ship was found to be moving faster than the other; and the line from the stern to pier 14 was kept all the time taut, or nearly so. Upon this positive testimony of several witnesses, it is not credible that the ship made any material sternway, or swing to port at her stern; certainly nothing like 12 to 15 feet to port, as would be necessary to be found, if the libelant's witnesses are correct in saying that the blade was 10 to 13 feet off and abreast of the canal boat's starboard bow. The blade seen by those witnesses may have been the opposite blade, the top of which would be about 12 feet away,

while the end of the port blade was under the canal boat's bottom. There is no doubt, on the libellant's evidence, that the bow of the canal boat ran up the slip beyond the propeller blade; Collins, the man in charge, says the bow was 6 feet ahead of it. The damage shows it was then 12 feet. Other evidence shows that before the accident, the canal boat was close along side the fore and aft log which was intended to guard the propeller. The theory that the steamer dropped astern 10 or 12 feet after the moving began and swung her stern to port as much more, so that her propeller blade ran under the canal boat, and that by a subsequent strain on the stern hawser the steamer was listed to starboard so as to lift her propeller blade and thus inflict the damage, involves also such a lapse of time between pulling on the stern and on the forward hawsers as to be wholly incompatible with the management of the steamer testified to by her officers, and incompatible with the probabilities of the case under the circumstances proved. So much, therefore, of the libellant's claim of negligence, I must regard as disproved.

I must find, therefore, that the canal boat got over the steamer's propeller blade by the movement of the canal boat up the slip. I do not think it material to consider when, how or why she got into such a position, as it is clear that it was not through any fault of the steamer, or through any lack of care on the steamer's part to indicate the position of the propeller blade, which was done by a log across the stern and by others running fore and aft on each side. It was a position that the canal boat had no right to take, and was at her own risk. This would not of course justify the steamer in inflicting any heedless or wanton injury; but the evidence on the part of the steamer clearly absolves her from any such charge.

The movement of the steamer across the slip in the way testified to, was not a movement reasonably likely to produce any injury to other boats. It did not, therefore, call for any express notice; and there is no evidence that prior to moving, Officer Young, who was in charge of the movement, suspected that the canal boat lay over the propeller. He testified that 15 minutes or a half an hour before, he observed the canal boat, and that she was then abaft of the propeller and in a safe place. Her captain, quite a young man, was then hauling on the line, and the officer testifies that he cautioned him against moving further up the slip. The captain denies this caution and also denies other cautions testified to by two other witnesses; but he states that the canal boat was 6 feet ahead of the propeller, and subsequent examination shows that at the time of the accident it was 12 feet ahead. Officer Young was mistaken, therefore, as to the precise position of the bow of the canal boat 15 or 30 minutes before the ship was moved, or else the boat was moved up further afterwards, as that officer contends it was. It does not seem to me necessary to determine the precise facts in these respects. Since the movement of the steamer was one which she was entitled to make and was not naturally calculated to inflict injury on other boats, if the damage was produced through a slight list of the steamer to starboard, owing to the strain of the hawser and the slight lifting of the port propeller blade while the canal boat lay over it, a contention

which rests upon argument, and not upon evidence, the result was not such as was to be reasonably anticipated, and is to be ascribed to the imprudence and carelessness of the canal boat, rather than to any negligence of the steamer.

One circumstance in connection with the final release of the canal boat, seems to me to favor the defendant's theory that the canal boat sank upon the blade while loading; namely, that the blade was finally extricated by a little backward turn of the propeller, after other efforts were unavailing to separate the boat. Some time before this the strain on the hawsers had been stopped, and any list of the steamer to starboard must have been thereupon immediately righted. Had the contact with the propeller blade arisen solely from the lifting of the blade by the steamer's list to starboard, the blade would naturally have been at once drawn out from the canal boat's bottom the moment the steamer righted on an even keel, and this would have occurred as soon as the strain on the hawsers was stopped. The fact that the boat was not then released, points to the probability that the accident did not happen from any list by the steamer, and that the list, if any, was small.

I must find, therefore, that no cause of action has been made out against the steamer, and that the libel should be dismissed with costs.

THE M. VANDERCOOK.

(District Court, S. D. New York. March 25, 1898.)

COLLISION—AGREEMENT BY SIGNALS—CONTRARY NAVIGATION.

In crossing the North river upon converging courses, the tug V., with a tow, and the ferry boat Plainfield agreed by signals of two whistles that the V. should cross ahead of the P.; the V. maneuvered accordingly, but the P. came on without materially slackening speed, and collision followed. *Held*, that the P. was alone to blame for not navigating in accordance with the signals, and not giving the V. reasonable space to pass ahead.

These were two libels in rem brought respectively by Mary J. McCaffrey, as administratrix, etc., and by the Central Railroad of New Jersey, against the steam tug M. Vandercook, to recover damages caused by a collision.

Cameron & Hill, for administratrix.

Carpenter & Park, for The Vandercook.

James J. Macklin, for The Plainfield.

BROWN, District Judge. About 6 p. m. on the 14th of July, 1896, the libellant's canal boat Daniel McCaffrey in tow of the tug M. Vandercook and on her starboard side, while crossing the North river in the ebb tide from Morris street, Jersey City, bound up the East river, came in collision with the ferry boat Plainfield, bound from the Communipaw Ferry to Liberty street, New York. The starboard bow of the canal boat projected ahead of the tug, struck the ferry boat on her port side a little forward of her paddle wheels, and was

so injured that she sank a few moments afterwards. There is much conflict in the testimony. The weight of evidence, I think, establishes the following points:

1. The collision was somewhere from one-third to one-half the way across from the Jersey shore, and not far from abreast of pier 7, New York.

2. Shortly after the Plainfield left her slip, the Vandercook, being then further out in the river and heading for the Battery, and having the Plainfield on her starboard hand, gave the Plainfield a signal of two whistles in answer to the Plainfield's signal of one whistle, and received a response of two whistles from the Plainfield. The Plainfield was then heading somewhat up river, and towards the New York shore, and the vessels were probably then from 700 to 1,000 feet apart. This agreement by signals bound the Plainfield to give the Vandercook reasonable opportunity to go ahead of the Plainfield, and to govern her own navigation accordingly.

3. The Vandercook thereupon starboarded her wheel and continued her course so that at collision she headed about for pier 1; but shortly before collision she was compelled to stop and reverse because the Plainfield, contrary to the agreement, proceeded to run ahead of her.

4. That the Vandercook did not give a signal of one whistle, nor make any such sheer to the westward nor any such change of course, as is alleged by the witnesses for the Plainfield, as a justification for her subsequent course.

5. That the Plainfield, even if she was going, as she claims, under one bell at the time when her signal of two whistles was given in answer to the Vandercook's two whistles, afterwards went full speed ahead, and thereby brought on the collision; that this was a violation of the agreement made by signals between the two vessels that the Vandercook should pass ahead; that no circumstances in the situation justified this change in the ferry boat's maneuvers, and she is consequently chargeable with the blame for the collision; that the pilot's narrative is not sufficiently consistent or credible to be accepted; and that the testimony that the Plainfield made this trip within two minutes of her usual time, confirms the Vandercook's account that the Plainfield came on at nearly full speed without regard to her previous signals.

6. That the navigation of the Vandercook was in accordance with the agreement between the vessels; and that the proposition which she made and which the Plainfield accepted that the Vandercook should pass ahead was not, under the circumstances, an unreasonable proposition, as the Plainfield was easily able to go astern of the Vandercook without material disadvantage.

I find the Plainfield alone to blame.

Decree accordingly.

COMMONWEALTH OF VIRGINIA v. BINGHAM et al.

(Circuit Court, W. D. Virginia. July 27, 1898.)

REMOVAL OF CAUSES—PROSECUTIONS BEFORE JUSTICE OF PEACE—ACTS DONE UNDER FEDERAL REVENUE LAWS.

A prosecution brought before a justice of the peace for a nonindictable misdemeanor is removable to a federal court, under Rev. St. § 643, when the act charged was done by defendant under authority of a federal revenue officer, acting under color of his office. *Virginia v. Paul*, 18 Sup. Ct. 536, 148 U. S. 107, distinguished.

The Attorney General of Virginia, for plaintiff.

T. M. Alderson, U. S. Atty., for defendants.

PAUL, District Judge. This case was removed from a court held by a justice of the peace of Franklin county, Va., into this court, on the petition of the defendants. The petition was filed under the provisions of section 643 of the Revised Statutes of the United States, which provides as follows:

"Sec. 643. When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or any such law, or on account of any right, title, or authority claimed by such officer or other person under such law, * * * the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner. Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counsellor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or, if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered upon the docket of the circuit court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. When the suit is commenced in the state court by summons, subpoena, petition, or any other process except capias, the clerk of the circuit court shall issue a writ of certiorari to the state court requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the state court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the state court shall be void. * * *

The petition for removal alleges, in substance, that one Thomas Felts was an officer of the United States, to wit, a deputy collector of internal revenue in the Sixth district of Virginia; that petitioners

were acting as part of a posse under the control of the said Felts; and that, while said Felts was in the actual discharge of his official duties, he and the petitioners were attacked and fired upon from ambush by persons supposed to be in sympathy with, and who were defending, violators of the internal revenue laws; that petitioners returned the fire in self-defense; that, during the firing, the petitioner Fitzwater was wounded, and the horses of petitioners were shot several times; that during the firing several hundred shots were exchanged; that there were some cattle in the vicinity of the firing; and that, while petitioners have no knowledge that any injury was done to said cattle by the promiscuous firing which took place, "one R. D. Allen has made complaint and information on oath before Samuel Via, a justice of the peace of Franklin county, Virginia, charging them with cruelty to animals, under the statute of Virginia, and further charging that said cattle had been shot by petitioners, and have died."

Following is the warrant issued by said Samuel Via, justice of the peace of Franklin county, Va., on said complaint and information, on oath of said R. D. Allen:

"Commonwealth of Virginia, Franklin County, to wit:

"To G. C. McAlexander, Constable of said County:

"Whereas, R. D. Allen, of said county, has this day made complaint and information on oath before me, Samuel Via, a justice of the peace of said county, that Thomas Bingham and Geo. S. Fitzwater, on the 18th day of July, 1896, in the said county, did unlawfully, but not feloniously, injure, maim, and disfigure two cows, by shooting and killing of them, the property of the said R. D. Allen, against the peace and dignity of the commonwealth of Virginia: These are, therefore, in the name of the commonwealth, to command you forthwith to apprehend and bring before me, or some other justice of the said county, the bodies of the said Thomas Bingham and Geo. S. Fitzwater, to answer the said complaint, and to be further dealt with according to law.

"Given under my hand and seal, this the 18th day of July, 1896.

"Samuel Via, J. P."

The petitioners further allege that they have been arrested under the said warrant, and are held under bail, to answer the same before a justice of the peace of said Franklin county. They further allege that the prosecution aforesaid against them was begun for an act done while they were under the command of said Felts, who was acting under color of his office of deputy collector, and they pray that the prosecution against them be removed into this court. On the filing of this petition with the clerk of the circuit court, the clerk issued a writ of habeas corpus cum causa, directed to the justice of the peace who had issued the warrant of arrest for the petitioners; and the justice, in obedience to said writ, stopped all further proceedings in the case, and forwarded the original papers in the case to the clerk of this court, and the case was docketed here. The commonwealth of Virginia moves to remand the case to the justice of Franklin county, Va., before whom it was pending when the petition was filed, on the following grounds:

First. That section 643 of the Revised Statutes of the United States, providing for the removal of prosecutions from a state court into the circuit court of the United States, contemplates only prosecutions

pending in a court of record; that this is shown by the following provisions of the statute:

"When the suit is commenced in the state court by summons, subpoena, petition, or any other process except *capias*, the clerk of the circuit court shall issue a writ of certiorari to the state court requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by *capias*, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the state court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the state court shall be void."

It is insisted that, as a court held by a justice of the peace in Virginia has no clerk, and is not a court of record, a prosecution such as this, which is a misdemeanor under the laws of Virginia, cannot be removed into this court. It is also urged that a proceeding is not "commenced," as the statute (section 643) contemplates, until an indictment has been found by a grand jury in the state court. It is urged that not only was there no indictment found in the state court at the time of the filing of the petition in this case, but that no indictment could be found in the courts of the state of Virginia on a charge such as is made by the warrant issued by the justice of the peace.

The act of the legislature of Virginia abolishing indictment by a grand jury in cases of misdemeanor, such as is charged in this case, provides that:

"The several police justices and justices of the peace, in addition to the jurisdiction exercised by them as conservators of the peace, shall have exclusive original jurisdiction of all misdemeanor cases occurring within their jurisdiction, in all of which cases the punishment may be the same as the county or corporation courts are authorized to impose. * * *

Prior to the passage of this act, misdemeanors (to which class of offenses the offense in the warrant issued by the justice in this case belongs) were indictable by a grand jury. The statute quoted changed the law of Virginia in this respect, and now it is not required that an offense of the grade here charged shall be submitted to a grand jury for investigation as the basis of a prosecution and trial by a jury. If the position of the counsel for the commonwealth of Virginia be correct, then the provisions of section 643 of the Revised Statutes of the United States relative to the removal of prosecutions from a state court into a federal court are in great part rendered of no effect by the Virginia statute. If this contention be sound, no officer appointed under or acting by the authority of any revenue law of the United States against whom a prosecution has been commenced in a state court of Virginia is entitled to the protection contemplated by the United States statute, unless he shall have first been indicted by a grand jury in a court of record in that state. Under this view of the law, a court held by a justice of the peace in Virginia not being a court of record (4 Minor, Inst. 160), not having the machinery of a

grand jury with which to commence a prosecution, no removal of a prosecution pending therein can be had, under the provisions of section 643 of the Revised Statutes of the United States. To give the statute the construction here contended for would be to admit that the state of Virginia can, by an act of its legislature, practically repeal it as to this state by simply enlarging the jurisdiction of a court not of record, and by abolishing the action of a grand jury in all criminal cases, and substituting therefor some other mode of commencing a prosecution.

In support of the position taken by counsel that a criminal case arising under section 643 cannot be removed into this court where no indictment has been found in the state court, the case of *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, is cited as a decisive authority. That was a case where a deputy marshal had been arrested on a warrant issued by a justice of the peace charging him with murder, and he was held in custody awaiting an investigation before the justice who issued the warrant. On petition of the prisoner, the case was removed into the circuit court before an indictment had been found in the state court. The supreme court held (syllabus):

"A prosecution of a crime against the laws of a state, which must be prosecuted by indictment, is not commenced, within the meaning of section 643 of the Revised Statutes, before an indictment is found, and cannot be removed into the circuit court of the United States by a person arrested on a warrant from a justice of the peace, with a view to his commitment to await the action of the grand jury."

The case at bar not being a crime against the laws of the state of Virginia which must be prosecuted by indictment, the holding of the supreme court in that case is not applicable to this. While the language of the statute (section 643) contemplates that the prosecution will be commenced in a state court of record, to give it that construction would render abortive the effort of congress to accomplish the manifest purpose of the statute. The law of congress is constitutional, its object is clear, and the intention of the lawmaking power unmistakable. In such case, the law, if possible, must be so construed as to give effect to the purpose of its enactment. The object of the law was to protect the officers of the United States government in the collection of the internal revenues, and in the enforcement of the internal revenue laws, against unjust and prejudicial prosecutions in the state courts; and whether the prosecution is commenced by indictment in a court of record, or by the issuance of a warrant of arrest on which the officer is to be tried by a justice of the peace, he is entitled to the protection secured him by this law. When the petition for removal in this case was filed with the clerk, he pursued the proper course in issuing a writ of habeas corpus cum causa, directed to the justice of the peace before whom the prosecution was pending. The case is properly in this court, and the motion to remand will be overruled.

BROWN v. SMITH.

(Circuit Court, D. Vermont. June 4, 1898.)

JURISDICTION OF FEDERAL COURTS—ACTIONS BY RECEIVERS OF NATIONAL BANKS.

Circuit courts have jurisdiction of actions by receivers of national banks to collect assessments made by the comptroller, without regard to the amount involved.

Thos. J. Boynton, for plaintiff.

John H. Senter, for defendant.

WHEELER, District Judge. This suit is brought by the plaintiff as receiver of the Sioux National Bank to recover an assessment upon the shares therein held by the defendant amounting to \$900. The defendant has moved to dismiss it for want of jurisdiction, because the matter in dispute does not exceed, exclusive of interest and cost, \$2,000.

Section 629 of the Revised Statutes, concerning the jurisdiction of the circuit courts, was divided into 20 paragraphs, the subjects of but few of which were carried into the act of 1875, to determine the jurisdiction of the circuit courts and regulate the removal of causes from state courts. 18 Stat. 470. Among the subjects left were suits by officers of the United States suing under authority of any act of congress, and suits by or against national banking associations. Receivers of national banks, as plaintiffs, had always been held to be officers of the United States suing under authority of acts of congress. Their right to sue in the circuit courts, without regard to the amount claimed, was held not to have been taken away by the act of 1875, by Mr. Justice Gray and Judge Nelson, in the circuit court of the district of Massachusetts in 1883. *Price v. Abbott*, 17 Fed. 506. This decision appears to have been uniformly followed in the circuit courts. *Armstrong v. Ettlesohn*, 36 Fed. 209; *Armstrong v. Trautman*, Id. 275; *Yardley v. Dickson*, 47 Fed. 835; *Fisher v. Yoder*, 53 Fed. 565. In *Thompson v. Pool*, 70 Fed. 725, Judge Shiras seems to have doubted whether a receiver of a national bank, in view of the decisions of the supreme court in *U. S. v. Germaine*, 99 U. S. 508, and *U. S. v. Mouat*, 124 U. S. 303, 8 Sup. Ct. 505, was an officer of the United States, but to have followed the decisions of the circuit courts. Since those cases the supreme court has again held that such a receiver is such an officer. *Gibson v. Peters*, 150 U. S. 342, 14 Sup. Ct. 134. So the law stood until the act of 1887 to amend sections 1, 2, 3, and 10 of the act of 1875, and the act of 1888, to correct the enrollment of the act of 1887. 25 Stat. 866, p. 433. That act amends that part of the act of 1875 granting jurisdiction by raising the amount in dispute from \$500 to \$2,000, and not otherwise, and draws the provisions relating to jurisdiction of suits by and against national banks into section 4, and confines it to such as would be had between individual citizens of the same state, and adds: "The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." Cases brought by re-

ceivers for the collection of assessments laid by the comptroller upon the shareholders are cases for winding up the affairs of the banks, and are not affected by the provisions of that section, which is the only one in the act relating to this subject, nor by those of any other section. This jurisdiction, therefore, seems to remain the same as it was under section 629 of the Revised Statutes and the act of 1875. In this view, the motion must be overruled. Motion denied.

BERTHA ZINC & MINERAL CO. v. VAUGHAN.

(Circuit Court, W. D. Virginia. July 27, 1898.)

1. JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—ACTIONS BY ASSIGNERS.

A nonresident assignee of a share in the estate of an intestate, who sues the administrators and their sureties to enforce obligations incurred by an alleged failure to properly discharge their duties, is not an assignee of a chose in action, in the meaning of the judiciary act of March 3, 1887, so as to be precluded from maintaining the suit in a federal court by the fact that his assignor could not have maintained it therein.

2. SAME—DECREE OF STATE COURT SETTLING ADMINISTRATOR'S ACCOUNTS.

A federal court may, in a case of diverse citizenship, entertain a suit to surcharge and correct a settlement of accounts by administrators which has been confirmed by decree of the proper state court.

Blair & Blair, for plaintiff.

Walker & Caldwell, for defendants.

PAUL, District Judge. The plaintiff is a corporation chartered under the laws of the state of New Jersey, and is a citizen of that state. It brings its bill in equity against J. P. Vaughan, administrator of one Michael Black, deceased, and the sureties on his official bond; J. P. Vaughan and T. C. Vaughan, co-administrators of Michael Black, deceased; the sureties on the official bond of said co-administrators; certain persons as distributees of the estate of said Michael Black, deceased; Clark Litterall; and B. F. Garnett. The defendants are all citizens of the state of Virginia. The material allegations of the bill are as follows: In the year 1888 Michael Black was accidentally killed while in the service of the Bertha Zinc Company, dying intestate; leaving, as the distributees of his estate, his children,—among them a daughter, Candice, who had intermarried with one George Nelson. On the 2d day of October, 1888, J. P. Vaughan was appointed administrator of the estate of said Michael Black by the county court of Grayson county, Va., and as such executed bond with sureties. On the 6th day of October, 1892, in the county court of Grayson county, the said J. P. Vaughan and one T. C. Vaughan were appointed co-administrators of the estate of said Michael Black, deceased, executing a bond with sureties in the penalty of \$15,000. The bill alleges that in the month of February, 1893, there passed into the hands of the said administrators the sum of \$13,003.37, being the proceeds of an execution in the name of J. P. Vaughan, administrator, etc., against the Bertha Zinc Company, which sum was liable to distribution among the heirs and distributees

of the said Michael Black, deceased,—six in number; that said Candice Nelson and George W. Nelson, her husband, by written assignment dated September 28, 1891, duly acknowledged before a justice of the peace, assigned to one Clark Litterall, in consideration of a parcel of land, the sum of \$1,000 of said fund, due her as one of the distributees of the estate of her father, Michael Black, deceased; that on the 18th of February, 1892, said Candice Nelson and her husband, George W. Nelson, assigned to said Clark Litterall \$100 more of said fund; that on the 29th of July, 1892, the said Candice Nelson, George W. Nelson, her husband, and said Clark Litterall assigned to one B. F. Garnett all of their right, title, and interest in said fund arising from said judgment and execution, the said assignment being in full of principal, interest, and costs of the interest or share of said Candice Nelson; that said Clark Litterall at the same time, for value, assigned to said B. F. Garnett the two former assignments that Candice Nelson and her husband had made to said Litterall; that thus said Garnett on the 29th of July, 1892, became, for value, the owner and assignee of the full interest of said Candice Nelson; that said interest, at the time said execution was paid to said administrators of said Michael Black, deceased, amounted to the sum of \$2,167.25. On the 29th of July, 1892, said B. F. Garnett assigned said full share or interest of Candice Nelson so held by him to the complainant, the Bertha Zinc & Mineral Company. The written assignments are made exhibits with the bill, and a part thereof. The complainant further avers that by proper legal assignments, without notice of offsets, it has become the owner of the entire interest of the said Candice Nelson in the judgment and execution due her father's estate which was collected by said administrators. The bill charges that, though frequent demands have been made, said administrators have not paid any part of the said sum of money due the complainant; that in the month of March, 1893, said administrators made an ex parte settlement of their accounts before the commissioner of accounts of the county court of Grayson county; that this settlement was returned before the county court of Grayson county on the 4th of July, 1893, and at the August term, 1893, of said court the same was confirmed and ordered to be recorded; that by this settlement it was made to appear that the entire fund had been distributed. Copies of the settlement, report, and order of confirmation are made exhibits with the bill. The bill attacks the settlement made by the administrators on the following grounds:

“(1) Because, although the said administrators of Black had full notice and knowledge of the ownership by the said B. F. Garnett, and of orator's subsequent assignment of the said Candice Nelson's interest, they proceeded to take the said account and make the said settlement before the said Commissioner Porterfield without giving to the said B. F. Garnett, orator's assignor, any notice of any kind thereof. (2) Because the amount charged to them as received from the Bertha Zinc Company on said *fi. fa.* as of February, 1893, was erroneous, as the principal, interest, and costs at that time, by a calculation, will appear to have amounted to more than the \$13,048.99 with which they are charged. The debt amounted to more than that, if properly calculated. (3) The settlement is erroneous in allowing Jas. A. Walker the item of \$5,609.40, as it was allowed contrary to law, and in violation of the rights of the said B. F. Garnett. (4) The amount paid to J. P. Vaughan, of

\$515, was erroneous, not properly proven, and should not have been paid. (5) That the division of the said distributive shares into sums of \$911.10 each was grossly wrong; and the item of February 28, 1893, in said account of Candice Nelson, by, etc., was erroneous and false, in this: that her distributive share amounted to \$2,167.25, instead of the paltry sum paid her of \$900 on February 28, 1893, and \$11.10 on March 7, 1893, as in full of her share, are false, as neither she nor said Garnett nor orator ever received one cent thereof. (6) Orator denies that either Candice Nelson, B. F. Garnett, or your orator has ever received one cent of the said fund on the distributive share of the said fund, and, if any one has ever so receipted and settled upon the said basis, it was unwarranted and wholly unauthorized, and in violation of the rights of the said Garnett and of your orator; and orator here denies and impeaches the said receipts, as unwarranted and unauthorized, and it demands of the said administrator the said sum of \$2,167.25, with interest from the time that the said fund should have been paid to the said B. F. Garnett. (7) Your orator further avers that the charge of \$5,609.40, which purports to have been paid by the said administrators to their attorney, was wholly unauthorized, and without the knowledge or consent of orator or said Garnett, and was so excessive, and in violation of the rights of said Garnett, who then owned the share of the said Candice Nelson. All that could have been legally allowed said administrators for the payment of their attorney was a reasonable sum; and orator avers that neither it nor the said B. F. Garnett ever had any notice or knowledge of any attorney's fees being allowed by the said administrators until a short time ago, and at the time of the assignment to said Garnett, on the 29th day of July, 1892, he had no notice or knowledge of any part of the said claim having been assigned, as he had the judgment lien docket of Wythe county examined, and also the clerk's office of the circuit court of Wythe county, wherein the judgment and execution were; and he has no knowledge of any attorney's fees claimed against the said fund, and orator had no knowledge or notice of any such claim when he took the same from Garnett by assignment. (8) But orator avers that not one cent of the said residue of \$911.10 due Candice Nelson after the payment of the said exorbitant fees has ever been paid either to her, the said Litterall, the said Garnett, or to orator, and that orator is advised that the said payment was unwarranted and wholly unauthorized. (9) For the foregoing reasons, orator impeaches, surcharges, and falsifies the said pretended and illegal settlement by said administrators, and demands the payment to it from them of the full amount of \$2,167.25, with interest from the 27th day of February, 1893, until paid. (10) Your orator therefore assails the said account as incorrect in whole, because taken without any notice to either it or said Garnett, although the administrators knew of the said assignment of said Candice Nelson's interest. They also surcharge and falsify it because they have not charged themselves with the full amount of the principal, interest, and costs received. They surcharge and falsify it because, instead of distributing the said sum of \$13,048.99, which they admit they received on the said fund, into six equal shares, they improperly and unjustly, and in violation of the rights of said Garnett and of your orator, paid over nearly one-half of the entire sum, to wit, \$5,609.40, to their attorney, J. A. Walker, without the consent or knowledge of orator or said Garnett, but which would have been resisted if such a transaction had been known to either of them. They also surcharge and falsify the allowance of 10% commissions on said \$13,048.99, which was \$1,304.89, because the administrators should not have been allowed 10% upon the gross amount received and collected by them, and orator says that such commissions were excessive, and that 5% commissions would have been ample and reasonable; and, as already stated, it denies all payments by them of any part of the said Candice Nelson's share to any one authorized to receive it, and asks the court to hold them responsible for improperly paying over Candice Nelson's share to any one except Garnett or said orator. Orator avers that both it and the said Garnett are surprised by the development of the fact that this ex parte settlement was made by the administrators at all, and especially that it was made in the manner heretofore indicated; and it here and now puts its finger upon the matters of wrong contained in said report of settlement, and the unfair advantage taken of them by the said

administrators, and asks the court to correct the said account, and to decree to your orator, the present valid owner, the full amount of the said Candice Nelson's share aforesaid. Orator demands that the said administrators produce before this court any vouchers for the interest of the said Candice Nelson, and, if produced, they are controverted and denied herein by your orator. (11) Orator avers that it supposed there would be no trouble about the receipt of this money, and that as soon as it was collected, and some small debts against Michael Black that were claimed were paid, that orator would receive its money; and it only learned a few months ago, to its great surprise, that said administrators had made any settlement before a commissioner."

The defendants demur to the bill, and state the following grounds of demurrer:

"First. Because the said bill shows on its face that the complainant is the assignee of the defendant B. F. Garnett, and that said B. F. Garnett is the assignee of his co-defendant Clark Litterall, who is the assignee of Candice Nelson, and that said Candice Nelson, Clark Litterall, and B. F. Garnett, being citizens of Virginia, could not have prosecuted suit upon said claim in this court, and therefore their assignee cannot do so. Second. And for a second ground of demurrer the defendants say that this court has no jurisdiction, because on the face of the bill it appears that the complainant seeks to review, reverse, and set aside a decree and order of the county court of Grayson county confirming the report of the commissioner of accounts for said county in pursuance of law, and in the exercise of powers and jurisdiction conferred upon said officer and said court of law. Third. And for a third ground of demurrer the said defendants say that this court has no jurisdiction over the settlement of a fiduciary account made by an administrator regularly appointed by a state court, and acting in pursuance to law, and that such settlements, when made before the proper officers, returned to, approved, confirmed, and recorded by the proper court, are judgments and decrees of a legally constituted tribunal having jurisdiction over the subject-matter and over the parties, and such settlement and such decrees and orders can only be impeached and corrected, surcharged and falsified, before the court rendering such orders and decrees."

The first ground of demurrer is based on the following provision of the act of March 3, 1887 (24 Stat. 552, 553, c. 373, § 1):

"Nor shall any circuit or district court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

It is insisted for the defendants that the interest of Candice Nelson, one of the distributees of the estate of Michael Black, was an interest in a judgment against the Bertha Zinc Company; that this judgment was a chose in action; that the assignor thereof could not have prosecuted a suit in this court for the recovery of the contents of the same if no assignment or transfer had been made. This act was construed in *Ambler v. Eppinger*, 137 U. S. 480, 11 Sup. Ct. 173. That was an action of trespass, brought by an assignee of the claim, to recover damages for cutting down and removing timber from the land of the assignor. The supreme court in that case said:

"This act, as appears on its face, does not embrace within its exceptions to the jurisdiction of those courts suits by an assignee upon claims like the demand in controversy. The exceptions, aside from suits on foreign bills of exchange, are limited to suits on promissory notes and other choses in action, where the demand sought to be enforced is represented by an instrument in writing, payable to the bearer, and not made by a corporation; the words

following the designation of choses in action indicating the manner in which they are to be shown. They must be such as arise upon contracts of the original parties, and not founded, like the one in controversy, upon a trespass to property."

The suit at bar is not one that arises upon contract of the original parties. The plaintiff here has never had a contract of any kind with the defendants the administrators of Michael Black. Nor is it seeking to enforce the collection of the judgment recovered in an action of trespass brought by the administrators of Michael Black against the Bertha Zinc Company. An execution issued on that judgment was collected, and went into the hands of the defendants the administrators of Black. It is to recover the amount due the plaintiff from the proceeds of this execution. It is to surcharge and falsify the settlement of the administrators, on the grounds that the settlement by the administrators made before the commissioner of accounts of Grayson county was made without notice; that the amount charged to the administrators was erroneous; that the amount allowed in the settlement to the attorney for the plaintiff in the judgment recovered by him against the Bertha Zinc Company was contrary to law; that the amount of commissions to J. P. Vaughan, one of the administrators, was erroneous; that the division of the distributees' shares into sums of \$911.10 each was grossly wrong; that the distributive share of Candice Nelson, now due the complainant, should have been \$2,167.25, instead of \$911.10; that the administrators have never paid to the complainant, or to any one authorized to receive the same, any part of said Candice Nelson's share assigned to the complainant. It denies all payments of any part of said share, though credit was given to the administrators for such payments by the commissioner of accounts, and controverts and denies any vouchers they may have for the payment of said interest or any part thereof. The suit is, in effect, one against the administrators and their sureties on their official bond, for a devastavit. It is not founded on a contract, nor brought to enforce a contract, but to enforce obligations incurred by administrators of an estate in their official capacity, by a failure to properly discharge their fiduciary duties. A nonresident assignee, bringing a suit of this character, is entitled to have the same heard in this court.

The second and third grounds of demurrer are practically the same, and will be considered together. They, in substance, deny that this court has jurisdiction to review or set aside a decree confirming a settlement of a fiduciary account made before a commissioner of accounts of a state court; that such settlement, when made before the proper officer and confirmed, is a judgment of a tribunal having jurisdiction over the subject-matter and the parties, and can only be impeached, surcharged, and falsified before the court entering such orders. This contention cannot be maintained. *Van Bokkelen v. Cook* was a case in which a bill in equity was filed in the circuit court of the United States against an administrator to recover assets which he had fraudulently withheld, and it was held that a final settlement of an administrator's accounts by a probate court was no bar to the suit; the court saying:

"The question thus raised is whether this court has jurisdiction to call an administrator to account, who has, in the course of his trust, defrauded the estate, notwithstanding the probate court which appointed him may have passed a decree finally settling his accounts and discharging him. That the court has this jurisdiction, we think, can be satisfactorily shown. The frauds charged in this bill are not shown to have been investigated or passed upon by the probate court, but to have been concealed from that court; and it would indeed be against conscience, and a subversion of justice, if an administrator, while confessing a fraudulent management of the assets of the estate under his care, could successfully plead in bar of a suit like this, by the defrauded heirs, the final settlement of his accounts by the probate court." 28 Fed. Cas. 949.

The question here raised was presented to the supreme court, and decided, in *Payne v. Hook*, 7 Wall. 425. In that case the court says:

"If this position could be maintained, an important part of the jurisdiction conferred on the federal courts by the constitution and laws of congress would be abrogated. As a citizen of one state has the constitutional right to sue a citizen of another state in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the federal tribunals has been heretofore presented to this court and overruled."

It is unnecessary to cite further authorities to sustain the jurisdiction of the court of this suit. The demurrer will be overruled, with leave to the demurrants to answer.

STRAINE v. BRADFORD SAVINGS BANK & TRUST CO.

(Circuit Court, D. Vermont. May 25, 1898.)

JURISDICTION—FEDERAL AND STATE COURTS—PROCEEDINGS FOR DISSOLUTION OF CORPORATION.

Proceedings brought by a public officer under a state statute for the winding up of a corporation, and the appointment of a receiver therein, do not deprive the circuit court of the United States of jurisdiction to proceed with a suit in equity brought by a stockholder, who is a resident of another state, against the corporation, for the adjustment of mutual claims, and to enjoin any disposition of his stock held by the corporation in pledge.

William M. Stockbridge and Gilbert A. Davis, for plaintiff.

W. B. C. Stickney and John H. Watson, for defendant.

WHEELER, District Judge. An original bill was brought herein to compel a set-off of claims of the orator against claims of the defendant, and for a decree for the balance, and to prevent disposition of securities held by the defendant as collateral, and for a sequestration of defendant's property, in nature of an attachment, which was had. A supplemental bill has been brought to prevent, by injunction, disposition of, and voting upon, the orator's stock in the defendant company, also held as collateral, and an injunction has been granted. Proceedings brought since by the inspector of finance of the state in the state court of chancery, wherein a receiver has been appointed for winding up the affairs of the defendant, and ratably dis-

tributing its assets among creditors, have been pleaded to the supplemental bill, and the plea has been argued.

An institution of this kind may be proceeded against in this way for other causes than insolvency. V. S. § 4054. Whether this proceeding is because of insolvency, which would leave the stock worthless, or for some other cause, which might leave it of value, is not set forth in the plea. It might belong to the orator again, with the other collaterals, upon satisfaction of the defendant's claims against him by set-off, or otherwise, and the trial of this cause might be necessary to settle the question of such satisfaction. The case of *Relfe v. Rundle*, 103 U. S. 222, is relied upon to show that the receivership would draw all questions relating to the property and claims to those proceedings. In that case, however, it was held that similar state proceedings to wind up a corporation did not prevent trying questions concerning them between citizens of different states in the United States courts; and the judgment was reversed for that purpose. In *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155, the court held that proceedings in a state probate court upon the death of a defendant in the United States circuit court would not withdraw property from seizure on process, of that court. And in *Coal Co. v. McCreery*, 141 U. S. 475, 12 Sup. Ct. 28, the court held that proceedings in a court of Ohio to wind up an Ohio corporation would not withdraw property of the corporation from the effect of a decree in the United States circuit court. The earliest cases on this subject were reviewed in these cases, and the principles applicable to these questions were deduced from them. In the latter case, Mr. Justice Brewer said:

"The circuit court takes its jurisdiction, not from the state of Ohio, but from the United States; and the extent of its jurisdiction is not determined by the laws of the state, but by those of the United States. Doubtless, while sitting in the state, as a court of the United States, it accepts and gives effect to the laws of the state, so far as they do not affect its jurisdiction and the rights of nonresident creditors. It nevertheless exercises powers independent of the laws of the state; and when, in pursuance of the jurisdiction conferred by the laws of the United States, it takes possession of the property of a defendant, and proceeds to final decree, determining the rights of all parties to that property, its decree is not superseded, and its jurisdiction ended, by reason of subsequent proceedings in the courts of the state looking to an administration of that property in accordance with the laws of the state."

According to these principles, the orator here, as a citizen of another state, had the right to have the claims in controversy, that must be adjusted in order to ascertain his right to the stock which is the subject of the supplemental bill, tried and determined in this court. The state court has not, by the appointment of the receiver, attempted to interfere at all with this right, and this court cannot properly deny it. Plea overruled.

FEWGLASS et al. v. KEESHAN et al.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

No. 533.

1. PRINCIPAL AND SURETY—COST BONDS—DEATH OF SURETY.

There being no power to release a surety on a cost bond without the consent of the party for whose benefit the bond is given, the contract is not terminated by the death of the surety, and his estate is bound for costs thereafter accruing.

2. SAME—EFFECT OF ADDITIONAL BOND.

The fact that, after the death of a surety on a cost bond, the party is required to give an additional bond, does not release the estate of the deceased surety from liability for costs subsequently accruing.

3. LIMITATIONS—ACCRUAL OF CAUSE OF ACTION—NUNC PRO TUNC ENTRY.

Limitation does not begin to run against an action on a cost bond until the rendition of judgment for costs against the principal. The fact that such judgment is entered nunc pro tunc, as of a prior date, does not affect the operation of the statute.

4. ADMINISTRATORS—DISCHARGE—NECESSITY OF ORDER.

The mere filing by an administrator of a statement and affidavit that he has neither received nor paid out anything, and knows of no debts against the estate, and asking that it be accepted as a final report, and he be discharged, will not operate as a settlement and discharge, in the absence of any order of court relating thereto.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

C. W. Baker, for appellants.

J. C. Harper, for appellees.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. This is an appeal from the decree of the circuit court against Howard Ferris, the administrator of Samuel Cooper, deceased, and Hannah Cooper Fewlass, his sole heir and next of kin, on a cost bond entered into by Cooper shortly before he died for the amount of the costs adjudged to be due from the complainants in the case, most of which accrued after Cooper's decease. The bond was in the form following:

"In the Circuit Court of the United States for the Southern District of Ohio.

"Sarah E. McCloskey et al. v. Samuel Barr et al. Cost bond.

"I hereby acknowledge myself security for costs in this case.

"Samuel Cooper.

"Taken and acknowledged before me this 15th day of September, 1887.

"Robert C. Georgi,

"Deputy Clerk United States Circuit Court, Southern District of Ohio."

After a decree for costs was rendered against complainants in the action, the administrator and the heir and next of kin of Cooper were duly notified of the filing of a petition by the successful parties for a decree against them, and, after pleadings were filed raising various issues, evidence was taken, and the decree for the full amount of costs, now appealed from, was entered.

The first point made in this court by the appellants is that the cost bond does not bind the estate of the surety for any costs accruing after his death. The rule as to the obligation of a guarantor in respect to transactions occurring after his death is that the obligation is not affected by his death if the contract of guaranty was one from which he might not withdraw upon notice, but that, if he could have done so, then his death will be given the effect of a notice of withdrawal, at least from the time when the knowledge of the same has been brought home to the obligee. The former proposition is sustained by the cases of *Lloyd v. Harper*, 16 Ch. Div. 290; *Calvert v. Gordon*, 3 Man. & R. 124; *Green v. Young*, 8 Me. 14; *Moore v. Wallis*, 18 Ala. 458; and *Voris v. State*, 47 Ind. 345. The alternative proposition is illustrated in the cases of *Jordan v. Dobbins*, 122 Mass. 168; *Hyland v. Habich*, 150 Mass. 112, 22 N. E. 765; *Coulthart v. Clementson*, 5 Q. B. Div. 42; and *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025. A court cannot release a surety upon a cost bond without the consent of the party for whose benefit the security has been given. *Holder v. Jones*, 29 N. C. 191; *Standard Publishing Co. v. Bartlett*, 5 Wkly. Law Bul. 501. This feature of the obligation of a cost bond places it in the category of irrevocable guaranties, the obligations of which continue according to their terms, without regard to the death of the guarantor.

The second objection to the decree is based on the fact that some time after Cooper's death, the complainants were required to give an additional bond for costs in the sum of \$5,000. This they did, and one Nagel entered into such a bond. It is said that Nagel and Cooper thus became joint obligors, and that the death of one of two joint obligors releases the one dying from any liability for future transactions. It is a sufficient answer to this objection to say that, as Cooper and Nagel were not parties to the same contract, they were not joint obligors.

The third objection to the decree is that the claim is barred by an Ohio statute of limitations, which reads as follows:

"No executor or administrator, after having given notice of his appointment, as provided in this chapter, shall be held to answer to the suit of any creditor of the deceased, unless it be commenced within four years from the time of his giving bond as aforesaid, excepting in the cases hereinafter mentioned: provided, however, that any creditor whose cause of action shall accrue or shall have accrued after the expiration of four years from the time that the executor or administrator of such estate shall give or shall have given bond according to law, and before such estate is fully administered, may commence and prosecute such action at any time within one year after the accruing of such cause of action, and before such estate shall have been fully administered; and no cause of action against any executor or administrator shall be adjudged barred by lapse of time, until the expiration of one year from the time of the accruing thereof." Rev. St. Ohio, § 6113.

The bond was given in September, 1887. Cooper died August 31, 1888. Howard Ferris was appointed his administrator and gave bond September 11, 1888, and gave due notice of the same by publication. The administrator never filed an inventory or account, but on March 23, 1892, he filed the following papers:

Statement of administrator, filed as follows:

"Howard Ferris, administrator of the estate of Samuel Cooper, deceased, makes oath, and says that he is the duly-appointed administrator of said estate, and that no assets have ever come into his hands as such administrator, and that no claims of any kind have ever been presented to him, except such as have been fully paid by the widow of Samuel Cooper, deceased. Having received no funds as administrator, and having paid out nothing, the said Howard Ferris files this statement, under oath, as and for his final account herein, and for the discharge of his trust. Howard Ferris.

"Sworn and subscribed to before me, this 23d day of March, A. D. 1892.

"Chas. E. James, Justice of the Peace, Hamilton County, Ohio."

Affidavit of widow as to settlement of estate, filed as follows:

"Hannah Cooper Fewless, of lawful age, being duly sworn, makes oath and says on the 30th day of August, 1888, Samuel Cooper deceased, leaving no will, and that she, as his widow, was his sole heir, there being no issue at the time of his death; that Howard Ferris was appointed and qualified as administrator of said estate; and that she has read his statement to the effect that he received no moneys or assets of any kind as such administrator, and disbursed none, and that such statement she knows and believes to be true, and she asks that said statement be taken as a final account, and that he be fully and finally discharged as such administrator, and his bondsmen be released from any and all liability on account of said bond. The said Hannah Cooper Fewless further represents that all debts due and owing from said Samuel Cooper at the time of his decease have been fully paid by her.

"Hannah Cooper Fewless.

"Sworn and subscribed to before me this 23d day of March, A. D. 1892.

"Howard Ferris, Probate Judge & Ex Officio Clerk,

"By Chas. E. James, Deputy Clk."

These papers were filed under section 6190 of the statutes of Ohio, which is as follows:

"When an executor or administrator has paid or delivered over to the persons entitled thereto, the money or other property in his hands as required by the order of distribution, or otherwise, he may perpetuate the evidence of such payment by presenting to the court, within one year after such order was made, an account of such payments, or the delivery over of such property; which being proved to the satisfaction of the court, and verified by the oath of the party, shall be allowed as his final discharge, and ordered by the court to be recorded; and such discharge shall forever exonerate the party and his sureties from all liability under such order, unless his account shall be impeached for fraud or manifest error."

The record discloses no order of court allowing these papers to constitute the administrator's final discharge, or directing them to be recorded as such. It appears that the deceased was a member of two partnerships, and that, upon the application of the surviving partners, the assets of the two firms were appraised, but the appraisements have never been returned to court, and no settlement has been had in accordance with the statutes for the settlement and distribution of the interest of the deceased partner. The widow, who was sole heir and sole next of kin, appears to have paid such debts of the estate as came to her knowledge; to have taken the proceeds of one partnership; and to have succeeded her husband as a member of the other without a settlement.

The decree for costs against the complainants was not rendered in the circuit court until October 24, 1895. It was then entered nunc pro tunc, in accordance with the mandate of this court, as of October 25, 1894, because of the death of one of the parties to the

record, after submission of the case and before its decision. The petition of appellees, upon which the decree appealed from is founded, was filed April 13, 1896, or within a year after rendition of the decree for costs against Cooper's principals.

No cause of action accrued against Cooper's estate until the decree for costs was entered against those for whom Cooper had become surety. Until that time neither the existence nor the amount of his obligation was established. Until that time no action could have been brought on the cost bond against Cooper or his estate. *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. 107; *Newton v. Hammond*, 38 Ohio St. 431. The statute did not begin to run except from the time when the decree was actually entered. The fiction of a nunc pro tunc entry has no effect whatever on the operation of the statute of limitations. *Borer v. Chapman*, 119 U. S. 587, 602, 7 Sup. Ct. 342.

But it is said that the saving clause of section 6113, Rev. St., quoted above, has no application except in cases where the estate has not been fully administered, and that in this case the estate had been fully administered, and the administrator was discharged. We cannot assent to this view. The record does not show that the papers which the administrator filed March 23, 1892, were ever allowed as his final discharge, or were ever ordered to be recorded as such. It might be questioned whether the court could have made such an order in this case which would have been effective. *Weyer v. Watt*, 48 Ohio St. 545, 28 N. E. 670. However that may be, no order was made, and Ferris remained administrator and the estate remained unsettled. The case of the appellees is therefore clearly within the saving proviso of section 6113.

Some other questions of minor importance are raised upon the record, which we need not notice. The decree of the circuit court is in all respects affirmed, with costs.

WALKER et al. v. JACK.

(Circuit Court of Appeals, Sixth Circuit. July 7, 1898.)

No. 534.

1. EQUITY PLEADING—DEMURRER TO ANSWER.

There is no such thing as a demurrer to an answer in equity. The only way by which the sufficiency of the answer on its merits as a defense can be tested is by setting the case for hearing on the bill and answer.

2. SAME—EXCEPTIONS TO ANSWER.

The office of an exception to an answer is to raise the question whether the averments and denials thereof are sufficiently responsive to the allegations of the bill; and it cannot be treated as raising the question of the sufficiency of the answer as a defense on the merits.

3. TAXATION—INTANGIBLE PROPERTY OF NONRESIDENTS.

It is within the power of a state to tax money and credits of a nonresident when the money is invested, the debt contracted, and the investment controlled by a resident agent of the owner, having the evidences of the debt in his possession.

4. SAME.

Under Rev. St. Ohio, §§ 2731, 2734, 2735, moneys and credits owned by a nonresident of the state, and which are *held*, invested, and controlled for him by an agent residing in the state, are made subject to taxation. 79 Fed. 138, reversed.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was a suit in equity by John V. Jack against Isaac N. Walker, auditor, and Charles E. Eulass, treasurer, of Warren county, Ohio, to enjoin them from levying and collecting taxes on certain credits owned by complainant, who is a nonresident of the state. The circuit court entered a decree according to the prayer of the bill (79 Fed. 138), and the defendants have appealed.

George A. Burr, for appellants.

Thomas B. Paxton and W. F. Eltzroth, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is an appeal from a decree enjoining the taxing officers of Warren county, Ohio, from levying and collecting taxes on certain moneys and credits, evidenced by promissory notes and secured by mortgage upon land in that county, which are owned by John V. Jack, the complainant below, a nonresident of Ohio and a citizen of the state of New York. The answer admitted all the averments of the bill as to the ownership of the moneys and credits, the residence of Jack, and the intention of the defendants to levy and collect the taxes unless enjoined, but averred that the moneys and credits during the years for which the taxes were to be collected were invested, loaned, and controlled by one George W. Carey, "who was during all of said years the agent of the complainant in so investing, loaning, and controlling said moneys and credits, and was during all of said years a resident of the said county of Warren, and state of Ohio"; "that said moneys and credits should have been listed in said county of Warren for taxation therein, by the said George W. Carey, as such agent of complainant, in each and all of the aforesaid years, but that neither the said George W. Carey nor any one listed said moneys and credits for taxation in said county in and for any of said years." The complainant excepted to the answer for insufficiency; the court sustained the exception; and, the defendants declining to plead further, the court entered a decree perpetually enjoining the defendants as prayed in the bill. The court seems to have treated the exception as if equivalent to a demurrer testing the sufficiency of the averments of the answer as a defense to the bill upon its merits. This was not according to proper equity practice. There is no such thing as a demurrer to an answer in equity. *Grether v. Cornell's Ex'rs*, 43 U. S. App. 770, 23 C. C. A. 498, and 75 Fed. 742. The only way by which the sufficiency of an answer on its merits as a defense to the case made in bill can be tested is by setting the case for hearing on bill and answer. The office of an exception is to raise the question whether the averments and denials of the answer are sufficiently responsive to the allegations of the bill. In this case the aver-

ments of the answer were in every way responsive to the allegations of the bill, and left nothing to be desired in defining the sharpness of the real issue between the parties. It was therefore an error to sustain the exceptions. We might be content to reverse the cause on this ground; but in order to shorten the further proceedings for which the case must be remanded, and because the parties have argued the case on its merits as presented by bill and answer, we proceed to consider it in that aspect.

The question is whether, by the laws of Ohio, the moneys and credits of a nonresident of Ohio are subject to taxation under the laws of that state, when such moneys or credits have been invested, loaned, and are under the control of the owner's agent resident in Ohio. Counsel for complainant below contend that such moneys and credits are not taxable in Ohio for two reasons: First, because they are not within the jurisdiction of the state, and the state has no power to tax them; and, second, because the statutes of Ohio, properly construed, do not provide for their taxation.

The general rule for determining the situs of personal property is that it follows the person of the owner, and has its situs at his residence. With respect to tangible personal property, however, it is well settled that it may be taxed by the sovereignty having jurisdiction over the place which is its actual situs, though the owner live in another jurisdiction. Intangible personal property, however, like choses in action and credits, can, as a general rule, only be taxed at the residence of the owner. *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Kirtland v. Hotchkiss*, 100 U. S. 498. The language of the former of these cases has been modified somewhat in *Savings & Loan Soc. v. Multnomah Co.*, 169 U. S. 421, 428, 18 Sup. Ct. 392, where it was held to be within the power of a state to tax the interest of a nonresident mortgagee in the mortgaged property. But the earlier case is still authority for the general rule that a credit is taxable only at the residence of the creditor. Certain exceptions to this rule are recognized. One is where the chose in action is represented by a negotiable bond, property in which passes by delivery. In such a case the evidence of title is in such form, and is so important an element of the value of what it represents as to make it closely analogous to tangible property, and to give it a situs for taxation where the negotiable evidence of its existence actually is, even though the owner may live elsewhere. This exception is commented on by Mr. Justice Field in delivering the opinion of the court in the case of *State Tax on Foreign-held Bonds*. Another exception is where, though the beneficial interest in the debt is owned by a nonresident, yet the money is invested, the debt is contracted, and the investment is controlled, by a resident agent of the owner. In such a case it is held that the money and the credit in which it is invested are within the state, where the agent receives the money for his principal, and makes the loan, having authority to collect it and to reinvest it. *Finch v. York Co.*, 19 Neb. 50, 26 N. W. 589; *Billinghurst v. Spink Co.*, 5 S. D. 84, 58 N. W. 272; *In re Jefferson*, 35 Minn. 215, 28 N. W. 256; *Redmond v. Commissioners*, 87 N. C. 122; *People v. Trustees of Village of Ogdensburg*, 48 N. Y. 390; *Catlin v. Hull*, 21 Vt. 152; *People v. Smith*, 88 N. Y. 576;

Hutchinson v. Board, 66 Iowa, 35, 23 N. W. 249; People v. Davis, 112 Ill. 472; People v. Insurance Co., 29 Cal. 534; Herron v. Keeran, 59 Ind. 472. In such cases the circumstance that the agent has in his possession the evidence of the indebtedness is regarded as of importance. The authorities above cited leave no doubt of the power of the state of Ohio to tax any moneys and credits owned by non-residents, the custody of which has really been intrusted by their owners to resident agents.

The next question is whether the law of Ohio taxes such moneys and credits.

Section 2731, Rev. St. Ohio, is as follows:

"All property, whether real or personal, in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom; and such property, moneys, credits and investments shall be entered on the list of taxable property, as prescribed in this title."

Section 2734, Rev. St. Ohio, is as follows:

"Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county."

Section 2735, Rev. St. Ohio, is as follows:

"Every person required to list property on behalf of others shall list the same in the same township, city or village in which he would be required to list it if such property were his own, but he shall list it separately from his own, specifying in each case the name of the person, estate, company or corporation to whom it belongs."

Section 2731 provides for the taxation of all real and all tangible personal property within the state. It also provides for the taxation of all intangible personal property belonging to residents of the state. If this section stood alone, it cannot be doubted that intangible personal property belonging to nonresidents would escape taxation. Section 2734, however, requires every person of full age and sound mind to list all moneys invested, loaned, or otherwise controlled by him as agent or attorney, or on account of any other person or persons, company or corporation. It is forcibly argued that the first section above quoted defines what is intended to be taxed, and the other two only contain directions as to the persons who shall list the property described in the first section, and do not enlarge the scope of the first section at all. Hence it is said the moneys and credits to be listed by agent or attorney are those owned by residents of the state who are absent temporarily or are for any reason prevented from listing them themselves. Support is given to this argument by the arrangement of the sections in the Revised Statutes, and in the acts in which they first appear as laws. More than this, the state circuit court for the Fifth Ohio circuit, in the case of *Lee v. Dawson*, 8 Ohio Cir. Ct. R. 365, has so construed the sections, and has held expressly that a nonresident of Ohio is not required to pay taxes on his intangi-

ble property for taxation, notwithstanding it is under the control of a resident agent for investment and collection. We are unable, however, to follow this decision, because we are not able to reconcile it with the decisions of the supreme court of Ohio.

In *Grant v. Jones*, 39 Ohio St. 506, the supreme court of Ohio declared, in the syllabus of the case (which is always drawn by the court), that "credits owned by a nonresident of this state are not taxable here, unless they are held within this state by a guardian, trustee, or agent of the owner, by whom they must be returned for taxation." It is true that this decision was made under the tax law of 1859, and its amendments (2 Swan & C. p. 1438), which were then in force; but they were not substantially different from the provisions of the Revised Statutes in this regard. Judge Johnson, in delivering the opinion of the court, referred to the holding of the supreme court of the United States, in the case of *State Tax on Foreign-Held Bonds*, that a debt was taxable only at the residence of the creditor, and then continued:

"Our statute clearly adopts that rule. Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee, or agent. If they are held within the state in either capacity, they are within the jurisdiction of the state for purposes of taxation. If they are not so held, but are owned and held by a nonresident, they are not subject to taxation."

The case before the court was that of the attempted taxation of an itinerant peddler, a nonresident of Ohio, who owned notes secured by mortgages on land in Butler county, Ohio, who visited that county each year to collect interest and so much of the principal as was due, brought the notes and mortgages with him into the state, and took them away with him when he left it. It was held that the notes were not subject to taxation, because he had no resident agent to hold the notes for him. The court might have disposed of the case without deciding that, if a resident agent had made the investment and held the notes, they would have been taxable, and to that extent the language of the syllabus and the opinion above quoted were obiter dictum. The syllabus in Ohio decisions, however, is the language of the court, and is to be given more weight than the language of a single judge in delivering the judgment of the court. In any event, upon a doubtful construction of a state statute, such an expression of opinion by the highest court of the state is, and must be, very persuasive in this court.

In *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 796, the point in judgment was whether a nonresident of Ohio was subject to taxation upon notes secured by mortgage on Ohio land, because the notes were in the hands of a resident agent for collection, but not for reinvestment. It was held that the money invested in the notes was not money "invested, loaned, or otherwise controlled by him as agent or attorney, or on account of any other person or persons." Construing section 2731, the court said:

"The first clause evidently embraces all tangible property, real or personal, situated in this state, irrespective of the residence of the owner; and the second clause embraces all intangible property of persons residing in this state, irrespective of where the subject of the property may be situated. So that it

seems clear that the credits of persons not residing in this state are not the subjects of taxation by its authorities, though the debtor may reside here. Such has been the uniform policy of this state. * * * The rule as above stated is qualified as to 'money' by section 2734, Rev. St. By this section every person of full age and sound mind is required to list for taxation 'all moneys invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person or persons.' But the case before us does not come within this provision. The agent of the defendant had no power to loan or invest money for her in this state. His duties were confined to the collection of that which had been loaned, and transmitting it to his principal as fast as it was collected. The phrase 'or otherwise controlled by him' must be construed to mean, in a manner similar to the loaning and investing of money. * * * To loan or invest money is one thing; to collect and transmit it to the owner when collected is another and different thing. Any other construction would require every attorney in the state engaged in making collections for nonresidents to return the same for taxation. Such could not have been the intention of the legislature, nor does the language of the statute require that such construction should be placed on it."

It may properly be said that the court might have decided this case by assuming, without deciding, that the language of section 2734 applied to the money and credits of nonresidents, and by then holding that the case before it was not within the exception created by that section. The court, however, held that section did apply to moneys of nonresidents, but that the case in hand did not come within its application. It may be questioned whether the construction by the court of the section under these circumstances could be regarded as obiter; but, however that may be, we regard it as sufficiently authoritative to require us to follow the decision. With deference, we think that the opinion of the state circuit court did not give sufficient weight to the language of the supreme court of the state in *Grant v. Jones* or in *Myers v. Seaberger*.

The case must go back to the circuit court in order that, if the complainant wishes, he may be permitted to file a replication, and try the issue upon the facts whether the moneys invested for the complainant below were "invested, loaned or otherwise controlled by" Carey, as complainant's agent, within the meaning of section 2734. The order will be that the decree of the circuit court is reversed at appellee's costs, with directions to overrule the exceptions to the answer, and to take further proceedings not inconsistent with this opinion.

ALLISON v. CORSON et al.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1898.)

No. 1,044.

1. PRELIMINARY INJUNCTION—WHEN GRANTED.

A preliminary injunction maintaining the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted.

2. ENJOINING EXECUTION OF TAX DEED—PROBABILITY OF SUCCESS ON MERITS—TEMPORARY INJUNCTION.

A first mortgagee brought an action to enjoin the assignee of a tax certificate from taking a deed to the mortgaged premises, alleging that the

taxes, a part of which were illegal, were levied after his mortgage was made; that until after the hearing in a suit to foreclose his mortgage, to which the second mortgagee was a party, the certificate was held by the second mortgagee, and then assigned. *Held* that, it not being clear that complainant may not succeed upon the merits, a temporary injunction should issue pending the final hearing.

Appeal from the Circuit Court of the United States for the District of South Dakota.

R. J. Chase (Edwin Van Cise and C. A. Dickson, on brief), for appellant.

C. S. Palmer (Walter Anderson, on brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is an appeal by the owner of a first mortgage upon real estate from an order refusing to grant a preliminary injunction against the taking of a tax deed upon the mortgaged property by the assignee of a tax certificate which is based on taxes levied after the first mortgage was made, and which was held by the second mortgagee, from the time a suit to foreclose the first mortgage, to which he was a party defendant, was commenced, until after that suit was heard on the bill and his answer, and submitted for decision, and was then assigned to the appellee Henry T. Corson. The appellant filed his bill for the injunction on October 11, 1897. No demurrer or answer to it was interposed, but the appellees presented certain affidavits on the hearing upon the application for the injunction, and the bill and these affidavits disclose these facts: On June 17, 1890, Fred D. Gillespie and his wife mortgaged to Fred T. Evans four lots, which Gillespie owned, in the town of Hot Springs, in the state of South Dakota, to secure the payment of his notes to Evans for \$15,000; and Evans pledged these notes to the Western Home Insurance Company, a corporation, to secure his debt of \$10,000 to it, which has never been paid. This corporation has since become insolvent, and the appellant, John P. Allison, is the receiver of its property and effects. On May 9, 1892, Gillespie and his wife mortgaged the same property to the Vermont Investment Company, a corporation, to secure the payment of notes or bonds to the amount of \$15,000; and on December 7, 1893, the Vermont Investment Company assigned this mortgage to the appellee J. W. Russell, trustee, who held the mortgage to secure the notes or bonds which had been sold to third parties. The assessor placed a valuation of \$8,325 on this property for purposes of taxation, and the board of equalization of the county, without jurisdiction, unlawfully raised that valuation to \$15,000 in 1892; and the levy of taxes for that year was made on that increased valuation, so that the tax levied on this property for that year was \$420, when the lawful tax could not have exceeded \$233.10. The assessor valued this property at \$10,600 in 1893, and the county board of equalization, without jurisdiction, unlawfully raised this valuation to \$15,600 in 1893; and the levy of taxes for that year was made on this increased valuation, so that the tax upon this property was \$600.60, when the lawful tax could not have ex-

ceeded \$408.10. Nevertheless, on November 7, 1894, the premises were sold for these illegal taxes of 1892 and 1893 to the county of Fall River for the sum of \$1,164.35, and a certificate of that sale was issued to the county. On January 31, 1896, J. W. Russell, trustee, who had raised the requisite money from those who owned the notes or bonds that were secured by the mortgage he held, bought with this money the certificate of this tax sale on the property; but he paid for it \$246.20 less than its face value, on account of the illegality of the tax of 1893. On June 19, 1896, the appellant brought a suit in a court of the state of South Dakota of competent jurisdiction to foreclose the mortgage of June 17, 1890, to Evans, and filed in the proper office notice of the pendency of that suit. In that suit he made the county of Fall River and the appellee Russell parties defendant. Russell answered that the mortgage to Evans was paid, and that the mortgage of May 9, 1892, of which he was assignee, was the first mortgage upon the property. That case was tried and submitted to the court on April 19, 1897. On May 1, 1897, Russell assigned the certificate of tax sale which he held to the appellee Henry T. Corson for \$600 in cash, and Corson's promise to pay \$400 more on demand. On July 22, 1897, the court rendered a decree in the foreclosure suit that the mortgage to Evans held by the appellant was "a valid and subsisting lien from June 17, 1890, upon the premises therein described, prior to the lien of the mortgage to the Vermont Investment Company, and prior and superior to any and all claims of the defendants, and each of them, and that said defendants, and each of them, and all parties claiming under them, or either of them, since the commencement of the action, and the filing of notice of pendency thereof, June 19, 1896 (though such persons, if any, so claiming since said date might not be parties to the action), be forever barred and foreclosed of all right, title, interest, and equity of redemption in and to said mortgaged premises," unless they redeemed from the sale under that decree. The amount found due on the debt secured by this decree was \$16,618.26, and the mortgaged property is worth only \$5,000. The appellant was proceeding to advertise the property for sale under this decree, and expected to be the purchaser at the sale, when the appellee Corson took proceedings to obtain a tax deed thereof on the sale of November 7, 1894; and the appellant brought this suit to enjoin him from so doing, on the grounds that the appellee Corson stood in the shoes of the second mortgagee, Russell, who was a defendant in the foreclosure suit; that Russell, and all claiming under him, were barred by the decree in that suit from asserting any lien or title superior to that of the appellant's mortgage; that a second mortgagee cannot acquire a tax title to the mortgaged property, as against the first mortgagee; and that the taxes on which the sale rests were illegal, and the sale was void. When the application for the preliminary injunction had been heard on this state of facts, the court ordered that a temporary restraining order which had been issued be set aside and annulled "unless the complainant, John P. Allison, as receiver of the property of the Western Home Insurance Company, pay to the said defendant, Henry T. Corson, or C. S. Palmer, his attorney, the amount which the certificate of sale represents, which is

now held and owned by the said defendant Henry T. Corson, as the same appears from the complainant's bill of complaint, and defendant Corson's answer and return to the order to show cause," and refused to grant the injunction. The appeal challenges this order.

When the appeal was taken the court below properly continued the restraining order in force until the questions it presents could be decided by this court. The same considerations which led to this wise exercise of its discretion might well have induced that court to hold matters in statu quo, by the issue of the injunction, until a final hearing and decision of the case could be reached. No substantial loss or inconvenience would have been entailed upon the appellees by the allowance of the writ. Why, then, should not the injunction have been issued? Why should not the rights of these parties have been held where they were, without loss to any one, until the final hearing? The controlling reason for the existence of the right to issue a temporary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during a litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. Undoubtedly an injunction ought not to be issued unless substantial questions of law or fact, whose decision in favor of the moving party would entitle him to ultimate relief, are presented. If it is reasonably clear that he cannot ultimately succeed,—if his pleading discloses no cause of action or defense,—no injunction should be granted. But if the questions to be ultimately settled are serious and doubtful, and if the injury to the moving party will be certain, great, and irreparable if the motion is denied and the final decision is in his favor, while, if the decision is otherwise, the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted, it is the duty of the chancellor to issue it. A preliminary injunction, maintaining the status quo, may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. *City of Newton v. Levis*, 79 Fed. 715, 718, 25 C. C. A. 161, 163; *Great Western R. Co. v. Birmingham & O. J. R. Co.*, 2 Phil. Ch. 597, 602; *Glascott v. Lang*, 3 Mylne & C. 451, 455; *Shrewsbury & C. R. v. Shrewsbury & B. R. Co.*, 1 Sim. (N. S.) 410, 426; *State v. Brailsford*, 2 Dall. 402; *Blount v. Société Anonyme du Filtre*, 6 U. S. App. 335, 3 C. C. A. 455, and 53 Fed. 98; *Dooley v. Hadden*, 38 U. S. App. 651, 20 C. C. A. 494, and 74 Fed. 429; *Jensen v. Norton*, 29 U. S. App. 121, 12 C. C. A. 608, and 64 Fed. 662.

When the application for the injunction was made in the case at bar, the lien of the foreclosure decree of the appellant was about to be divested by the issue of the tax deed to the appellee Corson. The appellant had the right, without leave of the court, to pay the amount which the certificate represented, and to obtain a discharge of its lien. *Sess. Laws S. D. 1891*, p. 66, c. 14, § 115. What he sought by his suit was an adjudication that this certificate was void, and a per-

petual injunction against the issue of a tax deed upon it. The refusal to issue the preliminary injunction unless he pays the amount represented by the certificate is, in effect, an adverse decision of his case before it reaches a hearing on its merits. It renders any subsequent adjudication futile, and any further prosecution of the suit nugatory. If he pays the amount represented by the certificate, its lien will be discharged, and there will be nothing further to litigate; and, if he refuses to pay it, the deed will issue, and his property will be conveyed, long before his case can be tried. In either event, if his claims are well founded, and the injunction is not issued, his rights will be seriously affected; and the loss he sought to prevent will be sustained before his case can be heard on its merits, and the perpetual injunction he seeks will come too late, in any event, to protect his rights or to avert his loss. On the other hand, if the injunction issues, and if the certificate of tax sale held by Corson is valid, and if the final decision is in his favor, he can then take his deed, and he will suffer no serious loss or inconvenience. The record presents a case in which the issue of the injunction can cause no substantial loss to any one in any event, while the failure to issue it may result in the loss of all the rights which the appellant claims in his suit. In such a case a temporary injunction should issue, unless it is reasonably clear that the claims of the moving party are unfounded.

Is it clear, then, from the facts presented on the application for this injunction, that the appellant will not ultimately be found to be entitled to a perpetual injunction, or to some relief in equity, against the issue of this tax deed? He claims that Corson is barred from any right or title to this land under his tax certificate by the decree in the suit for the foreclosure of the first mortgage upon it, to which Russell was a party defendant. Is it certain that he is not? Corson had no greater rights than Russell, because he bought of a defendant to that foreclosure suit while the suit was pending, and when a notice of its pendency was on file. *Henderson v. Wanamaker*, 79 Fed. 736, 738, 25 C. C. A. 181, 183. The bill in that suit contained a prayer that the mortgage held by the appellant might be declared a valid and subsisting lien from the date of the execution thereof, on June 17, 1890, and that the defendants and all persons claiming under them subsequent to the commencement of the action might be barred and foreclosed of all right, claim, lien, and equity of redemption in the mortgaged premises; and after an answer by Russell, and a hearing, that prayer was granted. When that suit was commenced, when Russell answered the bill, and when the case was tried, Russell held this certificate of sale, and the certificate was based on taxes levied after the date of the execution of the mortgage of the appellant. It is true that he did not plead it in his answer, but he might have pleaded it, and he might have had the validity and effect of his certificate adjudicated in that suit. The holder of a tax certificate or title acquired after the date of a mortgage is a proper party to a suit to foreclose it. *Mendenhall v. Hall*, 134 U. S. 559, 568, 10 Sup. Ct. 616. In an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only as to every matter offered, but as

to every admissible matter which might have been offered, to sustain or defeat the claim or demand." *Cromwell v. County of Sac*, 94 U. S. 351, 352; *Board of Com'rs v. Platt*, 79 Fed. 567, 571, 572, 25 C. C. A. 87, 91. "It is a universal rule of law that if the party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment." *Dickson v. Wilkinson*, 3 How. 57, 61. In *Hefner v. Insurance Co.*, 123 U. S. 747, 8 Sup. Ct. 337, one Bates, who was the owner of the premises, mortgaged them to the insurance company on August 23, 1870. On November 15, 1871, the county treasurer sold them to one Callanan for the taxes of 1870, and on December 1, 1874, he issued to him a tax deed thereof. On October 31, 1876, the insurance company filed a bill to foreclose its mortgage, and made Bates, the mortgagor, and Callanan, the owner of the tax title, parties defendant to its suit. The bill made no mention of the tax title, but contained the customary allegation that Callanan "claims some interest in and to a portion of the mortgaged premises, the exact nature of which your orator is unable to determine," and a prayer for "a decree of foreclosure against the premises hereinbefore described, against all of the before-named defendants, and that the right, title, and interest of each and every of the said defendants be, by decree of this court, forever barred and foreclosed," for a sale of the premises by a master, and for, "all and singular, such relief as your orator is equitably entitled to receive." A writ of subpoena was issued on this bill, and was served on Bates and Callanan. Bates answered, and Callanan made default. Thereafter and on May 21, 1877, a decree was rendered that the mortgage "is a lien upon the mortgaged premises, prior and paramount to the lien of each and every of the said defendants, * * * and that the right, title, and equity of redemption of each and every of the defendants in this suit be, by a sale of the said mortgaged premises hereunder, forever barred and foreclosed, and the purchaser at such a sale shall take the premises sold by title absolute; and such title shall relate back to the date of the execution of the mortgage to the complainant, to wit, the 23d day of August, 1870." After the decree was made the insurance company purchased the property under it; and Callanan conveyed his right and title to it under the tax deed to Hefner, who took possession of it. The insurance company thereupon brought an action of ejectment against him. He pleaded his title under the tax deed to Callanan. But the supreme court held that Callanan was a proper, if not a necessary, party to the foreclosure suit, that the court which rendered the decree in that suit had jurisdiction to determine the validity or invalidity of the tax title, and that the decree was "a conclusive adjudication, which cannot be collaterally impeached by Callanan or those claiming under him, that he had no valid title or lien of any kind against the plaintiff as mortgagee of the land in question, and as purchaser at the sale under the decree of foreclosure, and was rightly held to estop the grantees of Callanan to set up his tax title." The similarity between the essential facts in this case and those in the case at bar is marked and striking; and, under the rules and decisions to which we have adverted, it can hardly be truthfully said that it is so

clear that the appellee Corson is not estopped from asserting and perfecting his tax title by the foreclosure decree that that question is not worthy of serious consideration.

Another claim of the appellant is that the tax sale and the tax certificate are void, and entitle Corson to no deed, because a portion of the tax for which the sale was made was illegal. It is conceded that at least one-third of these taxes were levied without jurisdiction, and were illegal. But the land was sold for all the taxes, legal and illegal, for the single sum of \$1,164.35; and a certificate of its sale for that amount was issued by the county, and has now been assigned to the appellee Corson. This sale was made on November 7, 1894. The \$1,164.35 named in the certificate was the amount of these taxes, and the interest, costs, and penalty thereon to that date; and the only way the appellant could redeem this land from this sale was by paying this entire amount, and interest from the day of the sale. *Sess. Laws S. D. 1891, p. 66, c. 14, § 115.* It is true that before the appellee Russell purchased this certificate, on January 31, 1896, the illegality of these taxes had been discovered, and that on this account the county sold the certificate to Russell for \$246.20 less than its face, and that Corson paid and agreed to pay only \$1,000 for it in May, 1897, when it represented, and the amount required to redeem from the sale it recited was, more than \$1,500. *Id. pp. 66, 67, §§ 114-116.* But it is also true that the attorney for the appellee Corson, in his affidavit in this case, and the certificate itself, demand the entire \$1,164.35, and interest thereon from November 7, 1894, as a condition of its surrender or redemption. Can the purchaser or the assignee of the purchaser of a certificate of a sale for a tax that is in part legal and in part illegal, who has purchased it of the county at a discount on account of the illegality of a part of the tax for which the sale was made, demand of the owner of the land the payment of the illegal as well as the legal part of the tax, with interest at 12 per cent. per annum, and impose upon him the penalty of a forfeiture of his title if he fails to comply with the demand? An affirmative answer to this question is not so clearly right that it should be given without serious attention.

The appellant insists that if the appellees were not estopped by the foreclosure decree, and if the sale had been made for a legal tax, still they could not lawfully take a tax title upon the property, against him, because he held the first mortgage upon it, and the second mortgagee, Russell, is not permitted to divest the lien of a prior mortgagee by acquiring a subsequent tax title upon land which furnishes a common fund for the discharge of both their debts. In this view he is sustained by the following authorities: *Trust Co. v. Wickhem* (S. D.) 69 N. W. 14, 70 N. W. 654; *Fair v. Brown*, 40 Iowa, 209, 210; *Eck v. Swenumson*, 73 Iowa, 423, 424, 35 N. W. 503; *Frank v. Arnold*, 73 Iowa, 370, 371, 376, 35 N. W. 453; *Black, Tax Titles*, §§ 279, 280; *Goodrich v. Kimberly*, 48 Conn. 395, 396; *Woodbury v. Swan*, 59 N. H. 22; *Smith v. Lewis*, 20 Wis. 369, 373; *Garrettson v. Scofield*, 44 Iowa, 35, 37. In the last case, a second mortgagee, who pleaded his tax title in answer to a bill for a foreclosure of the first mortgage, was held to have no title to the premises, but to be entitled to receive from the

proceeds of the foreclosure sale the amount which he paid for the taxes, with interest at 6 per cent. per annum, but without penalties or costs. If these decisions are right, the appellees could not have recovered more than a reimbursement of the amount of legal taxes which Russell's purchase of the certificate discharged, with simple interest from the date of payment, if they had pleaded their claim under it in the foreclosure suit. They could not have recovered the amount represented by the certificate, the amount bid at the sale, and 12 per cent. interest per annum, nor could they have acquired title to the property as against the appellant. We will not extend this opinion by a discussion of the questions presented here. Enough has been said to show that the appellant did not fail, on his application for the injunction, to at least raise a serious question whether he would not be entitled on a final hearing to the perpetual injunction which he sought. This is not the time for the decision of the issues of law suggested by this record, and we forbear to discuss them. There is no answer to the bill, no testimony on the issues to be finally heard before us, and there has been no final hearing in the court below. We defer the expression of our opinion on the merits of the case until we are advised what issues it presents, and until the court below has rendered its decree upon the final hearing. Meanwhile the appellees should be enjoined from making or receiving a tax deed until the case is finally decided. Such an injunction will entail no substantial loss or inconvenience or risk of it upon the appellees, if they have a good defense to this suit, but will merely delay the execution of their deed a few months, during which the money they have invested draws more than 12 per cent. interest per annum, while to refuse it would cause the loss of all the rights which the appellant seeks to enforce if his claims are well founded. These claims are certainly not so frivolous and devoid of merit that they can be rightfully dismissed without a full hearing and serious consideration. The order appealed from is reversed, and the case is remanded to the court below, with directions to issue the preliminary injunction as prayed in the bill.

MASSACHUSETTS LOAN & TRUST CO. et al. v. HAMILTON.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1898.)

No. 424.

1. CONSTRUCTION OF STATUTES—MEANING OF "RAILROAD."

The word "railroad" has no such fixed definition as to enable a court to determine whether, by its mere use in a statute, it applies to street railways or not. It may be used in its broad sense, which includes a street railroad, and any other kind of road on which rails of iron are laid for the wheels of cars to run upon, whether propelled by steam, electricity, horse, or other power, or it may be used in its technical sense, which does not apply to street railroads.

2. RULE OF CONSTRUCTION.

As a general rule, statutes are presumed to use words in their popular sense; but the safest rule of construction is to take the entire provisions of the statute, and thereby ascertain, if possible, what the legislature intended. The meaning must depend upon the context, and be ascertained

from the occasion and necessity of the law, the mischief felt, and the object and remedy in view.

3. **SAME.**

The difference between street railroads and railroads of commerce for general traffic consists in their use, and not in their motive power.

4. **SAME.**

The words "railroad" and "railway" are synonymous, and, under all ordinary circumstances, are to be treated as without distinction of meaning.

5. **SAME—JUDGMENTS FOR PERSONAL INJURIES—PRIORITY OF LIEN.**

The Montana statute which provides that a judgment against "any railway corporation" for any injury to person or property, or for material furnished, etc., shall be a lien, within the county where recovered, superior to the lien of any mortgage or trust deed on the railroad property (Comp. St. 1887, div. 5, § 707), being construed in connection with other provisions of the same statute (which plainly refer only to the railroads of commerce), does not include street railroads.

Appeal from the Circuit Court of the United States for the District of Montana.

Ransom Cooper and McConnell, Clayberg & Gunn, for appellants.
Edwin W. Toole, Thos. C. Bach, and Jos. K. Toole, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. Appellee, in an action against the Great Falls Street-Railway Company to recover damages for personal injuries received, obtained a judgment for \$7,500, with costs, and brings this suit in equity to enforce the judgment lien against appellants, as a prior and superior claim and lien, upon the property of the street-railway company, to the mortgage lien and claim of the Massachusetts Loan & Trust Company. Whether a judgment rendered against a street-railway corporation for personal injuries has priority over the lien of a mortgage upon the corporate property depends upon the interpretation to be given to the provisions of section 707 of the fifth division of the Compiled Statutes of Montana of 1887, which reads as follows:

"A judgment against any railway corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act."

Does this section apply to street railroads? Was it the intention of the legislature, at the time of the adoption of this section, that it should apply to all railroad corporations within the state,—to street railroads, as well as to commercial and steam railroads, operated by means of locomotives and cars, for the transportation of passengers and freight? Is there anything in the laws of Montana which sheds any light upon the question of the intent of the legislature? If not, how is the intent to be ascertained? What do the authorities say upon this subject?

In May, 1873, the legislature of the territory of Montana passed "An act to provide for the formation of railroad corporations in the territory of Montana" (St. Mont. 1873, p. 93). The provisions of this act are general in their character, and are all specially applicable to

steam railroads. At the time of the passage of this act there were no railroads of any kind within the territory. In 1887 the legislature of the territory passed "An act in relation to railroads," consisting of six sections, which, in the Compiled Statutes of Montana, is treated as a supplement to the railroad act of 1873, and numbered sections 702 to 707; the last section, heretofore quoted, being the one under consideration. Sections 702 to and including 706 are specially applicable to steam and commercial railroads. At the time of the passage of this act there were no street railways within the territory of Montana, but at the same session (1887) the legislature passed an act providing for municipalities licensing and authorizing the construction of street railroads. Section 325 of the municipal act provides, among other things, that "the city council of all cities incorporated under this act shall have the following powers" (subdivision 14): "To regulate and control the laying of railroad tracks and prohibiting the use of engines and locomotives propelled by steam or to regulate the speed thereof when used;" (subdivision 16) "to license and authorize the construction and operation of street railroads and require them to conform to the grade of the streets as the same are or may be established." The legislature of Montana in 1893 passed an act, approved March 2, 1893, extending the provisions of chapter 36 of the Compiled Laws of 1887, relating to the conditional sale of railroad equipments, to street-railway equipments. This act was entitled "An act relating to certain contracts for the conditional sale, lease or hire of railroads and street railway equipments and rolling stock, and providing for the recording thereof." Section 393 of the Civil Code of 1895 provides, "The purposes for which the private corporations mentioned in the last section are" (subdivision 15) "the construction and maintenance of a railroad and of a telegraph line in connection therewith and a street railroad of any kind." The constitution of Montana (section 12, art. 15) declares that "no street or other railroad shall be constructed within any city or town without the consent of the local authorities," etc.

But little is gained by a reference solely to the meaning of the word "railroad." The word, of itself, has no such fixed definition as to enable the court to determine whether, by its mere use in a statute, it applies to street railways or not. It may or may not include them. It may be used in the statute in its broadest sense, or it may be used in its technical or popular sense. 19 Am. & Eng. Enc. Law, 777 et seq.; *Bishop v. North*, 11 Mees. & W. 418; *Lieberman v. Railway Co.*, 141 Ill. 140, 147, 30 N. E. 544; *Bloxham v. Railroad Co.*, 36 Fla. 519, 539, 18 South. 444; *Funk v. Railroad Co.* (Minn.) 63 N. W. 1099. In its broadest sense, it undoubtedly includes a street railroad, and every other kind of a road or way on which rails of iron are laid for the wheels of cars to run upon, whether propelled by steam, electricity, horse, or other power, carrying light or heavy loads of freight or passengers, or both. 2 Bouv. Law Dict. tit. "Railroads." In its technical sense it does not apply to street railroads. *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 2 Duv. 175; *Ror. R. R.* 1422; *Elliott. Roads & S.* 558.

It may be, as counsel for appellee claim, that searching for legislative intent is often like "hunting for a needle in a haystack"; but it is nevertheless the duty of courts to make the search by applying the usual magnets of construction, and drawing therefrom, through the ordinary channels of thought, such intent. There is no other way to determine the question, and the fact that it is difficult simply makes it more necessary that a thorough search be made. If there is any doubt about the true meaning of the word or term used in a statute, the legislative intent is not to be determined from that particular expression, but from the general legislation of the state concerning the same subject-matter. It may in some connections have a broad and comprehensive meaning, and in others a narrow and limited meaning. As a general rule, statutes are presumed to use words in their popular sense, and courts often apply this rule in order to arrive at the object and intent of the legislature. End. Interp. St. § 76. But in all cases the safest rule is to take the entire provisions of the statute where it is used, and thereby ascertain, if possible, what the legislature intended. The meaning of the word must always depend upon the context and the legislative intent of the statute in which it is used, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view. Potter's Dwar. St. 194, note 13. Following these, or other similar, rules of construction, the courts have in many instances held that the word "railroad" does in certain statutes include street as well as steam railroads, and in others that it refers only to the railroads of commerce. No particular stress should be given to the difference in the motive power of the respective roads. The difference between street railroads and railroads of commerce for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers from one part of a thickly populated district to another, in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers,—is a street railroad, whether the cars are propelled by animal or mechanical power. *Williams v. Railway Co.*, 41 Fed. 556. The railroads of commerce derive their powers from, and are governed by, national or state legislation. The street railways are regulated and controlled, principally, by municipal laws. It has been held that street-railway companies are "railroad corporations," within the meaning of "An act to enforce against railroad corporations" certain provisions of the state constitution, where such constitutional provisions include all corporations organized for business in its prohibition, and no words are used in the body of the act which were intended, or could fairly be used, as making any distinction between steam and other railroads, and where it is apparent that both street railroads and steam railroads are within the mischiefs recited in the preamble or other

parts of the act, and within the remedies provided for in the act. *Cheetham v. McCormick*, 178 Pa. St. 187, 191, 35 Atl. 631. In Tennessee it is held that an act relating to railroads, which requires certain precautions to be used in the movement of trains in the city of Memphis, is applicable to a dummy train of street cars. *Katzenberger v. Lawo*, 90 Tenn. 235, 16 S. W. 611. And in Ohio, that a statute giving a lien to mechanics, laborers, etc., for work done upon "any railroad, turnpike, plank road, canal or any public structure," applies to street railroads. *New England Engineering Co. v. Oakwood St. Ry. Co.*, 75 Fed. 162.

The words "railroad" and "railway" are synonymous, and, under all ordinary circumstances, they are to be treated as without distinction in meaning. As said by Mr. Justice Green in *Gyger v. Railway Co.*, 136 Pa. St. 96, 104, 20 Atl. 399:

"When either one or the other of these words is used in a statute, and the context requires that a particular kind of road is intended, that kind of a road will be held to be the subject of the statutory provision; but if the context contains no such indications, and either of the words is used in describing the subject-matter, the statute will be held applicable to every species of road which is embraced within the general sense of the word used." *Hestonville, M. & F. Pass. R. Co. v. City of Philadelphia*, 89 Pa. St. 210; *Borough of Millvale v. Evergreen Railway Co.*, 131 Pa. St. 1, 18 Atl. 993; *Rafferty v. Traction Co.*, 147 Pa. St. 579, 589, 23 Atl. 884.

A corporation with authority to construct, complete, and operate a railroad is none the less a railroad corporation, within the statute authorizing municipal subscriptions to railroad companies, because it is also a coal or a mining or a furnace or a manufacturing company. *Randolph Co. v. Post*, 93 U. S. 502, 511; *Improvement Co. v. Slack*, 100 U. S. 648, 659.

In *Electric Co. v. Simon*, 20 Or. 60, 65, 25 Pac. 147, 148, the contention of the plaintiff was that the statute of Oregon, which, among other things, provides that "a corporation organized for the construction of any railway" might condemn land for a right of way and other specified purposes, contemplates the exercise of such power as much by street and suburban railways propelled by horse power or electricity as railroads where cars are propelled by steam. The court, after reviewing the various provisions of the statute, specifying the objects and purposes for which land might be taken by railroad corporations, held that it did not apply to the street railway, so as to authorize it to take private property, without the consent of the owner, for its own use as a right of way. In the course of the opinion the court said:

"While it is true that the word 'railway' may include railroads operated by steam, as well as those whose cars are propelled by some other power, yet it is common knowledge that such corporations as belong to the latter class are usually operated as street railways for local convenience. The plaintiff is an electric company, and as such, we know, belongs to the class of corporations operated as street railways for the benefit of the local public."

After quoting several provisions of the statute, the court said:

"Few, if any, of these provisions have any reference to the class of corporations to which the plaintiff belongs, and was scarcely intended to apply to them. They contemplate and authorize a railway to be constructed where none was built before, through the country; requiring bridges, cuttings, all

ings, and embankments, and sometimes tunnels through hills and mountains, and also the building of depots and stations for the accommodation of freight and passengers, of engine houses, repair shops, switches, and turnouts, to enable the corporation to properly conduct its business."

These authorities show the necessity that exists for the courts, in all cases, to look carefully to the statute itself, in connection with the history of the times, and the contemporaneous legislation, in order to discover in what sense the word "railroad" is used, or to ascertain what particular kind of a railroad the legislature intended should come within its provisions. The general railroad act of 1873 may be said to have reference only to the railroads of commerce, and it is fair to presume that the legislature did not then have in mind the construction of street railways, although sections 1, 2, and 3, authorizing the formation and incorporation of railroad corporations, are broad enough to include corporations for the construction and maintenance of street railways.

In *Oler v. Railroad Co.*, 41 Md. 583, 589, objection was made to the certificate of incorporation for a horse-railroad company on the ground that the provisions of the act of 1870, under which it was organized, referred to roads similar to those alone upon which steam is used as the motive power. The court said:

"We do not see why so limited a construction should be put upon this law. It would be against both its spirit and letter. The term 'railroad' is used without qualification or restriction, and we have found nowhere—either in the preamble or body of the law—any allusion to the motive power used, as limiting its ordinary meaning or making a distinctive class. It is very true that many of the special requirements contained in the law are applicable only to railroads of the character of those upon which steam is now used. Had they not been made parts of the law, it might have furnished an argument, that would not have been without weight, that such roads were intended to be excluded from its operation; but we do not understand that their being in the law can furnish any sound reason for the exclusion of other classes of railroads, when the language of its general provisions, as is the case with the law before us, is broad enough to embrace them."

See, also, *City of Chicago v. Evans*, 24 Ill. 52; *City of Clinton v. Clinton & Lyons Horse Ry. Co.*, 37 Iowa, 61; *New York Cable Co. v. Mayor, etc., of New York*, 104 N. Y. 1, 10 N. E. 332; *Lieberman v. Railroad Co.*, *supra*.

In New York, from 1850 to 1884, all street railroads were incorporated under the general steam railroad act. *Cook, Stock, Stockh. & Corp. Law*, § 912, and authorities there cited. But no question is here presented whether street railways can be incorporated under the provisions of the railroad act. The street-railway company in this case was not organized under the general railroad act of Montana. It is a corporation organized and existing under and by virtue of the laws of the state of New Jersey. The supplemental act passed in 1887 "in relation to railroads" does not mention street railways, and all its provisions, independent of the section under consideration, are specially applicable to the railroads of commerce. Street railways were then in contemplation in the minds of the members of the legislature, for at the same session an act was passed giving to all incorporated cities the power to license and authorize the construction and operation of street railroads. What significance,

if any, should be given to these facts? Is it not shown, from all this legislation, including section 12 of article 15 of the state constitution, that the legislature of Montana regarded railroads and street railroads as being different in their character? Is it not fair to infer that when the term "railroad" is alone mentioned the act refers only to the railroads of commerce, and is not this inference strengthened by the fact that when "street railways" are clearly intended to be embraced in the provisions of the act the prefix "street" is used in order to specially designate the kind and character of railroad to which the law is intended to apply? We are of opinion that this act, in all of its provisions, was intended by the legislature to apply only to the railroads of commerce. This conclusion is supported by a careful consideration of each of the six sections, and the evident object and purpose of all their provisions. The first section (Comp. St. Mont. 1887, § 702) provides that "any railroad corporation chartered by or organized under the laws of the United States, or of any state or territory whose line of railroad shall reach or intersect the boundary line of the territory at any point, may extend its railroad into this territory from any point or points to any place or places within the territory, and may build branches from any point of such extension or continuation of any such extension or branch," and then directs what shall be done by the corporation before making such extension, etc. This is manifestly applicable only to the railroads of commerce, and has no application whatever to street railways. The same can be said of the second section (703), providing that "any two or more railroad corporations whose respective lines * * * are wholly or partly within this territory" may, in certain cases, be operated together as one property, and their stock, franchise, and property consolidated so as to become one corporation, etc. Then follows the third section (704), which provides that "any railroad corporation whose line is wholly or partly within this territory, or reaches the boundary line thereof, * * * may lease or purchase the whole or any part of the railroad or line of railroad of any other railroad corporation," together with the rights, powers, privileges, and franchises pertaining thereto. These sections furnish the earmarks that show plainly what character of railroad the legislature had in view at the time of the passage of the act. Section 5 (706) starts off with the proviso that "any railroad corporation whose line is wholly or partly within this territory, whether chartered by or organized under the laws of this territory or of the United States or of any other state or territory, shall have authority and power to make, issue, negotiate and deliver its bonds, securities or obligations, * * * execute and deliver such mortgages or deeds of trust upon any or all of its property" as the board of directors may determine or direct, and provides that the record of such mortgages or deeds of trust in the office of the secretary of the territory shall be notice of their existence and contents to all parties whomsoever, without any further record. Admitting, for the sake of argument, that some provisions of this section might be applicable to street railways, if they were alluded to or mentioned in the act, it is apparent from the object, scope, and effect of the previous sections, and the language at the head of the provisions

in this section, that the legislative mind was directed solely to the character of railroads operated by steam for the purpose of the general traffic of carrying freight and passengers, and herein designated as the "railroads of commerce," as distinguished from street railways in the cities and towns for the convenience of passengers only.

This brings us to the sixth section (707),—the one under consideration. It is true that the words, "a judgment against any railway corporation for any injury to person or property," if taken by themselves, without reference to the language in the latter part of the section, which provides that "such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this act," or to the language of the previous sections, are broad enough to apply to all kinds of railways. But the judicial mind must draw its inspiration from the language of the entire act, its declared object and purpose, the mischiefs, if any, that it was intended to prevent, and the special powers and remedies it was intended to give. In the passage of this particular section the legislature seems to have had in mind the thought that the railroads with the "iron horse," extending through various counties of the state, in regard to which all the previous sections had special reference, ought to be subject to some distinctive legislation in order to protect the class of people for whose special benefit this provision was inserted. It is a matter of common knowledge that there are many more judgments obtained in favor of parties who have been injured in their persons or property against the railroads of commerce than against the local street railways in the cities, because of the greater risks and hazards. The same is true of the other class of judgments. Moreover, such railroads often commence the construction and operation of their roads by executing and recording a blanket mortgage or deed of trust covering all the property they then had or might at any time thereafter acquire, thus making it difficult for people who are injured in their person or property, or those who have furnished supplies or performed labor for the railroad corporation, to obtain their just demands; and hence it was deemed proper, if not necessary, to pass such a law, as a protective measure. If it can be said that such persons also needed protection from street-railway corporations, the answer is that, if the legislature so thought, it was its duty—as in the passage of other acts at the same session—to have included street railways within the terms of the section. We have no power to insert "street railways" into this section of the act, with the knowledge we have that all the other provisions of the act refer in clear, plain, and unequivocal terms to other kinds of railways or railroads. Especially is this true when we find acts passed at the same session where the word "street" is used as a prefix to the word "railway" or "railroads" in all acts intended to apply to street railroads. It is true that the courts may in certain cases impute a legislative intent not expressed with perfect clearness, where the words used import such intent, either necessarily or by a plain and manifest implication. But it would be a dangerous exercise of judicial authority, not to be justified by any consideration, for a court to declare a law by the imputation of intent, when the words used do not import it, either necessarily or by plain implication, and when all

the surroundings of the enactment clearly show that the construction claimed could not have been within the legislative thought. *Suth. St. Const.* § 433. It cannot reasonably be said that the words "railroad corporations" are used in the statute "without qualification or restriction," when the language used in the various provisions of the act clearly indicates the kind of railroads the legislature had in view.

In *Funk v. Railway Co.* (Minn.) 63 N. W. 1099, it was held that chapter 13, Gen. Laws 1887, which provided that "every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part when sustained in this state," is not applicable to a street-railway corporation. The reasons given for the conclusions reached are in some respects specially applicable to this case. The court, among other things, said:

"But if we assume that at the time of the passage of the law of 1887 the history of street cars was generally known, and their use, method of operation, and dangers therefrom well understood, can it be fairly and reasonably held that it was the legislative intent to apply the term 'railroad' to street railways? It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. Street cars are generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard, and danger of personal injury to railroad employes, arises from operating freight trains. There is no such danger in operating street railways, whatever may be the motive power, because they do not carry freight. Especially is the danger in coupling freight cars entirely absent. They get their business from the street, usually in populous cities, where passenger travel is the only business carried on. Street cars do not usually run beyond the city limits, and none beyond the state boundary. The words in the law of 1887 making a railroad corporation operating a railroad in this state liable for damages 'when sustained within this state' were undoubtedly aimed at the railroads operated by steam, where their lines extended beyond the jurisdiction of the state. It is true these restrictive words would include railroads operated by steam wholly within the state, but they were inserted to prevent the bringing of suits where the injury was sustained upon railroads outside of this state, but where the lines of the same railroad come within the boundary of our own state. Hence the words, 'when sustained within this state,' evidently refer to railroads operated by locomotives, and it was such railroads the legislature had in contemplation when this term was used. Through our territorial and state legislation, the term 'railroad' has acquired a definite and well-understood meaning, and it has never been understood to include street railways. It is usually applied to the ordinary steam railroad of commerce, and, when there has been legislation in regard to street railways, they have been so designated. * * * If we were to hold that the term 'railroad' in the law of 1887 applied to street railways because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to run upon, we see no reason why it should not be so construed whenever found in the other legislation of this state. This would require street railways to build depots and waiting rooms for passengers, for there is just as much reason to make the word 'railroad' applicable in this respect as to personal injury cases. This is but one of the very many instances where by the use of the word 'railroad' the company is required to perform certain duties, in respect to which it cannot reasonably be said that

the meaning of such words includes street railways. To so construe it in such instances would lead to confusion, and be a palpable violation of the legislative intent."

Mitchell, J., in a concurring opinion, said:

"But according to common popular usage the word 'railroad,' without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads, used for the transportation of both passengers and freight, and whenever street railroads are referred to the word 'street' is prefixed. This is also the general legislative use of the words. In all the legislation of this state I have found no act (unless this be an exception) in which the word 'railroad' or 'railway,' standing alone, was not evidently intended to apply exclusively to ordinary commercial railroads. Neither have I found an act (unless this be an exception) which had reference to street railroads in which the word 'street' was not prefixed. I do not claim that there might not be a law enacted where it would be evident, from its subject-matter and object, that the word 'railroad' was intended to include street railroads. But in my opinion this is clearly not such a case. The occasion for enacting this law was the peculiar risks incident to the operation of railroads, and especially those resulting from the negligence of fellow servants. The remedy sought to be attained was better protection to railroad employes from these peculiar hazards. * * * The question is not whether the legislature had the power to place street railroads in the same class with ordinary commercial railroads, but whether they have in fact done so. The difference in conditions affecting the risks to which employes are exposed is sufficiently substantial to authorize the legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word 'railroad' in its ordinary popular sense, and in the sense in which they themselves had generally used it in other statutes." *Riley v. Railroad Co.* (Tex. Civ. App.) 35 S. W. 826; *Railway Co. v. Johnson* (Wash.) 25 Pac. 1084; *Sears v. Railway Co.*, 65 Iowa, 742, 744, 23 N. W. 150.

The direct question here involved was presented in *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed. 82. The court held that the Iowa statute (McClain's Code, § 2008), which declares that "a judgment against any railway corporation for any injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the 4th day of July, A. D. 1862," did not apply to street-railroad corporations. The court said:

"It cannot be questioned, on the one hand, that a company engaged in operating street cars upon lines of rails laid down along the streets of a town or city, for the transportation of passengers, is, in one sense, a railway corporation, nor, upon the other hand, that there is a marked and recognized distinction between street-railway lines and those engaged in the general passenger and freight traffic of the country. * * * The point in dispute resolves itself into the question whether, in the legislation of the state, the terms 'railroad or railway lines,' or corporations operating railroads or railways, should be held to include street railways, when the latter class is not specifically named. The section of the Code already cited * * * forms part of chapter 5, tit. 10, McClain's Code Iowa, which includes the legislation in regard to railways. An examination of the 147 sections of this chapter shows that in none of them are street railways named, and at least 137 thereof show affirmatively, by the nature of the provisions thereof, that it was not the intent to include street railways therein; and it is therefore the fair inference that the entire chapter was intended to apply only to the other class of railways. Thus, in this chapter it is enacted that every corporation operating a railway shall, at all highway crossings, construct cattle guards, and erect signboards; must connect its line, by means of a Y, with all intersecting lines, and receive

and draw the cars of all connecting lines; must stop not less than 200 feet from any other line of railway intersected or crossed; and must give signals, by bell or whistle, beginning at least 60 rods from all highway crossings, of the approach of all trains. The application of these and similar provisions of this chapter would be practically a prohibition of the running of street cars."

After pointing out other distinctions, the court proceeds:

"So far the question has been considered as though all the provisions of chapter 5, tit. 10, McClain's Code, had been adopted at one time by the legislature, whereas, in fact, they were not, and therefore it can be properly urged that regard must be had to the act which first adopted into the legislation of the state the provisions of the section under consideration; for if it should appear from the terms of that act, as it passed the legislature, that it was intended to include street railways within its provisions, such legislative intent would not be changed or defeated because the section was subsequently codified as part of chapter 5, tit. 10."

After referring to the 11 different sections of the supplemental act (Laws Iowa 1862, c. 169), it is said:

"It is clearly apparent that, of these sections, at least nine have no application to street railways; and why, therefore, should it be held that the other two, to wit, sections 7 and 9, were intended to include street railways, when they are not named therein, and the same words, to wit, 'railroad company,' are used in these sections as are employed in the other nonapplying sections? Upon what theory can the court rightfully enlarge the meaning of the words 'railroad company,' as used in sections 7 and 9, over the plain construction applicable to these same words when used in the other sections of the statute? There is certainly nothing in the language of these sections, or in the context, that gives support to the contention that the legislature intended these sections to apply to a class of corporations not included in the other sections of the act. * * * The conclusions reached are that, as there is in fact a marked distinction between railroads used in the furtherance of the general passenger and freight traffic of the state, and those used for street purposes only, we should naturally expect to find in the legislation of the state provisions applicable to the one class which are not applicable to the other; that an examination of the statutes of the state shows that such difference is recognized therein; that chapter 5, tit. 10, McClain's Code, is intended to embrace the provisions applicable to companies engaged in the general passenger and freight traffic; that, as that is the general purpose of the chapter, the court is not justified in excepting out of it one or two sections, and holding that they include also street railways, when the latter are not specifically named therein, and there is nothing in the context of the chapter, or in the text of the original act of 1862, which shows the legislative intent to include street railways therein; that the adoption of other sections of the statute, not included in said chapter 5, which authorize the construction and operation of street railways under the control of the city or town, with special provisions in regard to right of way and liability for injuries caused to others, shows clearly that the legislature did not intend to include street railways within the provisions of chapter 5, tit. 10; and that the court cannot so include them upon the argument that the proper protection of the people requires the application of the same rule to both classes of corporations,—it being for the legislature to give force to this argument, if it deems it advisable so to do."

Having arrived at the conclusion that the statute in question is not applicable to street railroads, and this being conclusive of the case, it is unnecessary to notice any of the other objections presented by appellant. The decree of the circuit court is reversed, and the cause remanded, with instructions to dismiss the bill.

McGEORGE et al. v. BIGSTONE GAP IMP. CO.

(Circuit Court, W. D. Virginia. July 27, 1898.)

1. AUTHORITY OF TRUSTEES—INSTITUTION OF SUITS.

Where property is vested in three trustees, with power to bring suits, etc., one of them has no authority to institute a suit without the knowledge and consent of his co-trustees.

2. EQUITY—DECREE FOR COSTS.

Where persons are made parties complainant to a bill without their knowledge or consent, and a decree is entered against them for costs, such decree is a nullity as to them, and they may have their names stricken from the record on filing a petition therefor in the cause.

3. SAME—AUTHORITY OF ATTORNEY.

An attorney employed to bring a suit, without specific instructions as to what court to commence it in, may, in the exercise of a sound discretion, resort either to a state or a federal court.

These petitions were filed in the case of William McGeorge, Jr., and others against the Bigstone Gap Improvement Company, by William McGeorge, Jr., Joseph B. Altimus, George Burnham, and Henry Lewis, praying that their names be stricken from the record and proceedings in said cause, and that they be relieved and discharged from any and all liability on account of costs or otherwise, or in any wise, in said suit.

H. S. K. Morison, for petitioners.
Bullitt & Kelly, for defendant.

PAUL, District Judge. These petitions, and the evidence taken thereon, present the following facts:

On May 27, 1893, the bill was filed in this suit, and the following persons were named as plaintiffs, to wit: William McGeorge, Jr., who sues in his own right and as trustee, etc., John C. Bullitt, Samuel Dickson, Joseph I. Doran, Joseph B. Altimus, George Burnham, Charles C. Harrison, Dr. William Pepper, John H. Dingee, Sabin W. Colton, Jr., and Henry Lewis, all citizens of the state of Pennsylvania, suing for themselves and all other creditors and stockholders who would become parties and contribute to the cost,—against the Bigstone Gap Improvement Company (hereafter called the "Improvement Company"), a corporation under the laws of Virginia. The bill alleged mismanagement of the business of the defendant company, its insolvency, and prayed for the appointment of a receiver. Temporary receivers were appointed, a temporary injunction order issued, and a rule awarded requiring the defendant company to appear on the 13th of June, 1893, to show cause, if any, why the temporary appointment of receivers should not be made permanent. The rule to show cause was heard on the 13th of June, 1893, and on September 4, 1893, a decree was entered by Judge Goff dissolving the injunction, providing for the settlement of their accounts and the discharge of the temporary receivers, and dismissing the bill at the costs of the complainants. At the May term, 1895, of this court, a decree was entered against the complainants McGeorge, Altimus, Burnham, and Lewis for the whole of the costs of the suit, and execu-

tion was awarded in favor of the defendant company. The names of Bullitt, Dickson & Dale, a law firm of Philadelphia, appeared on the bill as solicitors for the plaintiffs. These attorneys appeared by counsel before the court on the 13th of June, 1893, and stated that their names had been used without their authority; and, on motion, their names as attorneys were withdrawn from the record. On the 4th of September, 1893, in the decree entered as of that date, the names of J. C. Bullitt, Joseph I. Doran, and Samuel Dickson were stricken from the bill for the reason that they had been made complainants without their authority. At the October term, 1893, for the same reason, the names of John H. Dingee and Sabin W. Colton, Jr., were stricken from the bill. And subsequently the names of Dr. William Pepper and Charles C. Harrison disappeared from the proceedings in the cause,—Pepper's by death, and Harrison's by request. Thus, when the decree for costs was entered at the May term, 1895, the only remaining complainants on the record were the said William McGeorge, Jr., Joseph B. Altimus, George Burnham, and Henry Lewis, against whom the decree was entered.

The evidence shows that, a short time prior to the institution of the suit, Mr. M. B. Wood, of Bristol, Va., who held some of the bonds and stock of the Bigstone Gap Improvement Company, had a conference with the complainant McGeorge about bringing a suit, and having receivers appointed for the Improvement Company; that, in that conference, McGeorge said he wished F. S. Blair, a prominent attorney of Wytheville, Va., to be employed as counsel. McGeorge gave Wood the names of the persons to be made parties complainant in the bill. After the conference between Wood and McGeorge, the latter returned to Philadelphia; and shortly afterwards he had a conference with his co-trustee, Samuel Dickson, in a deed of trust executed by William D. Jones to secure a loan (which trustees held some of the bonds of the Improvement Company as collateral for said loan), as to the propriety of joining the people they represented in the proposed suit; having previously agreed with Wood that, if he (McGeorge) and Dickson agreed as to the appointment of a receiver for the Improvement Company, he (McGeorge) was to telegraph Wood, using a cipher message, saying, "Wheat is going up." After McGeorge had met and talked with Dickson on the subject, he wrote to Wood as follows:

"Philadelphia, May 22d, 1893.

"Hon. M. B. Wood—My Dear Judge: I had an opportunity to-day, for the first time, to talk over the matter of the receivership of Big S. G. Imp. Co. with Mr. Dickson. Dr. Bailey was present. Mr. Dickson wanted us to agree on J. K. Taggart for receiver. He thought the V. C. & I. Co. would insist upon that as a *sine qua non*. We suggested Major Wood, and it was finally agreed that Major Wood and J. K. Taggart should be made receivers. In that event it would be proper to have the Virginia Coal & Iron Co. made parties, as Taggart would represent them. I did not dare to telegraph all this, and so write promptly. Yours, very truly,

"[Signed]

Wm. McGeorge, Jr."

On the 25th of May, 1893, Mr. Blair, in order, he says, to be sure that the list of names was correct, sent from Richmond, Va., to McGeorge the following telegram:

"May 25, 1893.

"To William McGeorge, Jr., Bullitt Building, Philadelphia, Pa.: If Judge Goff will appoint Wood and Taggart on a bill by you as trustee, and any other noncitizens, must I file it and get order? Give names of plaintiffs.

"F. S. Blair."

The complainant McGeorge not being in the city of Philadelphia at the time, the telegram was delivered to his son, Arthur McGeorge, who answered as follows:

"Dated Philadelphia, Pa., 26 May, 1893.

"To F. S. Blair, Richmond, Va.: McGeorge in New York. Dickson says take instructions from Judge Wood. Arthur McGeorge."

Wood having previously furnished Blair with the list of names given him by McGeorge, Blair presented the bill, with the names inserted, to Judge Goff; and the temporary receivers were appointed, and the injunction granted.

For convenience, the court will consider first the joint petition of Altimus, Burnham, and Lewis. The evidence, taken in connection with this petition, establishes certain facts about which there can be no question. It is clearly shown that the petitioners, Altimus, Burnham, and Lewis, who were made complainants in the bill filed in this suit, did not themselves employ counsel to bring the suit, or authorize the same to be brought, either themselves or through McGeorge; that they did not know such a suit had been instituted until over two years after the suit had, by decree entered by Judge Goff, been dismissed at the costs of the plaintiffs; that, on learning that they had been made parties complainant in this suit, they took immediate steps to have their names stricken from the record, and to be relieved from the payment of costs, and from any other liability accruing therein, on the ground that the use of their names as complainants was without their authority, and was an imposition upon the court. Of these three petitioners, Altimus testifies that the first time he heard of the pendency of the suit was on October 15, 1895. Burnham and Lewis testify that they knew nothing of the institution of such a suit until December 9, 1895. McGeorge testifies that prior to these dates he had not spoken to any of them about the institution or pendency of the suit. But counsel for the defendant insist that McGeorge had authority to institute this suit in the name of himself, Altimus, Burnham, and Lewis, on the ground that these persons were trustees in what is known as the "Altimus-Benson-McGeorge Trust." Under this trust deed, entered into in 1883, it appears that eight or ten persons owning undivided interests in certain lands in Virginia and Kentucky, for the purpose of being able to handle it conveniently, agreed to convey it to these trustees,—the conveyance to be made to the trustees as individuals; that the public was not to know that they held the land in trust; that the trustees were to have full power to sell, lease, and convey these lands, and full power to bring and defend any and all suits in reference to the trust property; that a part of this trust property was sold to the defendant, the Improvement Company,—the trustees receiving as consideration therefor certain bonds and stocks of the Improvement Company, which were held by said trustees at the time

of the institution of this suit,—and in this way they were interested in the affairs of the Improvement Company. It further appears from said evidence that said trustees were interested as individuals in the trust property, but, as the trust property was held by them as individuals, all suits were brought in their names as individuals.

It is contended that the evidence shows that the other trustees delegated their authority to their co-trustee, McGeorge; that for years prior thereto, and at the time the suit was brought, all of the affairs of the trust were managed by him; that he had full charge, not only of the ordinary business of the trust, but also of its legal matters; that he frequently directed settlements and the bringing of suits without consultation with his co-trustees, and that his actions in so doing had never been disapproved by his co-trustees; and that he was generally understood by the public at large to have full authority in the premises. The claim of delegated authority cannot apply to Burnham, for the evidence shows that he, from the organization of the trust to the present, has never been a trustee. The trustees at the time the suit was instituted were McGeorge, Altimus, and Lewis. The strongest evidence to sustain the position that the other two trustees had delegated their authority to McGeorge, and that he had general charge of the affairs of the trust, are the depositions of two practicing attorneys who were formerly counsel for the Altimus-Benson-McGeorge trust,—one from the year 1884 to 1888 or 1889; the other from September, 1889, to August, 1890,—as local counsel, having been previously employed for several months in conjunction with the then local counsel. The court has carefully considered these depositions, and the objections taken to the same by counsel for the petitioners; and it considers that they are insufficient to establish the fact that the co-trustees of McGeorge had delegated to him the authority vested in the three by the trust deed. The only other witness introduced by the Improvement Company to prove that McGeorge had authority to act for his co-trustees is D. C. Anderson, the agent in Virginia of the Altimus-Benson-McGeorge trust. He is asked:

"Q. Did you get all your instructions with reference to the interests of the Altimus, Benson, and McGeorge trust from Mr. McGeorge? A. These instructions came through Mr. McGeorge, but they were, as I always understood them, the instructions of the trustees as a body. I was employed, not by Mr. McGeorge personally, but by the board of trustees, at a regular meeting of the trustees. Business of importance I submitted to the trustees, through Mr. McGeorge. In answering my communications, he would invariably say that he had consulted Mr. Altimus and Mr. Lewis, or either of them, and that they had decided the matters submitted."

Again, after speaking of a sale he had made of some white oak timber, he is asked:

"Q. Did you not consider this as being done under Mr. McGeorge, and did you observe and abide by the directions which he gave you? A. I considered that I was employed by the trustees, and, as I have already stated, all business of importance was submitted to them, through Mr. McGeorge; and when Mr. McGeorge wrote me, directing me to do anything, it was as the result of the action of the trustees, or of conferences between him and Mr. Altimus and Mr. Lewis, or either of them. I have no recollection at all of having submitted any proposition or matter of business of any importance in which Mr.

McGeorge, in sending me instructions, did not state that he had submitted the matter to Mr. Altimus or to Mr. Lewis, his co-trustees, or either of them."

Altimus, one of the trustees, is asked in his deposition:

"Q. Had there ever been any consultation between you and Mr. McGeorge, as co-trustees, with reference to the bringing of that suit? A. No. Q. Please state whether or not Mr. McGeorge had any authority from you—either special or general—to bring suits of this character? A. None whatever."

Again, on cross-examination:

"Q. Do you mean that Mr. McGeorge consulted you about everything? A. Everything. Q. Is it not a fact that Mr. McGeorge really only consulted you about matters of importance, and that the ordinary business he attended to himself? A. In all the business generally we held a consultation as trustees."

Lewis, the other trustee, states in his deposition that he never authorized McGeorge to bring suits in his behalf, and that there had never been any consultation between him and McGeorge as to bringing this suit. McGeorge, in answer to the question, "Who had actual charge of the business of the Altimus, Benson, and McGeorge trust?" says:

"No one had actual charge, in the sense of having discretionary power in regard to it. Everything that was done was done upon consultation with the trustees; but the trustees paid me a salary to carry on the correspondence, and announce their conclusions and agreements from time to time."

This evidence disposes of the contention that McGeorge was authorized by his co-trustees to exercise the authority vested in the three trustees. It is scarcely necessary to cite authority for the proposition that a power conferred upon three trustees cannot be exercised by one only. The doctrine is thus stated in 1 Perry, Trusts, § 411:

"Where a settlor vests his property in several co-trustees, they all form, as it were, one collective trustee. Therefore they must perform their duties in their joint capacity, even in making a purchase. In law there is no such person known as an acting trustee, apart from his co-trustees. All who accept the office are acting trustees. If any one trustee who has accepted refuses to join in the proposed act, or is incapable, the others cannot proceed without him, but an application must be made to the court. So, if trustees bring suits or defend suits in court, they must act jointly. * * *

The petition of McGeorge to be relieved from the payment of costs, in view of the facts already recited, requires but brief discussion. The evidence shows that he was one of the active movers in bringing the suit. Without his co-operation, it is doubtful if any proceedings would have been commenced. Through Wood, he employed Mr. Blair as attorney for the complainants, and furnished a list of names of persons to be made parties plaintiff. The day the receivers were appointed and the injunction granted, Dr. Bailey, who, McGeorge wrote to Wood, was present at the interview which McGeorge had with Dickson, wrote to McGeorge from Richmond, telling him what had been done. A copy of a newspaper published at Bigstone Gap, of June 1, 1893, was mailed to, and received by, him. This newspaper contained a number of articles on the appointment of the receivers; giving the name of McGeorge as one of the plaintiffs, and criticising him as the chief instigator of the proceedings. McGeorge's letters of October 31 and of November 11, 1893, to Ayers

show that he knew of the pendency of the suit, and of the proceedings had prior thereto. This was two years before the decree for costs was entered against him. Yet he took no steps looking to his release from the cause as one of the complainants improperly made so, or to prevent the rendering of the decree for costs. In his deposition he states that he objects to the suit because the bill contains scandalous matter, of which he was not cognizant, and that the suit was brought in the federal court, instead of, as he expected, in a state court. But the evidence fails to show that he gave his counsel any specific or general instructions as to the court in which he wished the suit to be brought. In a case like this, where both the state and the federal court have concurrent jurisdiction, the attorney bringing the suit may, in the absence of instructions from his client, in the exercise of a sound discretion, choose either forum. The Improvement Company, in its answer, insists that the decree for costs which it is sought to annul was a final decree, and ended the cause. and that therefore this court cannot entertain these petitions to annul that decree. The court holds that the decree, as to Altimus, Burnham, and Lewis, was a nullity, and that it has jurisdiction in this proceeding to so declare the same. In *Shelton v. Tiffin*, 6 How. 163, the supreme court says:

"An appearance for a party not served, by counsel, who has no authority to waive process and defend the suit, does not bind the party, and the judgment or decree is a nullity."

The principle is thus stated in *Black, Judgm.*:

"If an attorney, assuming without authority to act for the plaintiff, brings a suit, and loses it, the defendant recovering a judgment for costs, equity will restrain the enforcement of such judgment in the same circumstances which would induce it to relieve the defendant in the converse case." *Black, Judgm.* § 374.

The court sees no ground for sustaining the petition of William McGeorge, Jr., and the same will be dismissed. The court sustains the petition of Joseph B. Altimus, George Burnham, and Henry Lewis. An order will be entered setting aside and annulling the decree heretofore entered, requiring these petitioners to pay the costs of this suit.

FOSTER et al. v. BANK OF ABINGDON et al.

(Circuit Court, W. D. Virginia. July 27, 1898.)

1. BANKS AND BANKING—SUITS BY DEPOSITORS.

A depositor in a bank does not sustain to it a relation like that of a stockholder in a corporation, and therefore is not subject to the requirement of the ninety-fourth equity rule, requiring stockholders, before they can maintain suits, to assert rights properly enforceable by the corporation itself, to show that they have sought in vain to procure action by the corporation.

2. EQUITY PLEADING—JOINDER OF CAUSES OF ACTION.

A bill by depositors against the directors of a bank for negligence in the discharge of their duties resulting in injury to plaintiffs and other depositors is not rendered bad for misjoinder of causes of action by a further allegation that the president of the bank, by fraudulent representations, induced plaintiff to deposit money therein.

Rhea & Peters, Curtain & Haynes, and D. F. Bailey, for complainants.

White & Penn, Fulkerson, Page & Hurt, and Honaker & Hutton, for defendants.

PAUL, District Judge. This suit is brought by the plaintiffs, who were depositors in the Bank of Abingdon. They sue for themselves and all other creditors who may come into the cause and contribute to the costs thereof. The only questions now before the court are raised on demurrer filed by the defendants. The grounds assigned for sustaining the demurrer are the following:

"(1) That it appeareth by the complainants' own showing by the said bill that they are depositors in the Bank of Abingdon, an ordinary bank of discount and deposit, of which the defendants were directors, and that, being such, they have no right to institute this suit against the said defendants, there being no allegation in said bill that the authorities of said bank decline to sue.

"(2) That the said bill is exhibited against these defendants by complainants, on behalf of themselves and all other creditors of said bank, to hold them responsible as directors of the said Bank of Abingdon for losses alleged to have occurred to the said complainants by reason of the misconduct of said directors; and in said bill several distinct and independent matters and causes, which have no relation to each other, are embraced,—matters in which all the said complainants are not interested, and other matters which do not affect all of said defendants.

The demurrer admits the properly pleaded allegations of the bill. The bill alleges the insolvency of the defendant bank; charges that no regular meetings of the stockholders or of the board of directors had been held for a long period of time; that the business of the bank had been conducted from year to year under the reckless and careless management of the directors of said bank; that the bank, under their management, was completely wrecked, the moneys of its depositors squandered in wild speculation, worthless securities and loans, in consequence of which the bank became hopelessly insolvent, and was forced to make an assignment. It further charges "that the liabilities of said bank amount in the aggregate to the sum of \$230,000 or more, whereas the available assets will not pay one-fourth of the indebtedness"; that a large part of the debts due the bank are owed by insolvent parties, to whom the money was loaned with reckless and gross negligence of the interests of the depositors. It charges that large sums of money were loaned to insolvent individuals and firms, designated in the bill, for which there were no indorsers, or, if any, they were insolvent, and that the insolvency of the borrowers and indorsers was known to the board of directors; that these officers themselves obtained large loans, a part of which they pretended to secure with what are charged to be worthless collateral securities; that one of the directors is due the bank \$10,000 for money loaned him without any security whatever, and that the collection of the same is now barred by the statute of limitations; that a large portion of the collateral received by the bank for money loaned consists of spurious stock of the Abingdon Development Company, which was in this way converted into money by the officials of the bank, thus practicing a transparent fraud on the complainants

and other depositors. It alleges that, if ordinary care and prudence had been exercised by the officers of the bank, all of the money of the complainants and of other creditors of said bank would have been saved, and the wreck of the bank averted. The bill further charges that the president of the bank, by representing to the complainants that the bank was solvent, and that its stock was worth \$110 on the share, induced them to deposit in said bank about \$18,000. It charges that the officers and directors have violated the laws of the state of Virginia, and the general law governing their conduct and management of said bank; that they failed to use ordinary care and diligence in the management of its affairs, and have been guilty of gross and inexcusable negligence instead; that the assets of the bank which went into their hands were largely more than sufficient to pay and satisfy the whole of the demands of the complainants and of other depositors if the defendants had used ordinary care and diligence in the management of the same. The bill alleges that, by reason of the failure of the defendants to exercise such care and diligence, the defendants have become and are severally and jointly liable to the complainants and other depositors and creditors of the bank for the amount of their deposits, with interest thereon. It prays a reference, and that the conduct of the officers and directors of said bank be inquired into, and that the officers named as defendants be held liable for their defalcations to the complainants and other depositors.

In the first ground of demurrer assigned, it is insisted that, the complainants being depositors in said bank, they have no right to institute a suit against the defendants, who are directors of the bank, there being no allegation in the bill that the authorities of the bank decline to sue. That a stockholder in a corporation cannot maintain in this court a bill in equity against the corporation and other parties founded on rights which may properly be asserted by the corporation, without setting forth the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, admits of no discussion. These allegations are made necessary by the provisions of the ninety-fourth equity rule, and we have numerous decisions of the federal courts based on the requirements of this rule. *Dannmeyer v. Coleman*, 11 Fed. 97; *Hawes v. Oakland*, 104 U. S. 450; *Huntington v. Palmer*, Id. 482; *Bell v. Donohue*, 17 Fed. 710; *Church v. Railroad Co.*, 78 Fed. 526. Counsel for the defendants have discussed the demurrer as though this were a suit by a stockholder of a corporation against the directors thereof. All of the authorities cited are in support of this position. But the court conceives there is a wide difference between the relation of stockholders in a bank to the corporation of which they are members, and a majority of whom exercise a controlling influence in all its affairs, and a depositor of the bank who has no voice in its control and management. The general relation of the bank to a depositor is that of debtor and creditor. *City of St. Louis v. Johnson*, 5 Dill. 241, Fed. Cas. No. 12,235. Under certain conditions a stockholder in a bank bears the relation of debtor to the

depositor. The relation of the directors of a bank to its depositors is that of trustees to cestuis que trustent, and, as such, they are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust. *Bank v. Bosseix*, 3 Fed. 817; *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586. The requirements of the ninety-fourth equity rule as to precedent action to be taken by a stockholder before he can maintain a suit against the bank and its directors do not apply to a depositor, and no case to which the attention of the court has been directed so holds. But that a depositor can maintain a suit against a bank and its officers for losses occasioned by their fraud or negligence is sustained by both state and federal decisions. *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586; *Solomon v. Bates* (N. C.) 24 S. E. 478; *Bank v. Bosseix*, 3 Fed. 817, and others.

The second ground on which it is claimed that the bill is demurrable is because it contains several distinct and independent matters and causes which have no relation to each other. The charges in the bill are that the president of the bank, by false and fraudulent representations, induced the plaintiffs to deposit in said bank; and it is also charged that the directors of the bank, of whom the president is one, by their negligence and failure to discharge their duties, injured the plaintiffs and all other creditors of said bank. In a case already quoted (*Solomon v. Bates*, supra), the supreme court of North Carolina says:

"It is not a misjoinder of causes of action to join in the same action, brought against bank directors individually, a cause of action for gross negligence in the discharge of their duties, whereby the plaintiff was injured, with causes of action for fraud and deceit in making false statements and misrepresentations of the condition of the bank, whereby the plaintiff was induced to deposit his money in the care of the bank." (Syllabus.)

The demurrer is not well taken, and will be overruled, with leave to the demurrants to answer.

BRUNSWICK TERMINAL CO. et al. v. NATIONAL BANK OF BALTIMORE.

(Circuit Court, D. Maryland. July 8, 1898.)

1. CONFLICT OF LAWS—LIMITATION OF ACTIONS.

Statutes of limitation affect the remedy, and not the substantive right, and are determined by the law of the forum.

2. SAME—CORPORATIONS—STOCKHOLDERS' LIABILITY UNDER LAWS OF ANOTHER STATE.

The Maryland statute of limitations is pleadable in an action in a federal court in that state, against a citizen thereof, to enforce a liability imposed by a Georgia statute on stockholders in a Georgia bank, when the statute giving the right of action does not itself provide a limitation, and especially when there is no statute of limitations whatever in Georgia applicable to the case.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A decision by a state court that every right of action given by a statute is in the nature of a specialty is not, when applied to a particular statute of that state, a construction of that statute which a federal court is bound to follow, but is a ruling upon the question of general law.

4. LIMITATION OF ACTIONS—LIABILITY OF STOCKHOLDER IN BANK.

The Maryland statute requiring actions on the case, or actions of debt on simple contracts, to be brought within three years, is applicable to an action to enforce the statutory liability of a stockholder in a bank of another state.

Demurrer to Defendant's Plea of the Maryland Statute of Limitations.

Williams & Williams and Goodyear & Kay, for plaintiffs.

Wm. A. Fisher, James L. McLane, and Allan McLane, for defendant.

MORRIS, District Judge. This is a suit in equity by creditors of the Brunswick State Bank of Georgia, who are citizens of Georgia, against the National Bank of Baltimore, a citizen of Maryland, to enforce a statutory liability imposed by the statute of Georgia upon stockholders in the Brunswick State Bank. The defendant has pleaded the Maryland statute of limitations applicable to actions of assumpsit or on the case, or actions of debt on simple contracts, which requires the suit in such cases to be commenced within three years. The complainants demur to this plea. The questions now before the court are: First, is it the Maryland statute or the Georgia statute of limitations which is applicable to this action? And, second, if the Maryland statute does apply, is this court, in applying the Maryland statute, controlled by the decisions of the supreme court of Georgia holding that the right of action given by the Georgia statute against stockholders is in the nature of a specialty?

First, as to whether the Maryland or the Georgia statute of limitations is applicable: The established rule is that remedies are determined by the law of the forum, and that statutes of limitations are part of the remedy, and are not laws affecting rights. *McElmoyle v. Cohen*, 13 Pet. 312-327; *Bank v. Eldred*, 130 U. S. 693-696, 9 Sup. Ct. 690; *Telegraph Co. v. Purdy*, 162 U. S. 329-339, 16 Sup. Ct. 810; *Williard v. Wood*, 164 U. S. 502-520, 17 Sup. Ct. 176; *Townsend v. Jemison*, 9 How. 407; *Railway Co. v. Wyler*, 158 U. S. 285-289, 15 Sup. Ct. 877. By the general rule, therefore, it is the Maryland statute of limitations which is applicable to this suit, which the complainants have instituted in the district of Maryland. If the contention of the complainants, that the Georgia law of limitations is to be here applied, is sustainable, they must show some recognized exception to the established rule. Counsel for complainants contend that, in suits against stockholders to enforce a statutory liability to the creditors of a corporation, the general laws of limitations of the state creating the corporation are to be applied, no matter in what state the suit is prosecuted; and they rely upon the following cases as supporting this alleged exception to the general rule: *Flash v. Conn*, 109 U. S. 371-378, 3 Sup. Ct. 263; *Bank v. Francklyn*, 120 U. S. 747-756, 7 Sup. Ct. 757; *Andrews v. Bacon*, 38 Fed. 778. It is to be observed that there is no period of limitation prescribed by the Georgia law which makes the stockholders liable to this action. If the statute giving the right to sue limited the duration of the right, undoubtedly the limitation would apply in this jurisdiction,

just as in Georgia. The *Harrisburg*, 119 U. S. 199-214, 7 Sup. Ct. 140. But not only is there no special limitation put upon this right of action by the Georgia law which gives it, but the supreme court of Georgia has held that there is no clause of the general law of limitations enacted by Georgia which is applicable to this action. In *Thornton v. Lane*, 11 Ga. 459-502, the supreme court of Georgia, in considering this question, said, "We are clear that a statutory liability is not included within any of the acts of limitation of this state." As there is no limit of time prescribed by the Georgia statute giving the right of action, and no clause of the general statute of limitations of Georgia which is directly applicable, I can see no reason why the Maryland statute applicable to causes of action of the class to which this belongs should not be applied.

The complainants rely upon the language of the opinion of the supreme court in *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757. On page 756, 120 U. S., and page 762, 7 Sup. Ct., the court says:

"Pursuant to these principles, this court has repeatedly held, not only that suits, either in law or in equity, in the circuit court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the state (*Terry v. Tubman*, 92 U. S. 156; *Carrol v. Green*, Id. 509; *Terry v. Anderson*, 95 U. S. 628), but that the question whether the remedy in the federal court should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes (*Mills v. Scott*, 99 U. S. 25; *Terry v. Little*, 101 U. S. 216; *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263)."

The case of *Bank v. Francklyn* was a suit instituted in New York under a statute of Rhode Island; and the court held that, as the Rhode Island statute required a creditor to obtain a judgment against the corporation before he could proceed at law to charge the stockholder, the plaintiff could not maintain his suit unless he first obtained a judgment against the corporation. The cases of *Terry v. Tubman*, 92 U. S. 156, *Carrol v. Green*, Id. 509, and *Terry v. Anderson*, 95 U. S. 628, were all cases in which the suit was brought in the state creating the corporation; and, in holding that the statute of limitations of that state was applicable, the court was only sustaining the rule that the law of the forum was applicable. In *Terry v. Anderson*, the supreme court upheld the constitutionality of a statute of Georgia, passed after the right of action had accrued, limiting the time within which the action could be brought to nine months after the passage of the act. This act was passed by Georgia in 1869 because of the distracted condition of affairs in that state arising from the Civil War, and it was held to be justified by the local circumstances which called for its enactment. This case is a full recognition by the supreme court of the United States of the doctrine that the period of limitation of actions is a matter which each sovereignty decides for itself, and varies according to the peculiar environment of its citizens, and their special necessities. As was said by the supreme court in *McElmoyle v. Cohen*, 13 Pet. 327:

"It would be strange, if, in the now well-understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts."

In *Hawkins v. Barney*, 5 Pet. 457-466, it was said:

"Laws limiting the time of bringing suit constitute a part of the *lex fori* of every country. They are laws of administering justice,—one of the most sacred and important of sovereign rights and duties."

In *Campbell v. City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, the question was whether the statute of limitation of the several states applied to the actions for infringement of patents brought in the circuit courts of the United States under acts of congress. The supreme court held that the local statutes of limitation were applicable to such actions, and said (155 U. S. 618, 15 Sup. Ct. 220):

"The truth is that statutes of limitations affect the remedy only, and do not impair the right, and that the settled policy of congress has been to permit rights created by its statutes to be enforced in the manner, and subject to the limitations, prescribed by the laws of the several states."

Looking then to the question which the supreme court had before it in *Bank v. Francklyn*, and to the cases cited by the court in its opinion, it would seem reasonable to conclude that the language used had reference either to cases in which the statute creating the liability prescribed the time within which it might be enforced, or to cases in which, as in all the cases cited in the court's opinion, the suit was brought in a court sitting in the state which created the corporation. The general rule prevails in cases of other statutory rights,—such as the right to sue for death caused by wrongful act. *Munos v. Southern Pac.*, 2 C. C. A. 163, 51 Fed. 188; *The Harrisburg*, 119 U. S. 214, 7 Sup. Ct. 140; *O'Shields v. Railway Co.*, 83 Ga. 621, 10 S. E. 268; *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Thompson v. Insurance Co.*, 76 Fed. 892. It would seem that, where foreign laws of limitation have been allowed to be pleaded, they have not been strictly laws of the limitations of actions, but laws specially limiting the time during which some special statutory right was permitted to continue. It is true that in *Andrews v. Bacon*, 38 Fed. 777, the United States circuit court for the district of Massachusetts, in 1889, held in a similar case to this that the statute of limitations of the state creating the corporation should govern. The facts of that case are not fully reported, and it does not seem to me it should govern in the case in hand.

The plaintiffs further contend that, even if the Maryland statute of limitations is to be applied, the supreme court of Georgia has so construed the Georgia statute giving the right of action against stockholders of banks, and has so defined the nature of the action, that even under the Maryland statute it is not barred under 12 years. The Maryland statute of limitations provides that "actions of assumpsit or on the case, actions of debt on simple contract, * * * shall be commenced within three years," and that "no judgment, recognizance, statute merchant, or of the staple or other specialty whatsoever shall be admitted in evidence after the debt or thing in action shall be above twelve years standing." The supreme court of Georgia has made two rulings with regard to the right of action against stockholders given by the Georgia law,—one general in its character, and the other local. The local ruling is that there is no statute of limitations of the state of Georgia which is directly

applicable to this right of action; and the other ruling, which is matter of general law, is that the right of action given by the statute is in the nature of a specialty. There is nothing peculiar to the Georgia statute with regard to the liability of stockholders which led the supreme court of Georgia to rule that the action was in the nature of a specialty; and it was from the principles of the general law, as interpreted by that court, and held by it to be applicable to actions given by statutes, that the court reached its conclusion. *Lane v. Morris*, 10 Ga. 162-164; *Thornton v. Lane*, 11 Ga. 459-502. It was not, therefore, the interpretation of a state statute, but the announcement of a general rule of law, without special reference to the particular statute. It would appear, therefore, that the decision of the supreme court of Georgia that every right of action given by a statute is in the nature of a specialty is not the construction of a statute of that state, which a federal court is bound to follow, but is a ruling upon a question of general law, as to which the decision of the state court is not binding. *Burgess v. Seligman*, 107 U. S. 33, 2 Sup. Ct. 10; *Township v. Talcott*, 19 Wall. 666-677. The decision of the supreme court of Georgia, so far as it concerned the statute of limitations, was, in effect, a ruling that by the Georgia statute of limitations there was no statutory limitation as to the actions of this class. The court said (*Thornton v. Lane*, 11 Ga. 502):

"We are clear that a statutory liability is not included within any of the acts of limitation of this state. It is neither a simple contract, nor a specialty,—for nothing is, but a writing under seal,—but a quasi contract in the nature of a specialty. Being at least as high evidence of indebtedness as any specialty can be, twenty years is the proper bar to actions brought to enforce the obligation it imposes."

Is there any reason why this ruling of the supreme court of Georgia with respect to the Georgia statute of limitations should be followed in Maryland, with respect to the Maryland statute of limitations? In the first place, as matter of general law, the supreme court of the United States has decided that the liability of a stockholder arises from his acceptance of the act creating the corporation, and his implied promise to fulfill its requirements, and that the proper remedy is an action on the case, and that the action is barred by the statute of limitations applicable to actions upon the case. The case of *Carrol v. Green*, 92 U. S. 509, arose out of the failure of the Exchange Bank of Columbia, in South Carolina; and the suit was based on the South Carolina law, making each stockholder of the bank liable for its debts, in a sum not exceeding twice the amount of his shares. This South Carolina law is, in essentials, similar to the Georgia law on which this suit is based. Four year had elapsed after the statute began to run before the suit was instituted in the circuit court of the United States for the district of South Carolina; and, by the South Carolina statute, actions upon the case and actions of debt grounded upon any lending or contract, without specialty, were barred after four years. The supreme court of the United States held that the liability of stockholders to creditors arose from their acceptance of the act creating the corporation, and their implied promises to fulfill its requirements, and that the proper remedy was

an action on the case, and that, as it was an action without specialty, it was barred in four years. The court said (page 515):

"It is insisted by the learned counsel for the appellees that, while the limitation act of 1712 provided that 'actions of debt upon any lending or contract without specialty' should be brought within four years, it did not limit actions of debt upon specialties, and that the liability here in question, being created by statute, is to be regarded as falling within the latter class. It is said that an obligation to pay money, arising under a statute, is a debt by specialty. In support of this point, *Bullard v. Bell*, 1 Mason, 243, Fed. Cas. No. 2,121, has been pressed upon our attention. Fully to examine that case would unnecessarily extend this opinion. It was cited in *Baker v. Atlas Bank*, 9 Metc. (Mass.) 182, and in *Corning v. McCullough*, 1 N. Y. 58, without effect. We think it is distinguishable from the case in hand in several material points. If it be in conflict with the cases to which we have referred in this connection, we think the results in the latter were controlled by the better reason."

And in *Beatty v. Burnes*, 8 Cranch, 98, Mr. Justice Story said:

"It is contended that the present suit, being a statute remedy, is not within the purview of the statute of limitations. But we know no difference in this particular between a common-law and statute right. Each must be pursued according to the general rule of law, unless a different rule be prescribed by statute," etc.

It has never been held in Maryland that a statutory right or remedy such as the one here in question is in the nature of a specialty. *Norris v. Wrenschall*, 36 Md. 492-500. That it has been so held in Georgia is not binding in Maryland.

A quite similar question was before the supreme court in *Bank v. Donnally*, 8 Pet. 361. That suit was instituted in the circuit court for the district of Virginia upon a promissory note made in Kentucky. By the law of Kentucky, such instruments were placed upon the same footing, and were to be received in all courts, as writings under seal. The court said (page 371):

"The statute of limitations of Virginia provides that 'all actions of debt grounded upon any lending or contract without specialty shall be commenced and sued within five years next after the cause of such action or suit and not after.' This being the language of the act, and confessedly governing the remedy in the courts of Virginia, the bar of five years must apply to all cases of contract which are without specialty, or, in other words, are not founded on some instrument acknowledged as a specialty by the law of that state. The common law being adopted in Virginia, and the word 'specialty' being a term of art of that law, we are led to the consideration whether the present note is deemed, in the common law, to be a specialty. And certainly it is not so deemed. It is not a sealed contract, nor does it fall under any other description of instruments or contracts or acts known in the common law as specialties. The argument does not deny this conclusion, but it endeavors to escape from its force by affirming that the note is a specialty according to the laws of Kentucky, and, if so, that this constitutes a part of its nature and obligation, and it ought everywhere else, upon principles of international jurisprudence, to be deemed of the like validity and effect. * * * But, whatever may be the legislation of a state as to the obligation or remedy on contracts, its acts can have no binding authority beyond its own territorial jurisdiction. Whatever authority they have in other states depends upon principles of international comity, and a sense of justice. The general principle adopted by civilized nations is that the nature, validity, and interpretation of contracts are to be governed by the law of the country where the contracts are made and are to be performed, but the remedies are to be governed by the laws of the country where the suit is brought, or, as it is comperdiously expressed, by the *lex fori*. No one will pretend that, because an action of covenant will lie in Kentucky on an unsealed contract made in that state, therefore a like

action will lie in another state, where covenant can be brought only on a contract under seal. * * * The remedy in Virginia must be sought within the time and in the mode and according to the descriptive characters of the instrument known to the laws of Virginia, and not by the description and characters of it prescribed by another state. * * * If, then, it were admitted that the promissory note now in controversy were a specialty by the laws of Kentucky, still it would not help the case, unless it were also a specialty and recognized as such by the laws of Virginia; for the laws of the latter must govern as to the limitation of suits in its own courts, and as to the interpretation of the meaning of the words used in its own statutes."

I think that the Maryland statute of limitations, requiring actions on the case, or actions of debt on simple contracts, to be brought within three years, is applicable in this case, and that the plaintiffs' demurrer to the defendant's plea of limitations must be overruled.

STURTEVANT v. NATIONAL FOUNDRY & PIPE WORKS, Limited, et al.

(Circuit Court of Appeals, Seventh Circuit. July 26, 1898.)

No. 494.

1. UNPAID SUBSCRIPTION FOR STOCK—ISSUE OF NEW CERTIFICATES—LIABILITY OF ASSIGNEE THEREOF.

Rev. St. Wis. § 1753, forbids and declares void an issue of stock for which payment has not been made. Section 1756 provides that persons transferring such stock shall be liable to certain corporate creditors for the amount unpaid thereon. Certificates of shares for which the subscriber had not paid were surrendered, and new certificates, in lieu thereof, issued to others as collateral security for a liability of the corporation; it being understood that the original subscriber was the owner of the new shares, subject to the pledge. *Held*, that one to whom the original subscriber assigned his interest in such certificates was not liable to pay therefor unless he allowed himself to be represented as a shareholder to creditors, who, in giving credit, acted on the faith of such liability.

2. SAME—LIABILITY OF ONE ACQUIRING TITLE THROUGH ONE NOT LIABLE.

Where holders of certificates of stock issued directly to them as collateral security for an obligation of the corporation were not liable to pay therefor, either to the corporation or its creditors, one who acquired, through them, title to, interest in, or appearance of holding, such certificates, cannot be held so liable.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This was a suit, in the nature of a creditors' bill, brought by the National Foundry & Pipe Works, Limited, against the Oconto City Water-Supply Company, S. D. Andrews, and others. A decree in favor of complainants and intervening creditors was reversed by this court (22 C. C. A. 110, 76 Fed. 166), and, on remand, a decree was rendered against George W. Sturtevant, Jr.,—against whom, on default of answer, a decree pro confesso had been taken,—and he prosecutes this appeal.

George G. Greene and W. H. Webster, for appellant.

George H. Noyes, for appellees.

Before WOODS and SHOWALTER, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. This appeal is from the decree rendered in the circuit court upon the return of the mandate of this court in *Andrews v. Pipe Works*, 46 U. S. App. 281, 22 C. C. A. 110, and 76 Fed. 166. In pursuance of the mandate the court dismissed the bill as against Andrews and Whitcomb, and certain of the other parties, but proceeded to enter a decree against the present appellant, George W. Sturtevant, Jr., who had not been made a party to the appeal of Andrews and Whitcomb,—nothing having been adjudged against him in the decree taken against them, though before the rendition thereof there had been taken against him, on default of answer to the bill, a decree pro confesso. The final decree against him, from which this appeal is prosecuted, after disposing of the other parties in accordance with the mandate and reciting that a decree pro confesso had been theretofore taken against him, finds that he was and is the assignee and successor in interest of the defendant Charles C. Garland, who subscribed for 990 shares of the capital stock of the defendant the Oconto Water Company; that the shares were issued, and all rights under Garland's subscription therefor were assigned to him, and he was and is the holder thereof, without anything having been paid therefor by him or by Garland or by any one, of which fact he had knowledge when he took the assignment; that he is liable for the unpaid amount due upon such subscription and stock, so far as necessary to discharge the indebtedness of the Oconto Water Company, "heretofore adjudged herein, not exceeding, however, the sum of \$99,000." And accordingly the court entered a decree that Sturtevant pay to the several creditors named the amounts of their respective claims, and to the appellee the National Foundry & Pipe Works, Limited, the sum of \$25,637.32, with interest thereon from October 3, 1892, and \$254.10 costs, less \$424.93 realized from the proceeds of the sale made under the mechanics' liens decrees obtained by the appellee.

The appellant contends that the decree is not justified by the bill or by the proofs, or by the mandate of this court. It is suggested in the brief for the appellees that the assignment of errors does not raise any of these questions. It is not alleged in the assignment that the decree is contrary to the mandate of this court, but there are specifications of error to the effect that the decree is wrong, in that it adjudges the appellant liable for the unpaid amount of the shares of stock subscribed for by Garland, to the extent necessary to discharge the indebtedness of the Oconto Water Company, and decrees that he pay to those creditors, respectively, the several amounts due them. Whether that decree is right depends upon the allegations of the bill, and upon the proofs. *Thompson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788; *Ohio Cent. R. Co. v. Central Trust Co. of New York*, 133 U. S. 83, 10 Sup. Ct. 235.

The facts, briefly stated, are that Garland had subscribed and received certificates for 990 of the 1,000 shares of the stock of the company, but had paid nothing therefor. In October, 1890, the certificates were surrendered,—Andrews and Whitcomb having refused to accept an assignment thereof,—and certificates for a like number of shares were issued by the company directly to Andrews and Whitcomb, in pursuance of a contract theretofore made, to secure a lia-

bility of the company to them. It seems to have been understood all the while that the ultimate ownership of the shares of stock issued to Andrews and Whitcomb, subject to the pledge, was in Garland; and accordingly, on January 12, 1891, in consummation of an arrangement between Garland and Andrews and Whitcomb, but at the instance and in the main for the benefit, of Andrews and Whitcomb, Garland executed to Sturtevant a writing whereby, after declaring himself the true owner of certificates of stock described by number and as held by Andrews and Whitcomb as collateral security, he said, "I do hereby, for value received, sell, assign, transfer, and set over unto George W. Sturtevant, Jr., Bushnell, Ill., all my right, title, and interest in and to all the said certificates of stock," etc.; adding a power of attorney to make all necessary assignments and transfers on the books of the company. It does not appear that any assignment of the stock on the books of the company was made, but the record of the proceedings of the company on January 12, 1891, shows a written consent of stockholders to the holding of a meeting of the stockholders of the company, wherein it is recited that each of the undersigned owns the number of shares of stock in the company set opposite his name, and opposite the subscribed name of Sturtevant is set "990 shares." A stockholders' meeting was then held, at which Sturtevant was elected a director of the company in the place of Garland, resigned; and at a later meeting of the directors on the same day he was chosen president of the company, and served in that capacity until his testimony was taken in this case. For the general scope of the original bill and amendments thereto reference is made to the report of the opinion on the appeal of Andrews and Whitcomb. The decree by which Andrews and Whitcomb had been declared liable to the creditors of the company for the amount of the unpaid stock subscribed for by Garland having been reversed and the cause remanded, it was held, upon the same averments and proofs, that Sturtevant had come into the shoes of Garland and was liable to the creditors of the company to the amount of the stock for which Garland had subscribed. The more important of the allegations of the bill which are pertinent to the question, and some of which, counsel argues, are sufficient to support the decree, are the following:

That Garland subscribed for and received two certificates of stock,—one for 490 shares, and one for 500 shares,—which certificates on October 2, 1890, he assigned to the defendants Andrews and Whitcomb. That on October 18, 1890, Garland, as president and the secretary of the company, caused to be issued to Andrews and Whitcomb, in lieu of the certificates theretofore issued, three certificates, each for 300 shares, and another certificate for 97 shares, of the stock of the company. That these certificates were issued by the corporation without consideration in money, labor, or property, "contrary to the provisions of the statute of the state of Wisconsin, and were in all respects fictitious and void, and in fraud of the rights of the complainant and other creditors" of the Oconto Water Company. "That no further subscription to the capital stock of said corporation has been made, and no further stock or certificates of shares of stock have been issued by or on behalf of said corporation, but that said Andrews and Whitcomb, by virtue of the premises, became, and are now, the assignees of the subscribers to the capital stock of said corporation, and claim to be owners and holders of the certificates of shares therein, to the said amount of 997 shares of its capital stock, and the said defendants Matt. S. Wheeler, A. J. Elkins, and N. S.

Todd are the assignees of the original subscribers, and the holders of certificates of three shares of stock in said corporation, as appears by the books and records of said corporation. That said defendants S. D. Andrews, W. H. Whitcomb, Matt. S. Wheeler, A. J. Elkins, and N. S. Todd constitute all the stockholders of record of said corporation, but, as complainant is informed and believes, the said defendants George W. Sturtevant, Jr., and F. H. Todd have and hold, or claim to have and hold, some interest in or title to a portion of said shares of stock; but what such interest or title is this complainant is not informed, and is unable to state, but alleges that, by virtue of such claim of said defendants Sturtevant and Todd, they claim to be, and are acting as, directors of said corporation, and said Sturtevant claims to be, and is acting as, the president thereof. That said defendants F. H. Todd, George W. Sturtevant, Jr., and S. W. Ford are, or claim to be, and are acting nominally as, the directors of said corporation. That said defendants S. D. Andrews and W. H. Whitcomb, Matt. S. Wheeler, A. J. Elkins, and N. S. Todd, George W. Sturtevant, Jr., and F. H. Todd, who are, or claim to be, assignees of the subscribers to the capital stock of said company, and who have and hold, or claim to have and hold, certificates of shares for all its capital stock, or some interest in or title thereto, and said Charles C. Garland, have not paid for the same, but are indebted to said corporation on account of said subscription, and the certificates of shares of stock issued by said corporation, to an amount sufficient to pay the judgment of this complainant, and the other debts of said defendant Oconto Water Company. That whatever sums are due from them, or either of them, upon such subscriptions, and by virtue of said stock and certificates of stock, are assets and trust funds of the said Oconto Water Company, and ought, in equity, to be collected, marshaled, and applied in satisfaction of the judgment of said complainant, and of the other debts of said corporation. That as to the amount which each of said defendants, as such stockholders and assignees of the subscribers to said stock, should justly and in equity respectively pay on account thereof, this complainant is not fully advised and informed; nor is it able to ascertain, except by the aid and decree of this court. That on or about the 12th day of January, A. D. 1891, the defendants S. D. Andrews and W. H. Whitcomb, being the holders of the certificates of the capital stock of said corporation as aforesaid, caused a stockholders' meeting to be held, and then and there caused it to appear that the defendant George W. Sturtevant, Jr., represented 990 shares of the capital stock of said company, and said defendant F. H. Todd represented 7 shares, and said defendant S. W. Ford represented 1 share, and said defendant W. H. Whitcomb represented 1 share, and the said defendant S. D. Andrews represented 1 share, of such capital stock, whereas in fact all said shares of stock were held and controlled by said Andrews and Whitcomb; the parties representing said stock other than said Andrews and Whitcomb being merely nominal parties, acting in the interest and under the control and direction of said Andrews and Whitcomb. That since the 12th day of January, 1891, and the election of said directors and officers as aforesaid, the conduct, management, and control of said Oconto Water Company, and of all its affairs, have been solely in the hands of S. D. Andrews and W. H. Whitcomb, their agents and attorneys; and all other persons acting either as directors or officers of said corporation have been so acting nominally and wholly at the request, and under the direction and control, of said Andrews and Whitcomb. That the said Andrews and Whitcomb, being such stockholders and officers of said defendant company, and in control thereof, on or about the 13th day of March, 1891, caused an agreement in writing to be entered into by and between said defendant Oconto Water Company and themselves," etc. "That thereafter, and on or about the 16th day of May, A. D. 1891, the said defendants S. D. Andrews and W. H. Whitcomb, then being such stockholders, officers, and directors of said defendant corporation, and being so in possession and control of the same, caused an agreement to be entered into," etc. "That on or about the 19th day of May, 1891, said defendants S. D. Andrews and W. H. Whitcomb, being such stockholders and officers of said defendant Oconto Water Company, and being in possession, control, and management of the same, and having or claiming to have in their possession its franchises, and all its stock, con-

sisting of \$100,000, and all its first mortgage bonds, consisting of \$100,000, entered into an agreement with said defendant Oconto National Bank whereby said Andrews and Whitcomb did assign, transfer, and set over to said bank the said franchises, stock, and bonds of said Oconto Water Company aforesaid, and did deliver into the possession of said bank all of said certificates of shares of stock and bonds as collateral security for advances thereafter made by said defendant bank to said defendants Andrews and Whitcomb, which said instrument in writing was never filed in the office of the city clerk of the city of Oconto, and which said instrument, and the security upon the franchises, stock, and bonds of said company undertaken to be given thereby and thereunder, were void and of no effect as against this complainant and the other creditors of said corporation. That the said defendant Oconto National Bank now claims to hold or have in its possession said franchises, certificates of stock, and bonds of said defendant corporation under and by virtue of said instrument of agreement dated May 19, 1891, executed between it and said Andrews and Whitcomb."

The prayer of the bill, in part, is:

"That all the stock, property, choses in action, and effects of said Oconto Water Company may be sequestered by the court, and some discreet and proper person be appointed receiver of the same, and of the rents, issues, and profits of its said waterworks plant, with the usual powers of receivers in such cases. That the amounts of the subscriptions to the capital stock of said Oconto Water Company still unpaid by the said defendant stockholders, respectively, be ascertained and determined, and that said defendant stockholders be adjudged to pay the amount or amounts so found to be due and owing from them, and each of them, to said corporation. That the said property and said unpaid stock subscriptions be declared trust funds, to be administered for the benefit of said complainant and the other unsecured creditors of said defendant."

The Revised Statutes of Wisconsin contain the following provisions:

"Sec. 1751. The capital stock of every corporation, * * * may be transferred by indorsement * * *; but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered on the books of the corporation, as to show the names of the parties by and to whom transferred, * * * and every person transferring any such certificates or shares of stock shall remain liable to the creditors of the corporation to the extent and in the manner prescribed in section seventeen hundred and fifty-six. * * *"

"Sec. 1753. No corporation shall issue any stock or certificate of stock except in consideration of money or labor, or property estimated at its true money value, actually received by it, equal to the par value thereof, * * * and all stocks * * * issued contrary to the provisions of this section, and all stock dividends or other fictitious increase of the capital stock of any corporation, shall be void."

"Sec. 1756. If any stock shall be transferred, which is not fully paid, the corporation may, by agreement, to be noted on its stock book, discharge the stockholder making such transfer, from liability to it for the unpaid part of his stock subscription, and accept that of the person to whom the stock is transferred in his place; but the person transferring such stock shall be liable for the amount unpaid thereon to the then creditors of such corporation, and those who may become such within six months after such transfer, or to any lawfully appointed receiver or assignee of the corporation for their use."

It is conceded that in this section (1756) the word "stockholder" is used as the equivalent of "stock subscriber." If that were not so, the section would be inconsistent with section 1753, which declares void certificates of stock for which the par value has not been paid.

If the decree against appellant has any foundation in the aver-

ments of the bill alone, it must be in the allegation (quoted at length above) that Andrews and Whitcomb, being the real owners and holders of the certificates of stock issued to them, caused it to appear at the meeting of stockholders on January 12, 1891, that the appellant represented 990 shares of the capital stock of the company. The allegation that Sturtevant became a director and the president of the company is without material significance, because the nominal ownership of a single share of stock would have been enough to qualify him to hold those offices. Though it is not so alleged, there is evidence that he held other shares than those assigned by Garland. It is not alleged that he was a subscriber to the stock of the company, or that any subscriber had assigned to him his shares or rights as a subscriber, or, indeed, that by assignment or otherwise he was the owner or holder of any number of shares. Whatever right or interest or appearance of holding he had, according to the bill, was conferred upon him by Andrews and Whitcomb, and, that being so, he came by the transfer under no obligation by which, as holders of the certificates, they were not bound. On their appeal (46 U. S. App. 281, 22 C. C. A. 110, and 76 Fed. 166) it was held that they were not liable for the amount of the shares for which they had received certificates, directly to the company in any event, nor to the creditors of the company unless they had allowed themselves to be represented as shareholders to creditors who gave credit on the faith of that representation; and that, it was found, they had not done. To repeat the language then employed:

"Holding the stock by direct issue as collateral security for the debt of the company to them, they could not be liable to the company to pay for the stock as if they had subscribed for it; and, not being liable to the company, they are not liable to the creditors of the company, unless they allowed themselves to be represented as shareholders to creditors who, in giving credit, acted, or should be presumed to have acted, on the faith of that liability. 'The liability of a shareholder to pay for stock,' says the court of appeals of New York in *Christensen v. Eno*, 106 N. Y. 97, 102, 12 N. E. 648, 650, 'does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute; and, in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares, as upon a subscription or contract.' In the same case it is said that: 'Assuming that the transaction, as to the company, was ultra vires, or that it could not give away its shares, the transaction, in that view, was simply a nullity, and Eno got nothing as against any one entitled to question the transaction; but it did not convert him into a debtor of the company for the forty per cent. He entered into no contract to pay it.' This view is more certainly true under the Wisconsin statute, which not only forbids, but declares void, an issue of stock for which payment in money or property is not made when it is issued. Rev. St. Wis. § 1753. The bill alleges that the shares issued to Garland, and also those issued to Andrews and Whitcomb, were void, and prays that it be so adjudged. In *Burgess v. Sellgman*, 107 U. S. 20, 2 Sup. Ct. 10, it is said: 'The courts in England, and some in this country, have gone very far in sustaining a liability for unpaid subscriptions to stock against persons holding the same in any capacity whatever,—whether as trustees, guardians, or executors, or merely as collateral security. It cannot be denied that in some cases the extreme length to which the doctrine has been pushed has operated very harshly; and in cases in which the corporation itself had no just right to enforce

payment, and where no bad faith or fraudulent intent has intervened, it may be doubted whether creditors have any better right, unless by force of some express provision of a statute."

The one fact in proof, outside of the averments of the bill, which it is contended justifies the decree, is the assignment executed by Garland to the appellant. If that assignment should be deemed to have effected a transfer of any right of Garland to Sturtevant, the admission of it in evidence was inconsistent with the averments of the bill to the effect that Andrews and Whitcomb were the real owners and holders of the stock, and that whatever interest Sturtevant had was nominal, and held for their benefit; but, if regarded simply as the means by which it is alleged that Andrews and Whitcomb caused it to appear that Sturtevant represented 990 shares of the stock, its introduction in evidence in support of that averment may have been proper. But, given its fullest possible significance, what does the fact of the assignment having been made amount to? The contention is that it put Sturtevant in the place of Garland, as a subscriber to the stock of the company. That is not the purport of the writing. There is nothing in the terms used, or in the circumstances, if there could be inquiry beyond the writing, to indicate that that was the intention. The purport of the instrument was simply to sell and transfer to the appellant Garland's right, title, and interest in and to the certificates of stock issued by the company to and held by Andrews and Whitcomb, as collateral security under their contract with the company. By the averments of the bill, and by force of the statute of Wisconsin, those certificates were illegally issued and were void, unless they were made valid by the work and the expenditures of Andrews and Whitcomb in the construction of the waterworks plant. If the par value of the stock was paid in that way, Garland, if conceded to be the ultimate owner, was not liable for further payment on the stock, and his assignment could not have imposed that liability upon another. If, on the contrary, the certificates were void, because not paid for in full, as in fact they had not been, the assignment conferred no right and transferred no obligation. The certificates of stock issued originally to Garland, which he surrendered in order that certificates for the same number of shares might be issued by the company directly to Andrews and Whitcomb, were also void because the stock had not been paid for; but, notwithstanding the surrender of the certificates and the issue of the other certificates to Andrews and Whitcomb, it is doubtless true that, as a subscriber for the stock, Garland remained liable to the company and its creditors for the amount thereof, and might, by a proper method, have substituted another in his place as a subscriber, transferring both his rights and his obligations, except as otherwise provided by the statutes quoted. It would seem under section 1751, *supra*, that such a transfer could be valid only between the parties until entered on the books of the corporation; but how that would be need not now be considered, because no such transfer of the rights and liabilities of a subscriber for stock was attempted. The instrument evinces no such purpose, and equity will not, by an unnecessary implication or inference, find in it a meaning and operation for which

there is no basis in estoppel or other equitable consideration. To affirm the decree against Sturtevant would be to fasten upon him a liability which the bill was designed to charge upon others, which he never intended, nor was believed by anybody to have intended, to assume, for which he received no commensurate consideration, and on the faith of which nobody ever gave the corporation credit.

The decree against the appellant is reversed, with direction to dismiss the bill.

GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. June 4, 1898.)

1. RAILROADS—RECEIVERSHIP—PREFERRED CLAIMS FOR OPERATING EXPENSES.

Claims for supplies used in operating a railroad during a receivership, and for six months prior thereto, are entitled to preferred payment from the funds in the hands of the receivers, as against a mortgage on which the first default of interest occurred during the receivership, where the stock of supplies coming into the hands of the receivers exceeded the amount of such claims, and it appears that the net earnings under the receivership to the time of default on the mortgage interest, together with the betterments made, also largely exceeds such claims.

2. SAME—ERRONEOUS PAYMENTS.

The fact that claims not entitled to preference have been improperly paid from funds in the hands of receivers does not entitle a mortgagee to insist that the amount shall be deducted from funds applicable to preferred claims.

This was a hearing in the matter of the receivership of the Central Vermont Railroad, arising on objections by the American Loan & Trust Company, mortgagee, to the allowance and payment, as preferred claims, of amounts due for operating supplies.

Henry G. Newton, for claimants.

Moorfield Storey and Elmer P. Howe, for mortgagees.

WHEELER, District Judge. When receivers of the defendant's roads and property were appointed, March 20, 1896, they were directed to pay claims for, among other things, supplies used in operating the roads during the six months next previous. Afterwards, May 29th, on motion of the American Loan & Trust Company, mortgagee, payment was restrained for classifying the accounts and funds. Upon classified accounts filed by the receivers, and a motion to so modify the restraining order as to allow payment of such claims as accrued on the New London Northern system, and those less than \$100 each and 25 per cent. of others that accrued on the main line, payment of the face of the New London claims and of the small claims has been allowed, and that part of the motion relating to the main line has been heard. The classification was asked, and the payment has been opposed, because, as has been said, the payments would or might, if made, come out of funds belonging to the mortgagee. All of the claims appear to have amounted to \$284,083.48. The receivers appear to have taken over from the defendant stocks of supplies on hand amounting to \$271,722.33; of station agents,

\$142,879.96; and other miscellaneous items amounting to \$82,267.68,—in all, \$496,869.97. The conditions of the mortgages were not broken till January 1, 1897, and the mortgagees would not be entitled to possession, nor to the net earnings as profits, till then. By conservative estimates as to what are operating expenses and what are permanent improvements, the roads now in question much more than paid all operating expenses from the beginning of the receivership to the breach of the conditions of the mortgages. Besides this, the excess of net earnings, which came to the hands of the receivers, over operating expenses and fixed charges paid by them before breach of the conditions of the mortgages, would seem to exceed the amount of these preferred claims, and, with the permanent improvements made by the receivers during that time, would largely exceed them. In this view, the payment of the residue of these preferred claims would not come out of the mortgaged property, nor out of any net earnings to which the mortgagees may be entitled, but out of the general funds of the receivership arising from the operation of the roads before the mortgagees became entitled to possession, or to claim the net earnings.

Some suggestion has been made that claims not properly of this class were paid before the stay, which may have exhausted the funds applicable to those unpaid. But such diversion, if any, should be corrected otherwise than from funds belonging to these claimants. This subject has lately been before the supreme court of the United States in *Virginia & A. Coal Co. v. Central Railroad & Banking Co. of Georgia*, 18 Sup. Ct. 657 (decided May 9). The cases are there reviewed, and the statement from *Fosdick v. Schall*, 99 U. S. 252, that "every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income," is again approved. Mr. Justice White for the court further said:

"It was thus settled that, where coal is purchased by a railroad company for use in operating lines of railway owned and controlled by it, in order that they may be continued as a going concern, and where it was the expectation of the parties that the coal was to be paid for out of current earnings, the indebtedness, as between the party furnishing the materials and supplies and the holders of bonds secured by a mortgage upon the property, is a charge in equity on the continuing income, as well that which may come into the hands of a court after a receiver has been appointed as that before. It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant, in subsequent income arising from the operation of a railroad under the direction of the court, affected by the fact that, while the company is operating its road, its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders, and are foreign to the beneficial maintenance, preservation, and improvement of the property."

In any view of the situation in this case, upon the principles so settled, these claimants appear to be entitled to payment from the earnings of the roads available for that purpose, and sufficient of

them appear to be available early in July for this 25 per cent. The stay should be so modified as to permit this payment.

Some question has been made about the coming of some of the claims within the time, and being for the proper purpose; and opportunity should be afforded for parties interested to make objection specifically to particular claims for either of these reasons. The list is on file, and the time before the 1st of July seems sufficient for filing objections to any of them. Stay so modified as to permit payment after the 5th of July of 25 per cent. of claims against which specific objections are not filed by the 1st of July, and objections to stand for disposition on the 5th of July.

GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. May 21, 1898.)

1. FORECLOSURE OF RAILROAD MORTGAGE—PARTIES.

Where a mortgage to secure railroad bonds provides that it may be foreclosed, upon default of payment, at the request of a majority of the bondholders, a bill filed by the trustee, alleging such default and request, is not subject to demurrer because bondholders are not joined as orators.

2. SAME—CREDITORS' SUIT—RECEIVERS AS PARTIES.

Where receivers have all the property in their hands, under order of the court, for whomsoever it may be found to belong, and all proceedings in the cause are for the purpose of ascertaining the rights of all claimants, and how the property should be disposed of, it is not necessary to make the receivers technical parties defendant to each bill filed, as the proceedings are in their nature in rem, and the receivers are in effect parties to all the proceedings.

3. SAME—SECOND MORTGAGE—PARTIES.

Where a second mortgage covered leased lines, without touching the rights of lessors, and the foreclosure is a part of a suit in which all the property is in the hands of receivers, neither the mortgagor, the first mortgagee, nor any lessor is, in strictness, a necessary party.

4. SAME—DESCRIPTION OF PROPERTY.

Where the description of the property in the bill is the same as in the mortgage, the necessity for evidence of the situation of the property, in order to the application of the description to it, is not ground of demurrer.

5. CREDITORS' SUIT—JUDGMENT CREDITOR—SEIZURE OF PROPERTY.

The receivership will not be withdrawn from unincumbered property of one of the consolidated corporations to enable a judgment creditor, who joined in the original petition for its distribution among creditors on the ground of insolvency, to seize it because of a supposed moral equity, and thus defeat the object of the petition.

6. FIRST AND SECOND MORTGAGES—CONFLICTING INTERESTS—FORECLOSURE BY SAME TRUSTEE.

In a proceeding to foreclose a first and a second mortgage, in which the same corporation is trustee in both, when a question arises as to what property is covered by each, as against the other, representative bondholders under each mortgage should be permitted to become parties, and properly litigate the question.

Chas. M. Wilds, for Grand Trunk Ry. Co.

Moorfield Storey and Elmer P. Howe, for American Loan & Trust Co.

Benjamin F. Fifield, for Central Vt. R. Co.

Michael H. Cardozo, for Baker.

Henry Crawford, for American Express Co.
John C. Coombs, for National Bank of Redemption.
Alric R. Herriman, for other banks.
Louis Hasbrouck, for executors of Smith.
L. S. Dabney, for Foss.
Hollis R. Bailey, for Jordan & Coffin.
Hiram A. Huse and Solomon Lincoln, for executors of Langdon.

WHEELER, District Judge. This is a creditors' suit, in behalf of all who will join, in which receivers have been appointed, and in which the National Bank of Redemption has joined as an orator, and also in which are pending one bill of foreclosure by the American Loan & Trust Company, as trustee of a first mortgage of the main line and equipment to secure \$7,000,000 of 5 per cent. consolidated bonds, of which \$7,000,000 were issued, against the Vermont & Canada Railroad Company, the Consolidated Railroad Company, the Central Vermont Railroad Company, and the receivers; and another bill of foreclosure by the same trustee of a second mortgage of the main line and equipment, and after-acquired lines, and leased lines, equipment, and property, to secure \$15,000,000 Central Vermont first consolidated mortgage bonds, into which stock of the Consolidated Railroad might be converted, and of which \$3,000,000 have been issued, against the Central Vermont Railroad Company; and in which is pending a petition of the National Bank of Redemption for the withdrawal of the receivership from property not covered by the mortgages, in order that this property may be levied upon to satisfy a judgment recovered since the receivership, and for leave to become a party defendant in the foreclosure; and of the Welden National Bank, the Farmers' National Bank, and the Ogdensburg Bank for like withdrawal of the receivership; a petition of Ezra H. Baker, chairman of a committee of the first mortgage bondholders, and of executors of James R. Langdon, holding \$379,700 of first mortgage bonds, for leave to become parties to the first foreclosure; a petition of the American Express Company, as holder of \$700,000, and of Eugene N. Foss, as holder of \$10,000, of second mortgage bonds, for leave to become parties to the foreclosure suits; and a petition of the executors of J. Gregory Smith, as holders of 2,500 shares of preferred and 1,500 shares of common stock, and of N. W. Jordan and E. A. Coffin, as holders of 160 shares of preferred stock, of the Consolidated Railroad Company, entitling them to bonds, for leave to become parties to the second foreclosure, for assertion of their rights as if bondholders. Both bills of foreclosure are demurred to by the Central Vermont Railroad Company, and the demurrers have been argued, and these several petitions have been heard.

The causes of demurrer to the bill of foreclosure of the first mortgage, now set down and relied upon, are the nonjoinder of bondholders of that mortgage as orators; the joinder of the receivers, and nonjoinder of second mortgage bondholders, as defendants; and uncertainty and insufficiency of description of the mortgaged property. Those to the bill of foreclosure of the second mortgage are that none of the bondholders of that mortgage are joined as orators; that

neither the resident receiver, nor the Vermont & Canada Railroad Company, nor the Consolidated Railroad Company, nor some of the first mortgage bondholders, nor the owners of the leased lines, are made defendants; that allegations of the title of the mortgagor, of the default of payment, and description of the property are too uncertain and insufficient.

Concerning the demurrers for nonjoinder of bondholders as orators in the respective foreclosures, the mortgages which are the foundations of these proceedings are to be looked at in connection with the allegations of the bills in these particulars. In the first mortgage, proceedings for foreclosure are required on default, and request of holders of a majority of the bonds; and the bill well alleges a default as to all outstanding bonds, and that such a request was made. In the second mortgage, proceedings by the trustee upon any default, and a request of holders of a majority of the bonds to make all become due, and for foreclosure by the trustee "in case it seems expedient," are required; and that bill also alleges a default, and a request by the holders of a majority of the bonds that the orator therein should proceed at once for a foreclosure. Thus, in each of these foreclosures, as they stand separately, the holders of the bonds, in majority, are not only theoretically, but actually, at their own request, represented by the trustee. This case differs in this respect from *Brooks v. Railroad Co.*, 14 Blatchf. 463, Fed. Cas. No. 1,964, where, in the proceedings considered, no request or representation of bondholders, as such, was shown. This cause of demurrer here does not, as these proceedings stand, seem to be technically well founded, however it might be, in fairness to the rights of the bondholders, on account of the position of the trustee in both mortgages, if they should not be otherwise protected. As the receivers have all the property in their hands, under order of the court, for whomsoever it may be found to belong, and all proceedings are required to be and are had in this cause for the purpose of ascertaining the rights of all claimants, and how the property should be decreed to be disposed of or distributed by the receivers, whether they are technically made parties to every proceeding for establishing rights to the property or not is immaterial. While not parties to the original cause, as orators or defendants, they are in effect parties to all proceedings touching the property in their hands, as in their nature the proceedings are in rem. *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27. The second mortgage, in so far as it touches property covered by the first mortgage, is of the equity of redemption only; in so far as it covers leased lines, it is of the leasehold interests only, without touching the rights of the lessors; and, as to property of the mortgagor not covered by the first mortgage, it is independent of either. Therefore neither the first mortgagee or mortgagor, nor any lessor, is in strictness a necessary party to a foreclosure of that mortgage, especially when all the property is in the hands of receivers in a suit of which the foreclosure is a part. The allegation of default in the payment of any of the bonds seems to be sufficient, without setting out owners, and particular demand by, and failure to pay, each. The duty of making due payment was upon the mortgagors, and a

general allegation of failure would be sufficient. Due payment is a defense, and may be brought forward as such if it exists. The description of the property is as definite in the bills as in the mortgages, and, if evidence of the situation of the property is necessary for the application of the descriptions to it, that necessity is not a good cause of demurrer, but only a good reason for proceeding in proper manner to take the evidence. These considerations dispose of all the causes of demurrer.

The National Bank of Redemption, as an unsecured creditor, has joined in the original bill to have the assets of the Central Vermont Railroad Company, as an insolvent corporation, divided ratably among such creditors, after the secured creditors. To now withdraw the receivership from unincumbered property, to enable this creditor to seize it because of some supposed moral equity arising from the imminence of insolvency at the time of the creation of the debt, as is now relied upon, would defeat that very purpose. Some question is made about the validity of its judgment recovered upon constructive notice since the receivership; but, whether it is valid or not, there is nothing about it or the debt to entitle it to preference over other simple creditors. This part of its petition must therefore be denied. As such creditor to a large amount, it is interested in reducing secured debts, and should, in justice, have an opportunity to be present at any proceedings for ascertaining the sum due in equity on the mortgages. The remainder of the petition is retained for that purpose.

Were there no question about the extent of the mortgages, in covering property of the respective mortgagors, the foreclosures could probably be proceeded with legally and safely by the trustee in each, as moved by the respective requests of the bondholders to begin them, without making or permitting any of them to become themselves otherwise personally parties to the proceedings. The mortgages were made at considerable spaces of time apart. The first, on its face, assumes to cover future-acquired rolling stock and property; and the second, to cover the whole, subject to the first mortgage on some. There is necessarily a question concerning what is covered by each, as against the other. The same corporation is trustee in each, and cannot well be on both sides of this question, and there adequately represent the interests of its respective cestuis que trustent. For want of such representation upon that question by the common trustee, some proper number of the first mortgage bondholders should be permitted to appear on the orator's side, and of the second mortgage bondholders on the defendant's side, of that foreclosure, to raise and contest somehow, by proper mode of procedure, that question, as they may be respectively advised is for their interests. Obviously, as the case now stands, the petitioner Baker, as committee of the first mortgage bondholders, and the American Express Company, as a very large, and perhaps the largest, holder of second mortgage bonds, are proper parties to appear for themselves, as representing the respective interests of themselves and their associate bondholders in this behalf. These now seem to be sufficient and adequate for this purpose, and single may be better for the interests of all than divided

representation or counsels. And as any question about the proper representation of those interested as owners in the conduct of the prosecution or defense of a cause is always before the court, the applications of other bondholders for leave to become parties to, or to be heard upon, this question, should be allowed to remain on file, and be moved upon without prejudice, in case their interests should hereafter be thought to be unrepresented or misrepresented.

The second mortgage appears to have been intended to secure to holders of Consolidated Railroad stock a right to convert it into bonds of that mortgage, which should stand on a par with the other bonds. Whether the conversion has been proceeded with far enough by the holders of stock now claiming bonds for it, or the rights of bondholders on account of it have been perfected, is a question foreshadowed by their petitions and the motions to dismiss them. Sometimes what is agreed to be done is, in equity, considered as done. The provisions of the mortgage, and the recognition of this principle, seem to give sufficient color to this claim of these stockholders to entitle them to a fair chance to make it good, if they can, in these proceedings. Just how the parties would have this done has not been made very clear, except that a suggestion is made in behalf of the executors of Smith that it be by cross bill in the foreclosure of that mortgage. They are not interested, however, as such stockholders making this claim, in opposition to the mortgage itself, but in favor of it, and of its foreclosure upon the property covered by it; and a cross bill might not, under these circumstances, be an apt proceeding to aid them, and might be an undue embarrassment to the unquestioned bondholders. The opposing interests are those of the mortgagor to keep the amount of bonds these stockholders might be entitled to out of the sum due in equity, and of the now bondholders to keep it out from sharing in their security. These questions appear to appertain solely to the taking of an account of the sum due in equity at the proper stage of the foreclosure. In the taking of such an account no separate pleadings are ordinarily had, or are necessary, for the purpose of trying such rights, and none seem to be necessary here. The right to appear and present the claims as sums due in equity, and of the now bondholders to there contest them, seems to be all that is necessary to protect the rights of each.

The demurrers are overruled. Leave is granted to Ezra H. Baker to appear as orator, and to the American Express Company to appear as defendant, in the foreclosure of the first mortgage, and the defendants are respectively assigned to answer each bill by July rule day. The prayer of the petition of the National Bank of Redemption, and of other banks, for withdrawal of receivership from property, is denied. Leave is granted to Consolidated Railroad stockholders to become parties to the taking of any account of the sum due in equity in the foreclosure of the second mortgage, without prejudice to the residue of these petitions as remaining on file.

BURNHAM et al. v. NORTH CHICAGO ST. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. July 26, 1898.)

No. 470.

1. PROCEEDINGS AFTER REVERSAL—EFFECT OF MANDATE—NEW TRIAL.

Where a judgment based on agreed facts is reversed and the cause remanded on the ground that the facts stipulated are evidential only, and cannot take the place of findings, a new trial is required, in which either party has the right to introduce additional evidence not inconsistent with the stipulation.

2. TRIAL—STIPULATION OF FACTS—EFFECT.

A stipulation that the facts therein stated "shall be considered by the court to be in evidence, and as absolutely true," does not preclude either party from introducing additional evidence not inconsistent with the stipulated facts.

3. RIGHT TO JURY TRIAL—WAIVER—EFFECT OF STIPULATION.

Where by stipulation a jury is waived, and a cause tried to the court, such stipulation does not operate as a waiver of a jury on a second trial, after the judgment has been reversed and the cause remanded.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

A. D. Wheeler, for plaintiffs in error.

John A. Rose, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This suit has been twice tried in the court below, and is now in this court for the second time. It was brought to recover the price of a street-car traction motor constructed by the plaintiffs for the defendant. Upon the first trial a jury was waived, and the case submitted to the court upon the following written stipulation as to the facts, without other evidence:

"It is hereby stipulated by and between the parties to the above-entitled cause, through their respective counsel, that jury shall be, and is hereby, waived, and the said cause submitted to the court for trial upon the foregoing statement of facts. For the purpose of said trial, the said statement shall be considered by the court to be in evidence, and as absolutely true."

The court gave a judgment for costs against the plaintiffs; the record showing that the court ruled that the defendant was entitled, in law, upon said agreed facts in the case, to a judgment against the plaintiffs for costs. A judgment was accordingly rendered upon that finding, and the case brought to this court by writ of error, where the judgment was reversed, and a new trial ordered. The case is reported in 23 C. C. A. 677, 78 Fed. 101. In that opinion this court said:

"The assignment of errors contains numerous specifications, the last of which only (that the court erred in giving judgment for the defendant) need be considered. It is evident that the case was submitted and tried upon a mistaken view of the so-called statement of facts, which in the main is a statement of evidence, and not of the ultimate or issuable facts. An agreed statement of facts, it is well settled, may 'be taken as the equivalent of a special finding of facts,' presenting for review on writ of error only questions of law; but

manifestly it is necessary that the ultimate facts be stated, and not evidence, merely, from which the facts to be established may be inferable. *Supervisors v. Kennicott*, 103 U. S. 554; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481; *Distilling & Cattle-Feeding Co. v. Gottschalk Co.*, 24 U. S. App. 638, 13 C. C. A. 618, and 66 Fed. 609. The motor which the plaintiffs made for the defendant, it is admitted, was not constructed, in all respects, in conformity with the model agreed upon; but on behalf of the plaintiffs it is contended that the defendant, by the use made of the motor after delivery, and by declarations of intention in that respect, had elected to keep the motor, and that such election is deducible from the agreed statement as a conclusion of law. But the question, in our opinion, remains one of fact, or perhaps of mixed law and fact, in respect to which, as it is presented here, it is not competent for the court to declare a legal conclusion, strongly evident as, upon the facts and circumstances stated, the inference of fact may be deemed to be. It follows that the judgment rendered is invalid. It is supported neither by a general finding appropriate to the issue, nor by special finding, nor by an agreed statement of facts which can be regarded as equivalent to a special finding. The agreed statement probably contains sufficient evidence to enable a trial court to determine the disputed questions between the parties, either by a general or a special finding, but the finding that the facts are as set forth in the agreed statement is neither the one nor the other. The statement being one of evidence, the finding does not make it a statement of facts. To what extent, upon another trial, the parties shall be bound by the agreement as a statement of evidence, if that becomes a matter of dispute, will be a question for the circuit court. The judgment is reversed, and the case remanded, with directions to grant a new trial."

On the second trial the plaintiffs asked for a jury trial, and also that they be allowed to introduce evidence in addition to, but not contradicting, the written statement,—both of which requests were denied by the court,—to which rulings exceptions were taken, and the trial had before the court upon the same stipulation of facts, and a finding and judgment rendered again against the plaintiffs.

We are of opinion that the court erred in each of these rulings. It had already been adjudged by this court that the facts stipulated were evidential in character, and not the ultimate facts to be found by the court. It fairly followed from this decision that other evidence not inconsistent with the stipulated facts might be introduced by either party on another trial. The stipulation did not purport that there could be no other evidence introduced. The facts then stipulated were not exclusive of other evidence. It was stipulated that for the purposes of said trial the statement shall be considered by the court to be in evidence, and as absolutely true. It did not preclude other evidence of facts, in terms or by necessary implication. We think this followed from the opinion of this court holding the stipulated facts as evidential in character. When a cause is remanded for a new trial, the parties have the right to introduce new evidence, and establish a new state of facts, as though no trial had ever been had. This is the true significance of the mandate. A new trial upon precisely the same evidence, and by the same court without a jury, would be not so much a new trial as a mockery. In *Dillon v. Cockcroft*, 90 N. Y. 649, there was a similar stipulation of facts made before trial, which appeared on the face to be "a statement of the facts in this action." After the reading of the stipulation, plaintiff offered himself as a witness; and objection was made to any oral evidence, on the ground that the facts had

been stipulated, and the terms of the stipulation were such as to show the understanding to be that no other testimony should be offered. The objection was overruled, and the court of appeals, in deciding the question, say:

"The objection urged to the admission of oral testimony upon the ground that the facts in the case had been stipulated by both parties, and that the stipulation precluded other testimony, was properly overruled. We think the effect of the stipulation was not to preclude other evidence, and it only included the facts therein stated. Other proof was not excluded, without a clause providing to that effect." *Brenner v. Coerber*, 42 Ill. 497; *Rush v. Rush*, 170 Ill. 623, 48 N. E. 990; *Zaleski v. Clark*, 45 Conn. 397; *Dodge v. Gaylord*, 53 Ind. 365; *Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, and 34 N. E. 441; *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 512, 60 N. W. 341.

2. The stipulation to waive a jury, and to try the case before the court, only had relation to the first trial. There could be no presumption then that there would ever be a second trial; and therefore it should not be presumed that the parties, in making the stipulation, had in mind any possible subsequent trial after the first, to which the stipulation could refer. The right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guarantied by the United States constitution. A stipulation for the waiver of such right should therefore be strictly construed in favor of the preservation of the right. *Cross v. State*, 78 Ala. 430; *State v. Fouchet*, 33 La. Ann. 1154; *Dean v. Sweeney*, 51 Tex. 242; *Brown v. Chenoworth*, Id. 469; *Town of Carthage v. Buckner*, 8 Ill. App. 152. This last-cited case was very similar to the one at bar, and the court says:

"It appears that on the first trial the parties entered into a written stipulation of facts agreed upon, as proven on the trial, and also that a jury should be waived, and the case submitted to the court for trial. On the second trial, appellant claimed that under such stipulation a jury should again be waived, and the case be tried by the court, and entered a motion to that effect. The action of the court in overruling this motion is one of the errors assigned. In this we think no error was committed. The agreement to waive a jury only bound the parties to the mode adopted—of trial by the court—to that one trial. When the case was remanded by this court for another trial in the court below, both parties were restored to their original right of trial by jury. Each party is entitled to as many juries as there are trials, and a waiver of a jury on one trial is expended by that trial." *Brown v. State*, 89 Ga. 340, 15 S. E. 462.

The rule and the reason for it are fairly laid down by the supreme court of Alabama in *Cross v. State*, 78 Ala. 430, as follows:

"We need not decide whether the defendant, under the facts of this case, so far waived his right of trial by jury as to justify the judge of the county court in proceeding to try the cause. * * * Conceding that such was the case, all we decide is that the agreement to waive the right of trial by jury must ordinarily be construed to apply only to the particular trial at which it is made. Such a waiver is a renunciation of a valuable constitutional right, and must be strictly construed. It may well be supposed that a defendant would be perfectly willing for a particular judge to try him, when he would not risk his successor, or that he would be willing to be tried the first time by a judge, when he would not submit to a second trial by the same judge after such officer had convicted him one or more times, so that the judicial mind might not afterwards be perfectly free from the influence of a bias created

by the circumstances of such previous conviction. This would be sufficient ground for the challenge of a juror, and ought not to be considered as waived in the case of a judge,—at least on doubtful implication." *Marton v. King*, 72 Ala. 354; *Stedman's Heirs v. Stedman's Ex'rs*, 32 Ala. 525; *Benbow v. Robbins*, 72 N. C. 422.

Nor is this court ready to concede that the waiver of the right of jury trial is absolutely binding upon the party, even as to the one trial where it is intended to be applied. A stipulation to waive, followed by an order of the court, is not in the nature of a private contract founded upon a consideration, which can only be set aside for fraud. It is a proceeding in court, which is liable to be changed or modified or set aside by order of the court, in its discretion, upon a proper showing. And where the circumstances are changed, as in the case of a change in judges, or other conditions, such a discretion to relieve from a waiver might very properly be exercised even on the first trial. A change in the court or in the counsel might very well furnish a good reason for allowing the waiver to be withdrawn; and where, upon a proper application, the circumstances seem to justify it, we think that a liberal discretion should be exercised by the trial court in allowing either party to withdraw from such a waiver, and to claim his right under the constitution. The judgment of the circuit court is reversed, with instructions to grant a new trial.

COLUMBUS SAFE-DEPOSIT CO. v. BURKE.

(Circuit Court of Appeals, Seventh Circuit. July 26, 1898.)

No. 479.

1. ASSIGNMENT OF ERROR—REVIEW.

Error cannot be predicated of an opinion or reason given by the court for a ruling, but must be of the ruling itself.

2. FAILURE TO PERFORM CONTRACT—WORK BENEFICIAL AND ACCEPTED BY DEFENDANT—RECOVERY UPON COMMON COUNTS.

Where work was not done within the time, or in the manner, stipulated in the contract, but was beneficial to defendant, and has been accepted and enjoyed by him, plaintiff may recover therefor upon the common counts, though he cannot recover upon the contract.

3. ADMISSIBILITY OF EVIDENCE UNDER SPECIAL FORM OF ISSUE—SUFFICIENCY OF OBJECTION.

The general objection that evidence offered is irrelevant or incompetent is not sufficient to raise the question of competency or relevancy, under the special form of the issues joined.

4. WRITTEN BUILDING CONTRACT—CHANGE OF PLAN BY PAROL AGREEMENT.

Where, by the terms of a written contract, a building was to be erected according to plans prepared by certain architects, and such plans were abandoned, and, in pursuance of a parol agreement between the parties, the building was erected according to plans prepared by the contractor, the work was done under a parol contract, and not under such written contract.

5. DELAY IN COMPLETING WORK—CHANGE OF CONTRACT—EVIDENCE ADMISSIBLE.

The issue was whether there had been such delay in completing the work as would justify a claim for the liquidated damages provided for in a written contract which had been departed from by parol agreement of the parties. *Held*, that it involved the inquiry whether the delay was attributable to causes provided for in the contract, and whether the pro-

vision for the completion of the work at the date named had been waived; and therefore the entire conduct of the parties—all they did and all they said to each other in reference to the work—was admissible in evidence.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

I. K. Boyesen, for plaintiff in error.

William E. Church, for defendant in error.

Before HARLAN, Circuit Justice, and WOODS and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This was an action of assumpsit, the declaration containing only the common counts. The answer was: First, non assumpsit; second, that the several supposed causes of action mentioned were one, to wit, a supposed cause of action on certain contracts in writing, copies of which are made "exhibits" (a questionable mode of pleading), and the substance thereof alleged, whereby the defendant in error, the plaintiff below, undertook, on terms and conditions stated, to furnish the materials, prepare, put in place, and finish the marble and mosaic work in the building then in process of construction in Chicago, known as the "Columbus Memorial Building," one of the provisions of the contract being that the work should be finished, except the two south stores and the fourteenth story, on or before the 15th day of April, 1893, "and in default thereof that he would pay to the owner \$200 for every day thereafter that the work should remain unfinished, as and for liquidated damages," but if the prosecution or completion of the work were delayed by the neglect or default of any contractor, or by any alteration in the work, or by damage thereto by fire, or by the unusual action of the elements or otherwise, there should be an allowance of additional time beyond the date set for the completion of the work, "but no allowance was to be made unless a claim was presented in writing at the time of such obstruction or delay." It is alleged "that the plaintiff failed to perform the contract on his part to be performed, in this, that he did not complete the work and furnish the materials, except the two south stores and the fourteenth story, agreed to be finished by him on or before the 15th day of April, 1893," nor, in fact, "until the 12th day of October, 1893," that the failure to complete the work by the time stipulated was not caused by the delay or default of any contractor, other than the plaintiff, nor by reason of any alteration in the work, nor by fire, or the unusual action of the elements, or otherwise, but wholly by the fault of the plaintiff, that, in accordance with a provision of the contracts, the plaintiff and the defendant appeared before the architects, W. W. Boyington & Co., and submitted to them the claim of the defendant for damages for the default of the plaintiff, and that Boyington & Co. then and there determined the default to be for the period of 180 days. The conclusion of the plea is:

"That by reason of the premises the plaintiff became indebted to the defendant for the sum of \$36,000, liquidated damages, arising out of the non-performance, as hereinbefore particularly set forth, of the contract on which this suit is brought; and it makes a counterclaim for that sum against the claims of the plaintiff, and offers to apply so much thereof as will be neces-

sary to discharge the claim of the plaintiff upon his claim. And this the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought to have his aforesaid action against this defendant."

The third plea contains similar averments, and concludes as follows:

"That by reason of the premises the plaintiff became indebted to the defendant in the contract in the sum of \$18,000 damages, and this defendant recoups said sum against any claim the plaintiff may have growing out of the said contracts, and it offers to apply any part that may be necessary in discharge of the plaintiff's claim. And, by reason of the premises set forth in its special pleas, it is entitled to recover a judgment against the plaintiff for any sum that may be found in its favor in excess of the claims of the plaintiff. And this the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought to have his aforesaid action against the defendant," etc.

The fourth plea need not be noticed.

To the second and third pleas severally the plaintiff replied nil debit; denied the execution of each of the contracts therein set up; and alleged, further, that the work and materials for which the action was brought were not performed and furnished under the contracts in the plea mentioned or either of them.

There was a verdict on which the court gave judgment for the plaintiff for the full amount of his demand.

The assignment of errors contains 41 specifications, but there has been a total failure to comply with the requirements of rule 24 of this court that the brief for the plaintiff in error shall contain, after a concise abstract or statement of the case, "a specification of the errors relied upon," setting out, in cases brought up by writ of error, "separately and particularly each error asserted and intended to be urged." In *Vider v. O'Brien*, 18 U. S. App. 711, 10 C. C. A. 385, and 62 Fed. 326, the intention of this rule was declared to be "that each specification of the brief shall conform substantially, if not literally, to the particular assignment (meaning specification) of error of which it is predicated; and for convenience there ought to be with each specification, in the brief, a reference to the corresponding assignment of error, as well as to the place in the bill of exceptions or other part of the record where the alleged error is shown." It will relieve the judges of this court of much needless labor if counsel can be prevailed upon to take the little pains necessary on their part to comply with this suggestion. The voluminous briefs for the plaintiff in error, besides the lack of the required specification of errors relied on, contain no reference to the portions of the record on which the chief questions discussed are supposed to have arisen. In the assignment of errors following some of the specifications is the statement that the ruling was excepted to, and in some instances the ground of exception is stated. But the assignment of error is no proof of the truth of these statements, which, indeed, should be found only in the bill of exceptions and in the briefs (*Railroad Co. v. Mulligan*, 34 U. S. App. 1, 14 C. C. A. 547, and 67 Fed. 569; *Woodbury v. City of Shawneetown*, 34 U. S. App. 655, 20 C. C. A. 400, and 74 Fed. 205); and the court, in order to know what foundation there is for any of the numerous errors assigned, must make for itself, in each instance, an unaided search of the record. The questions dis-

cussed, however, are comparatively few, and the undue labor imposed would have been much less if the briefs, even without particular references to the record, had contained the required restatement of the errors intended to be urged.

The specifications of error numbered from 1 to 9 are each to the effect that the court erred in holding as a matter of law a particular proposition stated. If the court so held, it must have been in ruling upon the admission or rejection of evidence, or in charging the jury, and error should have been assigned upon each specific ruling intended to be brought under review. Rule 11 of this court. Error cannot be predicated of an opinion or reason given by the court for a ruling, but must be of the ruling itself. *Russell v. Kern*, 34 U. S. App. 90, 16 C. C. A. 154, and 69 Fed. 94; *Caverly's Adm'r v. Deere & Co.*, 24 U. S. App. 617, 630, 13 C. C. A. 452, and 66 Fed. 305; *Insurance Co. v. Hamilton*, 22 U. S. App. 548, 11 C. C. A. 42, and 63 Fed. 93.

The tenth, eleventh, and twelfth specifications are to the effect that the court erred in refusing a peremptory instruction in favor of the defendant; the thirteenth, fourteenth, and fifteenth are for the refusal of requests for special instructions; the sixteenth to the thirty-ninth are upon the admission of evidence; and the fortieth and forty-first are upon instructions to the jury.

The chief ground on which a reversal of the judgment rendered is sought is that evidence was admitted over objection which, by a strict and quite technical rule of pleading insisted upon, was not admissible. The only pleading required in this court is an assignment of errors, and, when it is sought thereby to present a purely technical question of pleading in the trial court, there could be no injustice in exacting of the plaintiff in error a strict adherence to the rule of pleading here.

The original brief of the plaintiff in error is an elaborate discussion of the following propositions:

"(1) Under the pleadings in this cause defendant in error, in order to recover, was bound to prove that he had performed the contract fully, and that all that remained to be done was for the plaintiff in error to pay the contract price.

"(2) Even though it be held that waiver might be shown where the pleadings consist only of the common counts and general issue, where the contract relied on as the defense is pleaded by the defendant, and the plaintiff is afforded an opportunity to reply a waiver of its terms, and fails to do so, but, on the contrary, elects to take issue on the fact whether the work sued for was done under the contract pleaded, without replying a waiver, then the plaintiff is precluded from proving on the trial a waiver which he failed to rely on in his pleadings.

"(3) Even though evidence of waiver be held admissible under the pleadings, still the entire evidence of defendant in error fails in law to establish a waiver of the terms of the contract pleaded.

"(4) Even though it be assumed that Mr. Furber on behalf of the plaintiff in error could waive any of the provisions of the contract of December 3d between the Fuller Company and defendant in error, the evidence is insufficient in law to show such waiver.

"(5) The charge of the court, in effect, eliminated the question of waiver of the terms of the contract, and told the jury that, notwithstanding that the express terms of the contract prescribed the manner in which the delay caused by other contractors should be ascertained and allowed for, the defendant in error was entitled to allowance for delay so caused, without complying with the terms of the contract in this regard.

"(6) The cause of the plaintiff in error was seriously prejudiced by the admission of incompetent evidence over its objections."

Under the first of these propositions it is contended, without pointing out any particular ruling of the court assigned as error, and of a character to raise the question, that the plaintiff could not recover upon the common counts by proving work done under a special contract, which he had not performed in all its terms, though he might be able to prove, if the evidence were competent, a waiver of the unperformed terms by the other party. The contrary was held by this court in *Elevator Co. v. Clark*, 53 U. S. App. 257, 26 C. C. A. 100, and 80 Fed. 705, where it is said that "when the work contracted to be done was not performed within the stipulated time or in the stipulated manner, and yet was beneficial to the defendant and has been accepted and enjoyed by him, the plaintiff cannot recover upon the contract because he has departed from it, but may recover upon the common counts"; and the proposition is well supported by the authorities cited, including decisions of the supreme court of Illinois. But later decisions of that court are cited (*City of Peoria v. Fruin-Bambrick Const. Co.*, 169 Ill. 36, 48 N. E. 435, and *Parmy v. Farrar*, 169 Ill. 606, 48 N. E. 693), which, it is said, support the proposition of the plaintiff in error. Without going into an analysis of these decisions, in order to determine whether they are distinguishable from the earlier cases and from the case at bar, it would be enough to say, if it were necessary here to say anything upon the point, that they were not handed down until after this case had been tried, and, if they depart from the rule recognized in *Elevator Co. v. Clark*, the judgment below should not on that account be reversed. Section 914 of the Revised Statutes does not mean that judgments in the national courts rendered in conformity to the practice and pleadings "existing at the time in like causes in the courts of record of the state" shall be reversed because of a departure from that practice declared in subsequent decisions of the state courts. The question, however, is not in this record, because it has not been pointed out and we have not found that any evidence was admitted over the particular objection now urged. It is a salutary rule that a party excepting to the admission of evidence must state his objection specifically. *Camden v. Doremus*, 3 How. 515; *Burton v. Driggs*, 20 Wall. 125; *Springer v. U. S.*, 102 U. S. 586; *Wood v. Weimar*, 104 U. S. 786; *Railroad Co. v. St. John*, 29 C. C. A. 634, 85 Fed. 806. The general objection, which in some instances appears to have been made below, that the evidence offered was irrelevant or incompetent, is not sufficient to raise the question of competency under the special form of the issues joined, of which not even a remote suggestion seems to have been made at the trial.

The second proposition,—in support of which are cited *Carroll Co. v. Collier*, 22 Grat. 302; *Diehle v. Insurance Co.*, 58 Pa. St. 443; *Railroad Co. v. Howard*, 13 How. 335; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 22 Fed. 249; *Knight v. Insurance Co.*, 14 Phila. 187; *Davis' Adm'r v. Thomas*, 5 Leigh, 4; 7 Rob. Prac. tit. "Replications," p. 923; 2 Herm. Estop. par. 1304,—asserts a still more rigid and technical rule of pleading, and there is therefore a correspondingly stronger reason for enforcing the requirement that the specific objection to the admission of the evidence should have been stated to the circuit court. That not having been done, the objection ought not to meet with favor here.

Another reason why the objection cannot prevail is that the special plea on which it depends was not strictly proved, while, on the contrary, it was proved, as alleged in the replication, that the work, of which the plaintiff sought to recover the value or price, was not done under the contract set up in the pleas. By that contract the work was to be done according to the plans and specifications prepared by the architects. It is established beyond question that, if there ever were such plans prepared, they were abandoned, the architects not being skilled in or capable of judging of that kind of work, and that the appellee himself, at the request of the plaintiff in error, prepared the plans and designs, under which the work was prosecuted and finished according to his own judgment. If, therefore, the written contract in other respects remained in force between the parties, it was not the whole contract, and, the remainder of the agreement being in parol, the contract between the parties, strictly speaking, was a parol contract, though evidenced in part by the so-called written agreements, and necessarily remained in parol notwithstanding the subsequent execution of writings in which the prior written contracts were mentioned as the contracts under which the work was being or to be done. See *Stagg v. Compton*, 81 Ind. 171. The plea that the work was done under the written contracts set up was one which, if treated as a plea in bar of the action (practically a plea in abatement), required strict proof, and the evidence being clear and undisputed that the contract in a material part was in parol, and was modified from time to time by parol agreements of the parties as the work progressed, it must be said that the proof establishes the replication rather than the plea, and, if in that respect there was error in the charge of the court, it was in favor of the plaintiff in error.

It may be observed, in respect to both the first and second propositions, that the alleged failure of the plaintiff to complete the work before the time stipulated was a breach of no absolute term of the written contract, but was rather the stipulated basis or condition of liability on the part of the plaintiff, in accordance with the agreement, to pay the sum of \$200 as liquidated damages for each day of unexcused delay. In apparent recognition of this view, the special pleas of the plaintiff in error seem to have been drawn on the theory of set-off or counterclaim rather than in bar of the action. Whatever doubt there may be of the theory of the pleas should be resolved against the pleader.

The third proposition, as worded, calls for the weighing of evidence in order to determine a question of fact. It is well settled that no such question can be considered on a writ of error. *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837; *Dooley v. Pease*, 88 Fed. 446. The discussion which follows the proposition is upon the quite different question, whether "the evidence of the plaintiff tended to prove a waiver of the provisions and conditions precedent to recovery contained in the written contract dated December 3, 1892." Without entering into a rehearsal, it is enough to say that, in our judgment, there was abundant evidence in that direction.

The fourth proposition as worded also presents a question of fact which cannot be considered, and that there was evidence tending to prove the fact is sufficiently clear.

It follows from what has been said that no substantial error was committed in admitting evidence or in giving or refusing instructions. An admission made at the trial eliminated every important question but one. "We do not dispute that the work was eventually completed," said counsel; "there is no dispute about the work; the question is whether the work was done at the time in the contract provided for." There is therefore no merit in the question whether the architects had given a certificate of satisfaction with the work; and, if in itself that question might have been of significance, there is evidence to warrant the conclusion that the stipulation for that certificate was waived. Burke did the work by his own plans and according to his own competent judgment, as it was intended he should do. Whether there was such delay in finishing the work as to justify the assertion of a claim for the liquidated damages stipulated was a question, under the special pleas, of which the burden of proof was upon the plaintiff in error. It was not a narrow question of pleading, but involved the inquiry, not only whether the delay was attributable, in whole or part, to any of the causes provided for in the contract, but whether the provision for completion of the work by the date named was waived by the parties. Touching that question, the entire conduct of the parties in reference to the work, changes in the work originally contemplated, contracts for additional work, all that they did, and all that they said to each other, however remote the bearing, was admissible in evidence. There is certainly no substantial error manifest in the record. The judgment is therefore affirmed.

GRAND TRUNK RY. CO. v. CENTRAL VT. R. CO.

(Circuit Court, D. Vermont. July 15, 1898.)

RAILROADS—RECEIVERSHIP—OPERATING EXPENSES.

Cars furnished to a railroad by other roads in the course of business are materials furnished for the operation of the road, and claims for their loss when destroyed and not returned are properly payable by receivers under an order for the payment of claims for expenses of operation.

Henry G. Newton, for claimants.

Charles M. Wilds, for Grand Trunk Ry. Co.

Elmer P. Howe, for American Loan & Trust Co.

WHEELER, District Judge. This cause has now been heard upon the objections of the American Loan & Trust Company, trustee in the mortgages, to specific six months' claims for materials and supplies shown by the report of the receivers in classification. The first of these objections is to "all claims for supplies furnished prior to September 20, 1895." The second and third are waived. The fourth is to a specific list, by name of claimant, number of voucher, and amount, referring to Schedule No. 1, A, filed as a part of the report March 8, 1898, the most numerous and important of which are claims for cars destroyed, belonging to other roads and companies, in the operation of these roads during the six months in question. Upon the appointment of the receivers, March 20, 1896, they were directed to:

"Third. Pay all just claims and accounts for labor, supplies, professional services, salaries of officers and employes, remaining unpaid, and that have been earned or have matured within six months prior to this order. Fourth. All loss and damage claims arising from the operation of said property as in their judgment, on examination, are proper to be paid, as expenses of operation."

This order is the basis of all others upon this subject; and it has not been changed or modified in any manner, except that payment under it was, on motion of this mortgage trustee, restrained by the order of May 29, 1896, until a detailed and classified statement should be filed by the receivers, and further order of the court. All subsequent orders have been in modification of, and operative only upon, this restraining order. A list of the claims on that schedule (No. 1, A) that accrued prior to September 20, 1895, and matured subsequently, was filed by the receivers July 5, 1898, by order of court, as an addition to their former report. In decisions and orders subsequent to May 29, 1896, the expression, "furnished within six months" prior to the receivership, and perhaps others similar, have been used, without carrying out the full expression, "or have matured within six months," of the original order, for brevity, and without any intention of affecting in any way the scope of that order. This hearing has been had upon continuation of a motion to modify the restraining order, and the modification should be adapted to fit, and not to narrow, the descriptions of claims in the original order, which are not now, and have not been since it was made, the subjects of consideration. The six months was fixed upon as a time that would probably fairly cover claims for current operating expenses for keeping the property a-going, and preserving its value, up to the time of the receivership, and to leave out those which had been allowed to become mere debts. The claims on this list of July 5th appear to come fully within the terms of the original order, except that some—like, for example, those specified as in vouchers Nos. 1,184, 1,905, and 2,401, which, from the dates and nature of the services, would not be likely to mature within the six months—probably came into the list by mistake. The restraining order should, in this view, be so modified as to allow the payment of the same per cent. of such of the claims on this list of July 8th as, upon review by the receivers, shall appear, by the terms upon which they were furnished, not to have matured till within the six months, as upon those furnished within that time. The specific claims

for cars destroyed would fall within the description of those for damages in the original order, which remains in force as to these, except as stayed for the reasons already mentioned. The cars destroyed in the operation of the roads were materials furnished for the purpose of operating them, and they come within the description of materials furnished, and paying for them appears to be paying operating expenses. The payment for detectives to prevent loss is of the same nature as payment for insurance to recover for loss, objection to which is waived. As to the claims in vouchers Nos. 1,805, 3,516, and 3,987, to which there appear to be offsets of about the same or greater amounts, the set-offs should apparently be allowed to be made, and the balances be collected. The money in vouchers Nos. 3,892 and 3,894, paid by a station agent for overcharges on freight, should have been taken out when he turned over the money in his hands, and should be returned now. The money in No. 3,910, received for corn sold, would seem to be held in trust, and it should be restored.

Many objections have been, with much fairness, waived by counsel, on explanation, and these considerations appear to cover all the rest, except No. 3, for a retainer of counsel in matters not appearing to be connected with the operation of the roads, and Nos. 4,346 and 7,107, for the assessments of a railroad association, which do not appear to fall within the description of operating or preserving expenses of the property.

Objections overruled, except as to claims for supplies that matured before September 20, 1895, and those specified in vouchers Nos. 3, 4,346, and 7,107.

**GREENBRIER DISTILLERY CO. v. JOHNSON, Internal Revenue Collector,
et al.**

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

No. 516.

1. INTERNAL REVENUE—REMISSION OF WHISKY TAX.

Under the internal revenue laws, the tax on spirits attaches as soon as they come into existence, and must be paid by the manufacturer, even in case of their destruction, unless the circumstances on which he relies for exemption come within the particular description in some one of the remedial statutes.

2. SAME—SPIRITS DESTROYED IN TRANSIT.

Under section 56 of the act of August 28, 1894, providing for the establishment of general bonded warehouses, the provisions for allowance for loss by fire or other unavoidable accident do not extend to the case of such a loss while spirits are in transit from a distillery warehouse to a general bonded warehouse.

In Error to the Circuit Court of the United States for the District of Kentucky.

This was an action by the Greenbrier Distillery Company against Ben Johnson, collector of internal revenue for the Fifth district of Kentucky, and the Fidelity & Deposit Company of Maryland, the surety on Johnson's official bond, to recover the amount of internal

revenue taxes exacted upon certain spirits destroyed in a railroad collision. In the circuit court a demurrer to the amended petition was sustained, and judgment entered for defendant, to review which the plaintiff sued out this writ of error.

Helm & Bruce, for plaintiff in error.

W. M. Smith, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. The plaintiff, the Greenbrier Distilling Company, is a distiller of whisky in Nelson county, Ky. Under an act of congress approved August 28, 1894, providing for general bonded warehouses, it transported from its distillery warehouse in that county to the general bonded warehouse in California 65 barrels of whisky. In the course of the transportation, the whisky was totally destroyed by an accidental railway collision in the state of Alabama. Ben Johnson, the collector of internal revenue for the Fifth district of Kentucky, demanded and collected from the plaintiff \$3,259.08 as the internal revenue tax upon these 65 barrels of whisky that were destroyed. The payment was made under protest, because of a threat by the collector to seize plaintiff's distillery. The plaintiff appealed from the collector to the commissioner of internal revenue, who held that there was no provision of law for the refunding of tax legally collected on spirits in transportation from a distillery warehouse to a general bonded warehouse.

Section 51 of the act to reduce taxation, to provide revenue for the government, and for other purposes, passed August 27, 1894 (28 Stat. 564), authorizes the commissioner of internal revenue to establish one or more warehouses, not exceeding ten in any district, to be known and designated as "general bonded warehouses," and to be used exclusively for the storage of spirits distilled from material other than fruit.

Section 52 provides that any distilled spirits made from materials other than fruit, and lawfully deposited in a distillery warehouse, may, upon application of the distiller thereof, be removed from such distillery warehouse to any general bonded warehouse established under the provisions of the preceding section; and the removal of said spirits to said general bonded warehouse shall be under such regulations, and after making such entries, and executing and filing with the collector of the district in which the spirits were manufactured such bonds and bills of lading, and the giving of such other additional security, as may be prescribed by the commissioner of internal revenue and approved by the secretary of the treasury.

Section 54 provides that any spirits removed in bond as aforesaid may, upon their arrival at a general bonded warehouse, be deposited therein upon making such entries, filing such bonds and other securities, and under such regulations as shall be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury. It further provides that one of the conditions of the

warehousing bond shall be that the principal named in the bond shall pay the tax on the spirits.

Section 55 provides that any spirits may be withdrawn once, and no more, from one general bonded warehouse for transportation to another general bonded warehouse, and, when intended to be so withdrawn, shall have affixed thereto another general bonded warehouse stamp indicative of such intention; and the withdrawal of such spirits, and their transfer to and entry into such general bonded warehouse, shall be under such regulations and upon the filing of such notices, entries, etc., as the commissioner of internal revenue, with the approval of the secretary of the treasury, may from time to time prescribe.

Section 56, which is the section whose construction is here in controversy, provides as follows:

"That the provisions of existing law in regard to the withdrawal of distilled spirits from warehouses upon payment of tax or for exportation, or for transfer to a manufacturing warehouse, and as to the gauging, marking, branding and stamping of the spirits upon such withdrawals, and in regard to withdrawals for the use of the United States or scientific institutions or colleges of learning, including the provisions for allowance for loss by accidental fire or other unavoidable accident, are hereby extended and made applicable to spirits deposited in general bonded warehouses under this act."

The provisions for allowance for loss by accidental fire or other unavoidable accident are:

First. Section 8 of the act of May 28, 1880 (1 Supp. Rev. St. p. 287), releases the distiller from the payment of tax upon spirits destroyed by accident while in the process of manufacture.

Second. Whenever the manufacture of spirits has been completed, it is drawn off into cisterns, where it is allowed to stand not exceeding three days before being carried into the distillery; but if it is destroyed before being drawn off and carried into the distillery warehouse, the tax is remitted by the act of March 1, 1879, amending section 3221, Rev. St. (1 Supp. Rev. St. p. 235).

Third. When the whisky is destroyed in the distillery warehouse, section 3309 provides for the remission of the tax.

Fourth. If the spirits are removed from a distillery warehouse to a manufacturer's warehouse, and are lost in the course of such removal, section 15 of the act of May 28, 1880, provides for the remission of the tax as follows:

"That where spirits are withdrawn from distillery warehouses for transfer to manufacturing warehouses under the provisions of this act, it shall be lawful under such rules and regulations and limitations as shall be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury, for an allowance to be made for leakage or loss by any unavoidable accident and without any fraud or negligence of the distiller, owner, exporter, carrier or their agents or employes, occurring during transportation from a distillery warehouse to a manufacturing warehouse."

Fifth. A similar provision is made where the spirits are removed from a distillery warehouse for the purpose of export by the act of December 20, 1879, amending section 3330 of the Revised Statutes, as follows:

"That where spirits are withdrawn from distillery warehouses for exportation according to law, it shall be lawful, under such rules and regulations and limitations as shall be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury, for an allowance to be made for leakage or loss by any unavoidable accident, and without any fraud or negligence of the distiller, owner, exporter, carrier or their agents or employes, occurring during transportation from a distillery warehouse to the port of export."

It is pressed upon the court that these various equitable provisions for relieving the distiller from the payment of tax upon whisky destroyed, whether it be in process of manufacture or in the cistern, in the distillery warehouse or in transportation to the manufacturing warehouse, or for export, require the court to construe section 54 of the act of August 28, 1894, liberally, so as to grant the same relief for whisky which is destroyed while in transit to a general bonded warehouse from a distillery warehouse. It is conceded that the tax attaches to the spirits as soon as they come into existence (Rev. St. § 3248); and it must be further conceded that the tax is to be paid by the manufacturer unless he can put his finger upon some clause which relieves him from its payment. The particularity with which congress specifies the circumstances under which the tax can be remitted is itself significant of the legislative intention that, unless the claim of exemption from the payment of the tax comes within the particular description in some one of the remedial statutes, it shall not be allowed. Congress might easily have adopted a general law authorizing a remission of the tax entitling the distiller to relief in respect to whisky destroyed before the tax is paid, and while it remains in the custody of the officers of the government, but it has not done so. It has specified each case, and, unless the plaintiff's case comes within one of them, he is without remedy.

Section 56 applies to spirits after they have been in general bonded warehouses under the act. It applies to their withdrawal from such warehouses upon payment of tax or for exportation or for transfer to the manufacturing warehouse or for use of the United States or scientific institutions or colleges of learning. It refers to the gauging, marking, branding, and stamping of the spirits upon such withdrawal. Sections 52, 53, and 54 contain the provisions as to the removal from the distillery warehouse to the general bonded warehouse. Sections 55 and 56 refer to the conditions under which spirits deposited in the general warehouses may be either kept there or may be removed. It is clear, therefore, that the provisions for allowance for loss by accidental fire or other unavoidable accident refer to such spirits after they have been deposited in the general bonded warehouse, and not to spirits in course of transportation to it. There may be the same equitable ground for the remission of tax on whisky which is being removed from the distillery warehouse to the general bonded warehouse as there is for its remission when in transit from the distillery warehouse to the manufacturing warehouse or for exportation. But it is a complete answer to this suggestion to say that congress has not provided a remission in such a case. By no natural construction of the words used in section 56 can they be extended to cover a case of spirits before they have reached the general

bonded warehouse. This was the view which was taken by the court below. The issue was made by demurrer to the amended petition, the demurrer was sustained, and a judgment entered for the defendant. The judgment of the circuit court is affirmed.

ATWATER et al. v. CASTNER et al.

(Circuit Court of Appeals, First Circuit. June 1, 1898.)

No. 239.

1. **TRADE-NAMES—PRELIMINARY INJUNCTION—PUBLIC ACQUIESCENCE.**

The word "Pocahontas" having been used by complainant as a trade-name for coal for fully 20 years, with unbroken public acquiescence, and such trade-name having been sustained and its infringement enjoined by the circuit court of another circuit, *held*, that a preliminary injunction was properly granted in the present case.

2. **SAME—GEOGRAPHICAL NAMES.**

It seems that if a manufacturer, producer, or dealer furnishes goods of such excellent quality, and builds up so extensive a trade, that his trade-name becomes a distinctive appellation of the locality where his business is pursued, he is not thereby prevented from having a trade-mark right in the name.

3. **SAME—PUBLIC ACQUIESCENCE.**

That one person, other than complainant, shipped coal marked "Pocahontas Coal, from the Browning Mines," does not show an interruption of public acquiescence in complainant's use of the name "Pocahontas," but rather, from the use of the qualifying words, supports complainant's exclusive use of the unqualified words.

4. **SAME—PRELIMINARY INJUNCTION—APPEAL.**

When an order granting a preliminary injunction was clearly proper when made, it will not be reversed merely because the circuit court of appeals for another circuit, in a case in which the same party was complainant, has since held that the trade-mark cannot be sustained.

5. **PRELIMINARY INJUNCTION—AFFIRMANCE ON APPEAL.**

The rule as to the effect of a judgment on appeal, affirming an order for a temporary injunction, as stated in *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 621, 60 Fed. 276, 282, repeated.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Causten Browne and James M. Morton, Jr., for appellants.
Arthur v. Briesen and Henry E. Everding, for appellees.

Before PUTNAM, Circuit Judge, and WEBB and BROWN, District Judges.

PUTNAM, Circuit Judge. This is an appeal from an order granting a temporary injunction, and relates to an alleged trade-mark or trade-name, "Pocahontas," used in the coal traffic. This has been used for fully 20 years by the complainants below, and their predecessors in title, in a very extensive trade, with unbroken public acquiescence, until the controversy out of which this litigation arose in this circuit and in the Fourth circuit. It does not indicate merely that the complainants below are the producers of the coal sold, but quite as much that it is sorted and put on the market under their

implied representation of uniform quality and excellence. In addition to the public acquiescence of which we have spoken, there had been, prior to the injunction order appealed from, an adjudication, in the circuit court in the Fourth circuit, sustaining the claimed trade-mark or trade-name, and enjoining its infringement.

It is said that the complainants' coal, and also the alleged infringing coal, come from an extensive locality, now generally known under the name of "Pocahontas"; and it is claimed that the case, therefore, falls within the rule of *Canal Co. v. Clark*, 13 Wall. 311, and *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151. But, even if this were true in a general sense, it would remain to be considered whether the supreme court, in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 203, 204, 16 Sup. Ct. 1002, was not compelled to a qualification of the broad principle, claimed to have been stated in the cases referred to, as applied to trade-marks and trade-names which have been long and extensively used, and have become widely recognized by the public at large, even when they might not have originated in accordance with the ordinary rules of law. In that case the court found that some qualification of the rule that a word which indicates quality cannot be protected as a trade-mark or trade-name is necessary, at least in some classes of cases; and there is ground for maintaining that this applies with the same necessity to trade-marks and trade-names which represent well-known localities as to those of the character of that in question in that case. We do not, however, find it necessary to decide, at present, whether or not any qualification of that nature would be applicable to the case at bar, because so sharp a question does not now arise. Some of the reasons which render it necessary, under some circumstances, to protect, at least to a qualified extent, a trade-mark of a geographical origin, were given by us in *Levy v. Waitt*, 10 C. C. A. 227, 61 Fed. 1008, 1012, 10 C. C. A. 227.

The exact rule of *Mill Co. v. Alcorn* is implied in the following statement, at page 464, 150 U. S., and at page 152, 14 Sup. Ct.:

"The word 'Columbia' is not the subject of exclusive appropriation, under the general rule that a word or words, in common use as designating locality or section of a country, cannot be appropriated by any one as his exclusive trade-mark."

This is explained in the same opinion, at page 465, by citing from *Canal Co. v. Clark*, *ubi supra*, the following expression:

"The word 'Lackawanna' was not devised by the complainants. They found it a settled and known appellative of a district in which their coal deposits and those of others were situated. At the time they began to use it, it was a recognized description of the region, and, of course, of the earth and minerals in the region."

It is necessary to recognize carefully the distinction which these expressions imply. Otherwise, a manufacturer, producer, or dealer, who furnishes goods of such excellent quality that they build up so extensive a trade as to give a distinctive name to the locality where it is pursued, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct. Therefore, even under the rule as stated in *Mill Co. v. Alcorn*, *ubi supra*, and

without the qualification recognized in *Singer Mfg. Co. v. June Mfg. Co.*, *ubi supra*, the case at bar, as presented to the court below, and also to this court, involves a difficult question of fact, to the effect whether, at the time the trade-mark or trade-name in question was adopted, the word "Pocahontas" was in common use, as designating a known locality, or whether the locality gained its name from the complainants. Therefore the circuit court was not met with a pure question of law, but with a mixed question of law and fact; and, by the well-settled principles touching the granting of temporary injunctions, the court was fully justified in its action by the long and unbroken public acquiescence, without reference to the adjudication in the Fourth circuit to which we have referred.

The defendants below suggest that the acquiescence was not unbroken, as stated by us, because the affidavits show that there was one dealer, Browning, who shipped his coal as Pocahontas coal; but they also show that all such coal was plainly tagged as follows: "Pocahontas Coal, from the Browning Mines." This, so far from interrupting the public acquiescence to which we have referred, supported it by an evident attempt on the part of Browning to bring himself within the rule stated in *Singer Mfg. Co. v. June Mfg. Co.*

Since the granting of the injunction in the case before us by the court below, and since the appeal to this court and the arguments at bar on the appeal, the circuit court of appeals for the Fourth circuit, in *Coffman v. Castner* (by an opinion passed down May 3, 1898) 87 Fed. 457, has held that the claimed trade-mark or trade-name, "Pocahontas," cannot be sustained, and has reversed the adjudication of the circuit court to which we have referred, and has remanded the cause to that court with instructions to dismiss the suit. As the complainants in this case were the complainants in the case in the Fourth circuit, it may be that, if this had occurred before the action of the court below, now appealed from, no temporary injunction would have been granted. But, as the injunction was granted before the decision of the circuit court of appeals was announced, the position is radically different. The order was clearly proper when made, and, if the circumstances remained unchanged, we could not reverse it. If the decision in the Fourth circuit were in all respects final, we should hesitate to allow the injunction to continue, especially as the parties complainant are the same in each case. It is, however, not final, as it may be reversed, possibly, on a writ of certiorari from the supreme court. It would not be seemly for the courts in one circuit to grant, dissolve, and, perhaps, renew, temporary injunctions according to varying conditions of litigation in other circuits; so that, as this injunction was clearly proper when granted, our only suitable course is not to interfere with it for any reason now apparent to us.

We, of course, do not mean to limit the usual powers of the court below over the injunction, as, while we accept the usual form of order, we attach to it the qualifications stated by us in *Davis Electrical Works v. Edison Electric-Light Co.*, 8 C. C. A. 615, 60 Fed. 276, 282.

Some incidental matters were brought to our attention by the parties; but we believe all of them are rendered unimportant, in

view of the conclusions which we have stated. As neither party takes from our decision anything substantial, and as the circumstances are without precedent, we are not satisfied that equity requires that the appellants should pay the costs of this appeal. The order appealed from is affirmed, neither party to recover costs of appeal.

Note by the Court. *Mills Co. v. Eagle*, 86 Fed. 608, which came to hand since our opinion was passed down, fully sustains our suggestions about trade-names of geographical origin.

CLISBY et al. v. REESE.

(Circuit Court of Appeals, Seventh Circuit. June 3, 1898.)

No. 480.

1. PATENTS—INVENTION—ANALOGOUS USE.

An exhaust fan for removing dust and chaff, and an elevator for carrying away the seed, both being old devices, long used in connection with the threshing of grain, there is no invention in adapting them to use with a broom-corn cleaner.

2. SAME—PRIOR USE—ABANDONMENT.

Where for a number of years a farmer had practically used on his own farm a broom-corn cleaner, the fact that he afterwards discontinued such use, and the machine was not thereafter employed by others, does not show that it was an abandoned experiment in the sense of the patent law. If there was any abandonment in such case, it was to the public.

3. SAME—COMBINATIONS—AGGREGATIONS.

A combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes from that given by their separate parts. Hence the use, with an old style of broom-corn cleaner, of an exhaust fan to take away the dust, and an elevator to scoop and carry away the grain, is a mere unpatentable aggregation.

4. SAME—BROOM-CORN CLEANERS.

The Reese patent, No. 505,128, for improvements in broom-corn cleaners, is void for want of invention, and as covering a mere unpatentable aggregation.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

This was an action at law by Frederick W. Reese against Ripley A. Clisby, John R. Clisby, and Frank W. Clisby for alleged infringement of a patent for improvements in broom-corn cleaners. The cause was tried to the court without a jury, and judgment was given for plaintiff, to review which the defendants have sued out this writ of error.

James H. Peirce, for plaintiffs in error.

Ephraim Banning, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is an action at law for the infringement of letters patent No. 505,128, issued September 19, 1893, to Frederick W. Reese for improvements in broom-corn cleaners. By stipulation the action was tried before the court without a jury, the

court making a special finding of facts and conclusions of law, holding the patent valid, and rendering judgment for the plaintiff, Reese, here defendant in error. There was a general issue in the case, and the sole question litigated relates to the validity of the plaintiff's patent. This was attacked—First, by making an objection to the introduction of the patent in evidence which was admitted by the court, and exception taken; and, second, by an exception taken to the conclusion of law holding the patent valid. The patent is for a combination of three devices, each of which is conceded to be old; and the contention of the plaintiffs in error is that it is not properly a combination involving invention, but a mere aggregation or bringing together of separate elements acting independently, and producing no new or useful result from their co-operation or joint action. There are two claims in the patent, which are substantially the same, as follows:

(1) In a machine of the class described and in combination with the cylinders and feed mechanism thereof, a casing provided with front and rear openings, and arranged to encompass the cylinders, and to permit of the introduction and egress of the material to be operated upon, an exhaust apparatus for withdrawing the dust and similar refuse collecting within the cleaning compartment of the machine, and an elevating mechanism; all substantially as and for the purpose described. (2) The combination, with a pair of diagonally-arranged cylinders and the feed mechanism, of a casing provided with front and rear openings, an elevator, and an exhaust mechanism and up-take located above the meeting line of the cylinders and over the refuse collecting bin, substantially as and for the purpose specified.

The eleventh and twelfth findings of the court describing the invention are as follows:

(11) A brief description of the mechanism shown and described in the Reese patent in suit will show that it combines five elements as follows: (1) Mechanism for feeding the broom corn into the machine; (2) mechanism for stripping the broom corn, and at the same time discharging the seed; (3) a case for confining and holding the dust and lint, provided with a front and rear opening for the introduction and egress of the broom corn; (4) an exhaust fan for carrying off the dust and dirt, and cleaning the lint and smut from the broom corn; and (5) an elevator for carrying the seed away from the machine to prevent the choking thereof. (12) The five elements above noted go to form an organized machine arranged for the purpose of stripping, cleaning, and preparing the broom corn for the market. It is admitted by the experts for both sides that, if one of these elements were left out, the machine would not be a commercially valuable or safe one to work. It might perform its mechanical functions,—such as the physical dislodgment of the seed from the corn,—but it would not protect the operator from injurious dust or smut unless all of the elements were present.

The first three items of the court's statement of the invention describe the machine for threshing the grain or stripping the seed from the broom, which had been in use nearly 50 years. The fourth and fifth relate to the addition of the exhaust fan for removing the dust, and the elevator for carrying away the seed from the machine. Both these devices are old, and have been used in connection with threshing grain and various other purposes for many years before the plaintiff made claim to his invention. The exhaust fan is like any other exhaust fan applied for the purpose of drawing the air by suction from a room. If the air happens to contain dust, that is drawn out with

the air. The beneficial use as applied to a threshing machine, whether of broom corn or any other grain, is obvious and well recognized. But, being so long in use in connection with grain-threshing machines and other devices, whether it would involve anything more than ordinary business sense and mechanical aptitude to adapt it to a broom-corn cleaner, either alone or with the other old device of an elevator to take the grain away and deposit it a convenient distance from the operating machine, would not seem to present a very difficult problem for solution. The court, in its ninth finding of fact, says:

"The evidence shows that the art of stripping broom seed from broom corn is old, as is exemplified by a patent granted to L. E. Grosvener, of South Groton, Massachusetts, No. 8,375, dated September 23, 1851. Broom-corn strippers of the Grosvener type continued in use without any material improvement until the date of the Reese patent. A device of this sort was offered in evidence by the defendants, and marked 'The Porterfield Machine.' This machine was in use for a number of years by a farmer named Porterfield in Illinois, but its use was abandoned or discontinued in 1881. It contained devices substantially the same as the Grosvener, with the addition of an elevator for elevating the seed."

In another place the court says, in regard to this Porterfield machine:

"Examining the art briefly, there are no machines found therein that contain all of these elements for this specific purpose. The nearest anticipation of the same might be said to be the Porterfield machine; but this machine lacks the essential features of the fan and casing to operate as the Reese invention; in fact, it is doubtful whether it can be considered more than an abandoned experiment, in that the machine was abandoned nearly fifteen years ago, and has never been in actual use since that date, and was at the time of its use confined to a private farm, worked by a private party, and never put out in public use."

It is quite evident that this finding shows no abandonment of an invention such as would enable some other person to invent the same thing which had been before in use by the public, as shown by the finding, in however limited a way. The finding shows no privacy or concealment, and the machine being in use a number of years shows that it was a practical machine. It is not necessary that everybody should use it, or that the use should always be continued. Some six years before the plaintiff applied for his patent, the use was abandoned. But whatever abandonment there was was evidently to the public, which would give no one the right to obtain a patent for the same device. But the claim of the plaintiff to invention consists in combining these three things, to wit, a broom-corn thresher, an exhaust fan on top of the case to take away the dust, and an elevator at the side to scoop the grain from the bin where it is deposited, and carry it away to a convenient place. There is nothing to show wherein these three things operate jointly to produce anything which is the result of their united action. Each of these elements appear to operate separately to produce its own separate individual result, just as they might in connection with any other business where an exhaust fan was needed to draw away the air from a given space, and an elevator with endless belts and buckets to carry any given substance to another place or to a different level. These elevators are no doubt as old as machinery, and were used by

the Egyptians many thousands of years ago for raising water, and very likely for raising the mud of Egypt, either before or after it was made into brick by the Israelites during their degrading bondage in that country. They have been used for scores of years in this country in every warehouse and grain elevator, and in connection with the common grain-threshing machines throughout the Northwest. Porterfield could have had no motive for concealing such a device, as it was in general use all over the country. The exhaust fan also has been in just as common use. The court below finds a fan present in the Parrott patent, No. 209,708. Here it was used to suck the air containing the dust from wheat and rye, but the use is precisely the same and the change from one kind of threshing to another, or from threshing to stripping, involves no invention. It is also a matter of common knowledge that the same device has been used for many years in connection with corn shellers, grain threshers, and sawmills to take up the flying dust and carry it away from the vicinity of workmen. There is no suggestion in the Reese patent of any difficulty in mechanism to be overcome in affixing the seed elevator or the exhaust fan to the broom-corn thresher. On the contrary, he says: "Any suitable elevator may be employed for raising the seed from the hopper." As was said by the supreme court in *Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. 1034:

"If, however, to adapt these separate elements to each other, so that they can act together in one organization, required the use of means not within the range of mere mechanical skill, then it would be true that the invention of such means for effecting a mutual arrangement of the parts would be patentable. * * * Nothing of that, however, appears in this case. The invention described is not of any such device for effecting the combination. No claim is made of that character. The claim made is for the combination, no matter how or by what means it is or may be effected."

These remarks seem quite applicable to this case. The court below in its findings speaks of a co-relation between all the parts, but there is no suggestion of any joint or unitary action producing any new or useful result. There is nothing in the findings or in the case anywhere to show anything more than a mere juxtaposition or aggregation. The combination, to be patentable, must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements. *Reckendorfer v. Faber*, 92 U. S. 347. Merely bringing old devices into juxtaposition, and then allowing each to work out its own effect, without the production of something novel, is not invention. *Hailes v. Van Wormer*, 20 Wall. 353. The judgment of the court below is reversed, with instructions to enter a judgment in favor of the plaintiffs in error.

THE JAMES MARTIN.¹

(District Court, E. D. Virginia. February 10, 1883.)

1. SHIPPING—ABANDONMENT OF VESSEL BY CREW—EVIDENCE.

Where the master and crew have abandoned their vessel under circumstances raising a grave suspicion that they dismasted and scuttled her, but, on a libel by the cargo owners and their insurers, the master and claimants assert that the injury was caused by collision, the failure of the latter to examine several members of their crew, who were disinterested, or to libel the vessel with which they pretend to have collided (the collision being denied), or examine any members of her crew in regard to the alleged collision, is prejudicial to their case.

2. SAME—FREIGHT—ABANDONMENT.

When a vessel and cargo are abandoned at sea by the master and crew, without intention to retake them, the shipowner can maintain no claim to the freight.

3. SAME—BAD SEAMANSHIP.

Where a master and crew abandoned their vessel, claiming that she was sinking, but she was afterwards found riding safely and not leaking seriously, and the circumstances were such as to raise a grave suspicion that she had been purposely dismasted, and an attempt made to scuttle her, *held* that, because of bad seamanship and negligence, the ship was liable for the amounts paid for salvage, and as damages to the cargo, by the insurers.

Note of evidence by the judge:

The schooner *James Martin*, 225 tons, was owned in Boston by several persons; William H. Browne, her master, owning an eighth part. This part was insured at \$800, and had been insured at that rate for 12 years. The schooner was 25 years old. In March last she took on a cargo of fertilizers, to the amount of 260 tons, consigned to Allison & Addison, in Richmond, Va. This cargo was insured with the Virginia Fire & Marine Insurance Company, one of the libelants here. The fertilizer was worth \$40 per ton, or some \$6,000 or \$7,000. When the *Martin* was about ready to sail from Boston, Capt. Browne, her master and part owner, found himself in negotiation for the purchase of another vessel. He telegraphed to a town in Massachusetts for Rowland Howes, and employed him to go on this voyage as temporary master of the *Martin*. The mate of the schooner was A. C. Browne, brother of the part owner and regular master, William H. Browne. The vessel was towed out of Boston Harbor on the 14th of March, 1882, and sailed on her voyage. By midnight of the 23d March she was off Cape May, some six miles distant. The wind was W. N. W. She was going south, making for the Virginia capes. Her master, Rowland Howes, testifies as to subsequent events substantially as follows: "About midnight of the 22d March,—we being closehauled, on starboard tack, wind W. N. W., and going south, with reefed mainsail, and with foresail and jib boom set, weather fair, but cloudy, and a strong breeze,—we were run into by a three-masted schooner, of about 700 tons, afterwards learned to have been the *Wm. H. Baily*, of New York. She was standing northward, and must have had the wind free. We saw her about 3 miles off. She was on the port tack. She was under full sail. After she had got nearly abreast of us, she suddenly luffed up, tacked ship, and ran in under our lee, and struck us on our port bow. She carried away our jib boom, cathead rail and bulwarks, and damaged the top of the top gallant forecabin. Both vessels had their lights set. It was a clear night. We were obliged to cut adrift the jib boom and the sails attached to it, to prevent damage to the vessel. All the rigging attached to the flying jib and the jib

¹ This case has been heretofore reported in 5 Hughes, 448, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

topsail boom was cut adrift, including the jib-boom guys on the starboard side. We examined the rigging after the collision, and found it in apparently good order. We then proceeded on our course. For the rest of the night the wind shifted around from W. N. W. to N. W. We continued under same sail as before. Next day, wind N. W. to S. W., went nearly around the compass and quite moderate. For three hours after the collision, until we got off Chincoteague, sea was comparatively smooth; that is, for the rest of the night after the collision, and all the next day. At 2 a. m. on the morning of the 24th, twenty-six hours after collision, a heavy sea had set in from the southward. Wind S. W. by S. While we were on the starboard tack, both masts came suddenly down with a crash, caused by the chain parting, which the starboard jib stay was set up to, and the lee on the port side of the bowsprit breaking, which the port jib stay was rove through. The foremast broke off about nine feet above the deck, and the mainmast at the saddle. The mainmast broke in three places. This happened at a distance of about six miles from Winter Quarter light-ship. No one was on deck at the time but the mate [A. C. Browne] and another man. There were six men, all told, on the vessel. We let go the small anchor soon after, but the chain parted. We then let go the large or sheet anchor, with 70 fathoms of chain, and the ship swung round to the wind and sea. We then cleared away the spars that were hanging over the side of the vessel. The gaff and topmast and head of the mainmast went overboard. The rest of the masts were left on deck. They fell over to the port quarter. When the mast came down, it broke the davit on the port side, and stove the boat. The ship's boat was destroyed by the falling masts. No injury was done to the deck. The houses were injured to some extent. After the masts came down there was a reef breeze from S. S. W., the sea heavy, and the weather smoky, so that we could see but a short distance. The ship was leaking, but we could not discover the source of leakage. We pumped her out every 15 minutes for about two hours, and when we left her there was two feet of water in her hold. We left her about eight hours after the masts fell, or 9 a. m. on the 24th March. The sea when the masts fell was such that the ship would take water over her bow lying at anchor. We left the ship on the boat of the steamer John Hopkins, Hallett, master, bound from Boston to Baltimore, via Norfolk, which came in sight on the morning of the 24th. We left the ship because she was entirely disabled, and there was no suitable boat to help ourselves with. I did not ask Capt. Hallett to take her in tow and carry her into port. The sea was too heavy. He had the privilege of taking her after we had abandoned her. I did not think it worth while to ask him about these matters. We left her on Friday. She was taken in tow on the next morning (Saturday) by the steamer Wm. Crane, Howe, master, bound out from Baltimore to Boston, and carried back to Norfolk. I went there from Baltimore, and saw her the following Tuesday afternoon, the 28th. When I landed from the John Hopkins I made no efforts to carry relief to the vessel and to save her. I thought she would sink. The entire pumping we did before we left her was equal to an hour. I did not ask the captain of the Hopkins to take off any part of the cargo." The testimony of A. C. Browne, mate of the James Martin, does not differ in substance from that of her master. He says that the crew all thought that, if the Hopkins had not taken them off, they would have been all lost. He says that after they left their vessel they took no steps to save her, except that they left her anchored. They thought she would sink, and her crew all thought themselves lucky in saving themselves as they did. He says that his captain said to Capt. Hallett, of the Hopkins, that his vessel was sinking. He says that he thought that the collision did disable the Martin to some extent. There were six men on the Martin on this voyage. Only three were examined on the part of the owners, viz. Rowland Howes, the employé of the part owner, William H. Browne; A. C. Browne, the brother of this part owner, whose interest was insured; and the steward, who knew or affected to know nothing of the material facts of the collision and of the falling of the masts.

The vessel, on being brought into Norfolk, was found to have a hole cut in her deck, about 10 inches long and 6 inches wide, tapering to a smaller size at the bottom. Her hatches were fastened down. The hole in the deck was a little aft of amidship, at the lowest point of the deck, where, when loaded,

it would be about 4 feet above the water. The scupper near this hole was found to be stuffed with rags and other rubbish. Efforts had been made to cut through the deck in and under the water closet in the cabin, but the deck was not actually cut through at this place. The schooner was towed from Norfolk to Richmond in charge of Mr. Cowardin, the president of the insurance company before mentioned, which held the insurance on the cargo. On arriving at Richmond, port wardens found the hatches properly fastened down. Fox, one of the witnesses, says the fore rigging on the starboard side, lying on deck, bore every appearance of having been cut, and cut somewhere between the rail and the mast head. Witness Allison, one of the libelants, says the starboard stays of the foremast were cut. Allen, a witness, and a stockholder in the insurance company, and an experienced sailor, says: "The starboard fore rigging had been cut eight or ten feet, or more, from the deck. The seizings of the forestay had been cut, which left it free to go. They were cut,—all of them. The effect upon the masts, of cutting the seizings, would certainly be to carry them away over the side of the ship, if there was any motion of the vessel at sea." He did not think the schooner had been in collision, as the hull was not damaged, and certainly her jib boom and bowsprit would have been carried away. From the general evidence apparent, he did not think his port bow indicated a blow from the outside. He saw no injury except at the cat head, a space of six or eight inches. The rail by the cat head was broken down, but there was no injury to the deck or plank sheer. The cargo was found damaged to the extent of about \$12 a ton, chiefly at the part of the vessel under the hole that was cut in the deck. The vessel was not in a leaking condition, and had not been since taken in tow by the steamer Crane; at least, not more so than vessels ordinarily are while loaded and making a voyage. The insurance company, which is one of the libelants, had to pay \$1,800 as salvage on the cargo, and \$2,007 to Allison & Addison, the consignees, for damages to the cargo. The freight contracted to be paid to the ship was \$390. The insurance company paid towage bills and other expenses nearly equal to that amount.

S. H. Matthews, one of the part owners of the Martin, testifies, among other things, that, after hearing of the collision, he was told of a schooner lying at Charlestown, Mass., which was loading with ice for Charleston, S. C., which was said to have collided with an unknown vessel. He went to see her, and had some talk with her master, who said a collision had happened. He found, upon examination, this schooner's mainstay was broken on starboard bow, and anchor stock broken, and various scratches on the hull of the starboard bow. After going to the custom house in Boston, where he made some examinations, he again saw the master, who admitted to him that he had been in collision about the point and time at which the Martin had collided. This was a three-masted schooner,—the William H. Bally, of New York. Matthews told the captain of the schooner that he had employed counsel in Boston to libel his vessel. The brothers of Matthews, who were part owners of the Martin with him, also told the captain of the Bally that they were going to libel, and that he had better go to New York and prepare bonds, so as to be ready for the libel. The sequel was that the schooner Bally went away from Boston, was not libeled, and gave no bonds, and that no steps have been taken to libel her, either in New York, Charleston, Boston, or elsewhere.

Under a consent order of sale entered by this court, the Martin was sold in Norfolk, and brought less than \$1,500. It does not appear that any of her owners, other than William H. Browne, had their interests insured, or had knowledge that William H. Browne had employed a temporary substitute as master for this voyage.

Sharp & Hughes, for libelants.

Ellis & Thom, for respondents.

HUGHES, District Judge. The original libel in this case, filed on the 24th of April, 1882, by the owners of the cargo and their insurers, claims damages for tort charged to have been committed by the master and crew of the James Martin, in having cut away her masts,

and cut holes in her hull, and abandoned her to perish at sea. The amended libel, filed at the hearing, claims damages from the failure of the master and crew to bring the vessel into port, because of bad seamanship and the unseaworthiness of the vessel. The owners make a cross claim for the freight contracted to be paid on the cargo. When the schooner was brought into Norfolk, on the 24th of March last, her master and crew were under grave suspicion of having dismasted and scuttled their vessel and deserted her at sea. When, on the day before, the steamer John Hopkins, from Boston for Baltimore, came in sight of them, and took the whole crew of the schooner on board, the master so impressed Capt. Hallett with the belief of the hopeless plight of the schooner alleged to be leaking and sinking that he came away, and brought her crew off, without deeming it worth while to make any examination into the true condition of things. When, 24 hours afterwards, the steamer William Crane, from Baltimore and Norfolk for Boston, came near the schooner Martin, she was found not to be seriously leaking, and not to be sinking; and Capt. Howe, of the Crane, found no difficulty in doing, in the absence of the schooner's master and mate, what Capt. Hallett had not done when they were present. He took the schooner in tow, reversed his own trip, and brought her back to Norfolk. When the schooner arrived here she was found to have a hole cut in her deck, in its lowest bend downwards, nearest the water, about midships, and the scupper near it was found to be plugged up with rags. On being taken to Richmond, and unloaded of her cargo, the latter was found to have received its principal damage from water in that part lying just under this hole in the deck,—a fact which indicated that the water causing this damage had come in through this hole while the schooner was in a position to be swept over by the sea; this latter fact indicating that the hole had been cut in the deck while the schooner was out at sea, sometime before she was brought within the capes of the Chesapeake. Mr. Matthews, one of the part owners, claimants, and respondents, was in Richmond about the time the Martin was taken up there, and negotiated a dismissal of the libel for salvage which had been put upon the schooner here on her first arrival in Norfolk. He could not have failed to hear at Richmond the charges against the master and mate of the schooner, which are embodied in the original libel before me. He must have appreciated the importance to the reputation of these two officers, and to the character of the schooner's owners, especially of William H. Browne, of meeting these charges by the evidence of the entire crew of the Martin, and by the evidence of all on board of the three-masted schooner with which he states she had been in collision on the night of the 22d of March, 1882. Naturally this court had a right to expect that all the crew of the Martin would have been examined in such a case as this. Yet only three of them have been examined, and the failure to examine the rest is wholly unaccounted for, although it is in proof that one of those others was for some time in a hospital at Norfolk. Such an omission, unaccounted for, in cases like this, has always been looked upon by admiralty courts as prejudicial to the case of

the vessel charged to be at fault. Moreover, the witnesses actually examined are those least disinterested in the suit. The part owner, whose interest in a schooner 25 years old is insured, and who did not make this particular voyage with his vessel as master, telegraphed from Boston for a temporary substitute, and sends this substitute on this voyage as temporary master; this part owner's brother being mate. This temporary master and this mate are the only persons examined of this crew, except a steward, who seemed to have been always below deck asleep, who insisted that he knew nothing, not even the names of his companions of the crew, and whose intelligence was probably as dark as he represented it to be. Again, it was of the highest importance to the case of the respondents in this court that they should have libeled the three-masted schooner with which they claim the Martin to have been in collision off Cape May,—if for no other purpose, at least to establish the fact of collision, and to show that the fault was not that of the master and crew of the Martin. The evidence before me is wholly *ex parte* as to that other vessel, and the testimony of the crews of vessels which have been in collision is proverbially unreliable. The testimony of the crews of each of these two vessels as to that collision ought to have been taken under oath and under cross-examination; otherwise it would have been, in that litigation, worthless. How can it be any better in this, where it is the whole truth that is essential to the formation of a just conclusion. But although the owners of the Martin themselves testify that they had abundant opportunity to libel the three-masted schooner, which they called the "William H. Baily of New York," yet they have not done so. In Boston they tried to maneuver with the master of the alleged schooner, to induce him to get out of the way of their libel. They could have libeled her during several days while lying at or near Boston. They told her master that they had arranged to libel her after a certain fast day, and to get his vessel ready, and they say he went off with his schooner before they got their libel out. If, therefore, these people have a good case, they have failed to support it with the evidence most necessary and proper for its vindication; that is to say, they have omitted to examine three of their own crew to sustain the statements alleged in their defense, and these three were the men who were wholly disinterested in the result of the suit. They have not libeled the schooner which they claimed to have collided with, nor examined any of her crew as to the alleged collision, although they insist that in this collision originated the disaster to their vessel. Nor have they accounted for these omissions. When we come to examine the testimony of their own master and mate as to the causes of the misfortunes of the schooner Martin, their explanations prove to be radically unsatisfactory. They say they were running southward, abreast of, and six miles off from, Cape May, on the night of the collision, with wind W. N. W. (when it was two points abaft their beam), and that they were closehauled and on the starboard tack. They say that the three-masted schooner was standing northward with wind W. N. W.

at that time, and yet that she was sailing with a free wind, and on a port tack. These statements are, by physical and mathematical necessity, untrue. Moreover, these officers say that the vessels collided by the Baily's starboard bow running into the Martin's port bow; and Mr. Matthews testifies that the port bow of the Martin, as he saw it at Richmond, was rubbed and abraded, and that the starboard bow of the Baily, as he saw her in Boston, was likewise rubbed and bruised, and that he saw a workman obliterating the mark or bruise on the Baily. Now, it is absolutely impossible that such a collision could have occurred between these two vessels, unless one or the other of them had entirely reversed her course; and there is no mention or intimation of such a reversal in the testimony of either the master or mate of the Martin. Counsel for the Martin suggests that she might have been sailing at the time of collision on a course to bring her under the land, say, S. W. by W., and that such a course would bring her close to the wind. But she was then opposite Cape May, north of the mouth of the Delaware Bay, and such a course as that suggested would have taken her into the mouth of the bay. She could not have been aiming to enter the bay; and, even if she had been, her port would then have been turned still further away from the other schooner, and her course would have rendered it still more impossible for the Baily to have run into her port bow with her own starboard bow. In short, I find it impossible to believe the statements of the master and mate on this subject,—a fact which naturally and necessarily discredits their whole testimony. The Martin was sailing with the wind free, the Baily was sailing close to the wind, and the rule of the road (Rule 17, Rev. St. § 4233) made it the duty of the Martin to keep out of the way of the Baily. If, therefore, there was a collision, it was by fault of the Martin, and she is responsible for all the consequences to the cargo for that fault. The statements of the master and mate as to the dismasting of the schooner are almost as incredible. They admit that they examined the rigging of the schooner shortly after the collision, and found the essential parts of it intact. They proceeded on their course for three hours on a rough sea, but after that period, all the way to Chincoteague, some 60 or 70 miles, the sea was "comparatively smooth," and the wind was "moderate." The wind was shifting all the rest of the night after the collision, all of the next day, and the first part of the next night, so that it had got entirely around the compass. There is no complaint of a storm, though the sea was heavy, and the wind was blowing a reef breeze. At 2 p. m. on the morning of the 24th the masts suddenly went down. What was the cause of this misfortune? The testimony of the witnesses examined at Richmond was that the starboard fore rigging was cut. So is that of Mr. Cowardin, who was on board the Martin from soon after she was brought into port at Norfolk until she was taken to Richmond. This rigging was cut some nine or ten feet above the deck. The masts fell over in the direction two points on the port quarter, showing that the fore rigging on the starboard side was at fault. The vessel had

gone on her course for 26 hours after the collision. Examination had shown that the essential parts of the rigging were intact shortly after the collision. Though it had been subjected to greater or less strain for the first 3 hours after that event, it had stood the strain. Then there was a "smooth sea" and a "moderate" wind for 20 hours, during which there could have been no strain. Then, without the agency of any vis major, in the shape of either high storm or heavy sea, the masts went down opposite the quarter where the rigging was found afterwards to have been cut. This is not a criminal prosecution, in which a court must require full proof of crime, but a civil suit, in which a court is bound to decide upon the preponderance of evidence positive and circumstantial. With every disposition to presume innocence, I cannot persuade myself that the falling of these masts was the result of any vis major of navigation, especially as it occurred at a desolate point on the coast, where violence to the vessel could find more of a chance of immunity and concealment than at probably any other point on the North Atlantic seaboard. But, even if the masts did fall by stress of weather and sea, still there was no justifying cause for the subsequent abandonment of the schooner by the master and mate. It is true that the chance of escape was cut off by the accidental destruction of their boat in the falling of the masts, but where was the necessity for escape at all? They could safely remain on board until help came from some quarter, and there was nothing in their condition to throw them into a panic of fright. If they were under the influence of such a panic before the Hopkins came in sight, they were needlessly so, and the certainty of rescue should have calmed them. Their vessel was not sinking. It was not even leaking considerably, but only to the extent to which the best of vessels are liable at sea. But they did more than escape. When they got aboard the Hopkins their trepidation should have entirely subsided; and they violated their duty as seamen to their ships, its owners, and to the cargo, by so exaggerating the condition of their vessel, in their statements to Capt. Hallett, as to induce him to sail away without attempting to save their ship. This is all proved by the sequel; Capt. Howe, of the Crane, having found the schooner riding safe at anchor, without much water in her hold, not in a leaking condition, and capable of being towed upon a right rough sea into harbor. The Boston steamers all stop for several hours at Norfolk, both on their trips in and out. When the Hopkins came into this harbor with the crew of the Martin on board, the first duty of the master and mate of the Martin was to take steps to have her looked after and saved, if practicable, which it certainly was. They took no such steps. So far as any evidence exists, they gave no publicity in Norfolk to the fact that their vessel was anchored out at sea, within a few hours' sail of Norfolk, in distress and danger. We have no evidence that they did anything or said anything while here for the rescue of their vessel, and they went on to Baltimore, where they would seem to have been equally reticent and inactive.

I am of opinion that whatever accidents are described in the evi-

dence as having happened to the James Martin happened by the fault of her master and crew; especially that the collision, if it occurred at all, was by their fault; and that the dismasting of the vessel was either through their act, or through their negligence or incompetency in not properly staying the masts previously to their falling. I am of opinion that the vessel was abandoned unnecessarily—was in fact deserted—by her master and crew, under circumstances in which their duty as seamen demanded that they should have stood by her; at least, to the extent of prevailing upon Capt. Hallett to do, under their supervision, what Capt. Howe did on the next day after they had deserted her. I am of opinion that, on being brought by the Hopkins into the port of Norfolk, the master and mate of the schooner ought to have taken effective steps for bringing their vessel into port, and should have hired a powerful wrecking tug, and gone themselves out to the place of anchorage, and themselves brought their vessel and her cargo into port, and saved salvage. I am of opinion that, having failed to do this at Norfolk, they should have done it in Baltimore. I am of opinion that, by omitting this natural and obvious duty, they themselves furnished strong evidence to sustain the suspicion that their desertion of the ship was premeditated and criminal. I am of opinion that the James Martin, in consequence of this bad seamanship of master and crew, is liable for the amounts paid for salvage and as damages to the cargo by the libelants.

As to the question of the freight: This was a clear case of an abandonment at sea of the vessel and cargo by the master and crew, without intention to retake possession. Where this is done, and where the owners of the cargo have done no wrongful act themselves, it is settled law that the ship owners can maintain no claim to the freight. The contract of affreightment, indeed, is not at an end, because it exists to form the foundation of a suit for damages to the cargo, by its owners, as in the case at bar.

The damages that will be awarded in this cause, from the negligence of the master and crew, will be \$1,800 for salvage paid, \$2,007 for damages to the cargo, and costs of this suit. The libel is in rem only, and the vessel brought, on a sale under a consent decree, only about \$1,500. Now, if the proceeds of this sale had been sufficient to cover this whole claim for salvage and damages, together with costs, I might be bound to listen to argument on behalf of the owners for the freight. But the large excess of the amounts claimed by libelants over and above the proceeds of sale, and the large deficiency, for which the libelants have no recourse here whatever, preclude such an inquiry in this proceeding. I will sign a decree denying the respondents' claim for the freight, and awarding to the libelants the amounts above indicated, to be paid, as far as may be, out of the proceeds of the sale of the ship.

SNOW v. SMITH et al.¹

(Circuit Court, E. D. Virginia. August 15, 1882.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSIES.

Under the act of March 3, 1875, § 2, if in a suit there is a separable controversy, the parties to which, actually interested in the decision of it, are, on each side, wholly citizens of different states, then the suit may, on petition of one or more of the said parties to the separable controversy, be removed to a federal court.

2. SAME—PARTIES TO REMOVAL PETITION.

Where there is a separable controversy between two of the parties, who have a right to the removal thereof, the unnecessary joinder in the petition for removal of a trustee who has not right of removal will be treated as a nullity, and the suit will not be remanded.

This was a suit in equity brought in the circuit court of Prince William county, Va., by William R. Snow, a citizen of Virginia, as trustee of Marcia C. Snow, against George Cowie, Edson R. Smith, and Harriet C. Snow. Defendant Cowie was a citizen of the District of Columbia, and the other two defendants were citizens of Minnesota.

The following facts, among others, were alleged in the bill: Prior to April 1, 1869, the complainant, William R. Snow, together with Thomas M. Smith and John C. Wilson, owned jointly a tract of land, containing about 400 acres, in Prince William county, Va.; each being the owner of an undivided one-third thereof. On the date mentioned, Smith and Wilson conveyed their interests to George D. Snow, who, in consideration thereof, paid \$2,000, and gave his six promissory notes. These notes were for something over \$1,000 each; three being executed to each grantor, payable, respectively, one, two, and three years after date. To secure their payment, the maker and his wife, Harriet C. Snow, executed and delivered a deed of trust to the defendant Cowie, covering an undivided two-thirds of the land. The three notes to Smith, and also the first of the notes to Wilson, were paid by Snow, who died in 1874, leaving a will in which the defendant Edson R. Smith was appointed sole executor. The widow—being the defendant Harriet C. Snow—was his sole legatee. In 1875 the executor and widow executed and delivered a deed of the said lands to the complainant, in trust for the complainant's wife, the said Marcia C. Snow; the complainant therein assuming the payment of the two outstanding notes to Wilson. The bill then alleges that these two notes to Wilson "have been in the possession and custody of the said defendant Harriet C. Snow from about the 25th day of June, 1875, until now, and the said Harriet C. Snow claims to hold the said promissory notes by purchase from the said John C. Wilson." Wilson died before institution of the suit, having executed an alleged release, apparently on the assumption that his notes had been paid. The bill further alleged that Harriet C. Snow claimed the right, under the deed of trust to defendant Cowie, to have an undivided two-thirds of the land sold to pay the said notes; that the said trustee, Cowie, acting under authority from her, had advertised an undivided two-thirds of the land for sale on September 22, 1883; that, by reason of the payment of the three notes to Thomas M. Smith, only an undivided one-third of the land was liable to be sold under the trust. The prayer of the bill was that defendant Cowie be enjoined from making the sale until such time as the land could be partitioned, and the rights of the several parties therein set apart to them. The bill concluded with a prayer for general relief. On October 8, 1883, the defendants E. R. Smith and Harriet C. Snow filed a petition and bond for the removal of the cause to the circuit court of the United

¹ This case has been heretofore reported in 4 Hughes, 204, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

States for the Eastern District of Virginia; alleging that there was a controversy wholly between citizens of different states, to wit, a controversy between the petitioners and the complainant, as trustee of Marcia C. Snow. The petition was granted, and the cause, being accordingly removed, is now heard upon complainant's motion to remand the same to the state court.

John J. Weed, for complainant.

George E. Harris, for defendants.

HUGHES, District Judge. Section 2 of article 3 of the constitution of the United States gives jurisdiction to the courts of the United States over "cases in law and equity," "cases of admiralty and maritime jurisdiction," "controversies between two or more states," "controversies between citizens of different states," etc. This language of the section makes a distinction between "cases" or suits, on one hand, and "controversies" on the other. Contemplating this distinction, the second clause of section 2 of the judiciary act of March 3, 1875 (Supp. Rev. St. U. S. p. 175) provides that:

"When in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit," etc

This second section of the statute of 1875 has been thoroughly reviewed and passed upon by the supreme court of the United States. That court has repeatedly and explicitly recognized the distinction made by the constitution and this statute between the general term, "case," or "suit," and the special term, "controversy." The doctrine which has been settled in the various decisions of that court construing the statute of 1875 is that whereas, if a suit embraces but one controversy, and the parties to it on either side are not wholly residents, respectively, of different states, the suit cannot be removed, yet if, in the suit, there is a separable controversy, the parties to which, actually interested in the decision of it, are, on each side, wholly citizens of different states, then the suit may, on the petition of one or more such parties to the separable controversy, be removed into the federal court. The leading decision on the former point is that of *Blake v. McKim*, 103 U. S. 336. The leading decision on the latter point is that of *Barney v. Latham*, 103 U. S. 205. Counsel have reviewed many cases directly or indirectly involving the right of removal, in their learned briefs; but I think it is useless for me to look further than to the two decisions just named, for it is very clear to my mind that the case at bar is governed by one or the other of them. The single question on which this motion to remand depends is whether the controversy between William R. Snow, trustee, and Marcia Snow, citizens of Virginia, and E. R. Smith, executor, and Harriet C. Snow, citizens of Minnesota, is separable from the other controversies, if any, in this suit, or whether that controversy comprehends the whole suit. If it comprehends the whole suit, then, under the ruling in *Blake v. McKim*, Wilson's administrator and the trustee, George Cowie, both citizens of the District of Columbia, being necessary parties to the suit, the cause must be remanded to the state court; but, if otherwise, then, under the ruling in *Barney v. Latham*, the cause must remain here. The controversy between the two Mrs. Snows is whether the

notes held by Wilson in his lifetime, and passed by him, for value received, to Mrs. Harriet Snow, passed as assigned choses in action, or passed as notes extinguished by the fact of Wilson's having received full value for them. One of these ladies contends that they merely passed from one holder to another, and remained in the hands of the second holder, a charge upon the land upon which the trust deed to Cowie was executed. The other lady contends that the notes became extinguished, as a charge upon the land, by the payment of their value to Wilson, in consequence of some anterior agreement between parties in interest. There is no doubt that that is a clearly defined controversy, and that the only persons actually interested in it are the two Mrs. Snows.

The remaining question is whether there is any other controversy in this suit. I think there is. It concerns the title to the land which was mortgaged to secure the payment of the notes in question. There was a deed of release executed by Wilson in his lifetime. If Wilson's deed was valid, then the title to the land is in William R. Snow, trustee of Mrs. Marcia Snow, or in some other person than George Cowie. If the release was not valid, then the title to the land is in George Cowie. It is very true that the decision of this question of the title to the land depends, in a court of equity, very much upon the decision of the question that has been stated in regard to the status of the notes passed by Wilson to Mrs. Harriet Snow. In fact, this intimate dependence of one controversy upon the other is the circumstance which creates all the difficulty in the case at bar. I think the question whether the legal title to the land is in George Cowie, or in some other person, is a distinct one from the question whether the Wilson notes are still alive to bind the land; and, so believing, I think the case at bar is governed by the decision in *Barney v. Latham*. It is hardly worth while to consider the question whether the unnecessary joinder of George Cowie with E. R. Smith, executor, and Harriet C. Snow, in the petition for removal, defeats the right of the two latter, who are citizens of Minnesota, to remove. Cowie has no right to the removal, and, if the petition was his alone, the cause would have to be remanded. But Smith and Mrs. Harriet Snow have a right to the removal, and that right ought not to be allowed to be defeated by the useless joining of Cowie in their petition. That joinder will be treated as a nullity, and the court will not grant a motion to remand on that merely technical ground. The motion to remand is denied.

SOUTHERN INDIANA EXP. CO. v. UNITED STATES EXP. CO. et al.

(Circuit Court, D. Indiana. August 4, 1898.)

No. 9,608.

1. CARRIERS OF GOODS—DUTIES OF CONNECTING LINES INTER SE.

The rules of the common law do not require a carrier to receive goods for carriage, either from a consignor or a connecting carrier, without prepayment of its charges if demanded, nor to advance the charges of a connecting carrier from which it receives goods in the course of transportation; nor can it be required to extend such credit or make such advances to one connecting carrier because it does so to another.

2. SAME—EXPRESS COMPANIES—INTERSTATE COMMERCE ACT.

The interstate commerce act does not apply to independent express companies not operating railway lines.

3. MONOPOLIES—ANTI-TRUST LAW—REMEDIES.

The anti-trust law of July 2, 1890, does not authorize a court of equity to entertain a bill by a private party to enforce its provisions, his remedy being by an action at law for damages.

4. CARRIERS—EXPRESS COMPANIES—INDIANA STATUTE.

The statute of Indiana prescribing the duties of railroads with reference to intersecting lines (2 Burns' Rev. St. 1894, § 5153; Rev. St. 1881, § 3903) has no application to express companies.

5. SAME—CUSTOM—SUFFICIENCY OF ALLEGATION.

In a bill against three express companies, an allegation of a custom between defendants to receive goods from each other for transportation without prepayment of charges, and to advance back charges to each other, is not an allegation of a general custom of the business, which would bind defendants to pursue the same method with other companies.

This was a bill by the Southern Indiana Express Company against the United States Express Company and others. Heard on demurrer to bill.

Joseph H. Shea and Francis M. Trissall, for complainant.
Baker & Daniels, for defendants.

BAKER, District Judge. This bill is filed by the Southern Indiana Express Company, a corporation organized and existing under the laws of the state of Indiana, against the United States Express Company, the American Express Company, the Adams Express Company, and certain individual defendants, alleged to be officers and stockholders in said companies. The express companies are alleged to be joint-stock associations organized under the law of the state of New York, which is as follows:

"Any joint-stock company or association consisting of seven or more shareholders or persons may sue and be sued in the name of the president or treasurer for the time being of such joint-stock company or association; and all suits and proceedings so prosecuted by or against such joint-stock company or association, and the service of all process or papers in such suits and proceedings on the president or treasurer, for the time being, of such joint-stock company or association, shall have the same force and effect as regards the joint rights, property and effects of such joint-stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders and associates in the manner now provided by law."

The bill alleges that the defendant companies have been for many years engaged in the express business, and in carrying articles of trade and commerce over railroads under contracts with them, and have been declared by the law of this and other states to be common carriers, subject to all the liabilities, and bound to perform all the duties, of such common carriers; that the complainant entered into a contract with the Southern Indiana Railway Company, a railway located wholly within this state, to carry on an express business over said railway for five years from and after June 30, 1898; that the defendant companies carry on an express business over railroads which connect with the Southern Indiana Railway, and that the express business originating on the line of railway over which the complainant carries on its business cannot be transported to its destination without pass-

ing over one or more of the lines of railway over which some one of the defendant companies carries on its business; that the usage, long established, over the Southern Indiana Railway by the defendants, as well as long, continuously, universally, and uninterruptedly established by them over the lines of railway on which they carry on their business, was to receive and deliver to each other packages for points beyond their own routes, so that a package for a distant point is transferred from one express company to another as often as required to reach its destination, and is taken by one continuous and unbroken carriage, and, to facilitate promptness and simplicity in transfers from one company to another, the receiving company pays to the tendering company all charges which have accrued for carriage to the point of tender, known as "accrued charges" or "advance charges," so that the company having advanced all the accrued charges receives from the consignee and retains the whole amount of charges to the point of destination; that another of such established customs and usages is to receive and forward packages from each others' lines to consignees at points of destination over the lines of the others without requiring the prepayment of charges from the consignor or the company to which the package is delivered to be forwarded; that another of the customs and usages established is the fixing and publication of tariff charges for carrying packages from and to all points, which tariffs are divided pro rata between each of the companies handling the package. The bill then proceeds to aver that these usages and methods of doing business were safe, reasonable, and essential to the quick and simple transfer of packages, and to the transaction of the express business, and that any company denied the facilities thus afforded would be unable to compete in the same business with another company which could avail itself of such usages, and could not do a general express business so as adequately to accommodate the public. The bill then proceeds to allege that the defendant companies refuse, when articles of trade and commerce carried by the complaint are tendered to the defendants, to pay the accrued charges, or to receive and transport to their destination any such articles without the prepayment of the charges for such transfers. The prayer of the bill is that the defendants may be enjoined and restrained from refusing to receive any and all parcels offered or delivered to them by complainant for transportation and delivery to consignees, and from demanding prepayment of their charges for such transportation, and from retaining and withholding from the complainant all sums of money known as accrued charges for express matter delivered to them by the complainant, and from refusing to or retaining from the complainant the reasonable pro rata part of the charges and compensation complainant may earn upon express business originating off its line.

The grounds upon which these claims for injunctive relief are predicated are: (1) That such is the duty of common carriers at common law; (2) that such is their duty under the interstate commerce act; (3) that such is the requirement of the anti-trust law; (4) that such duty is imposed upon them by the custom and usage set up in the bill.

The defendant companies have demurred to the bill and the amendment thereto, on the ground that the court is without jurisdiction,

and also because the bill and the amendment are without equity, on the facts stated.

Waiving, without deciding, the question of jurisdiction, the court is of opinion that the bill cannot be maintained on any one of the above-stated grounds.

1. There is no principle of the common law requiring a common carrier receiving articles of trade and commerce from a connecting line to advance or assume the payment of the charges accrued thereon for the transportation of such articles from the point of origin to the connecting line. If it does thus pay or assume such accrued charges, it can retain a lien upon the property transported for their payment as well as for the payment of the charges due to itself for such transportation. An express company, like any other common carrier, has a right to demand that its charges for transportation shall be paid in advance, and is under no obligation to receive goods for transportation unless such charges are paid if demanded. Nor is such express company under any obligation to pay to the tendering company the charges due to it for its services in transporting such articles of trade and commerce from the point of origin to the point of tender. It is true that the general practice is to collect the charges upon delivery of the goods to the consignee, and, when goods are received without payment in advance being demanded, it becomes the duty of the carrier to transport them to their destination, or to deliver them to the next receiving carrier. Receiving the goods for transportation without any demand for prepayment of charges constitutes a waiver of such right. The carrier holds a lien upon the goods for payment of charges, and, in case of a delivery of them to the consignee before payment, it can hold him responsible therefor. The same rule applies whether the articles of trade and commerce are received from the original consignor or from a connecting carrier. An express company, in the absence of contract, is under no obligation to receive and transport for the original consignor, or to continue the transportation for a connecting carrier, without the prepayment of its charges if demanded. The furnishing of equal facilities, without discrimination, does not require a common carrier to advance money to all other carriers on the same terms, nor to give credit for the carriage of articles of trade and commerce to all carriers because it extends credit for such services to others. *Oregon Short-Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 9 C. C. A. 409, 61 Fed. 158; *Id.*, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559.

2. The interstate commerce act has, so far as express companies not operating railway lines are concerned, wrought no change of the common law in this regard. At an early day the question was raised whether express companies were subject to the provisions of the interstate commerce act, and, after full argument and deliberate consideration, the interstate commerce commission unanimously decided that the act did not apply to express companies properly so termed; that is to say, to independent organizations that carried on an express or parcel business in the usual manner, and which did not operate railway lines. *In re Express Companies*, 1 Interst. Commerce Com. R. 349.

This case was decided on December 28, 1887. The commission shortly thereafter called the attention of congress to their ruling, and suggested such an amendment of the law as would place express companies within their jurisdiction; but, although more than 10 years have elapsed, congress has taken no action on the subject. The same conclusion was reached in *U. S. v. Morsman*, 42 Fed. 448. After a careful consideration of the question, I see no reason to doubt the correctness of the conclusions reached in these cases. Under the averments of the bill, it is manifest that neither of the express companies is affected by the interstate commerce act.

3. The anti-trust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States is an action at law for threefold damages, with costs and attorney's fees, and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States by its district attorney, on the authorization of the attorney general. *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407, and cases there cited.

Nor does section 5153, 2 Burns' Rev. St. 1894 (section 3903, Rev. St. 1881), aid the complainant's contention. The sixth paragraph of that section is as follows:

"Every such corporation shall possess the general powers and be subject to the liabilities and restrictions expressed in the special powers following: * * * To cross, intersect, join and unite its railroad with any other railroad before constructed at any other point on its route and upon the grounds of such other railway company, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersection and connections and grant the facilities aforesaid."

This paragraph plainly is not applicable to express companies which, like these defendants, do not own, control, or operate a railroad line, but which simply contract for space on railroad trains for the transportation of articles of trade and commerce committed to their care. Besides, the connections and facilities referred to are manifestly the physical connections essential to constitute the two railroads connecting lines. Such is the view of the supreme court of this state. *Lake Shore & M. S. Ry. Co. v. Cincinnati, W. & M. Ry. Co.*, 116 Ind. 578, 19 N. E. 440; *Chicago, St. L. & P. R. Co. v. Cincinnati, W. & M. Ry. Co.*, 126 Ind. 513, 26 N. E. 204. The same view of a very similar provision of the constitution of Colorado was taken by the supreme court of the United States in *Atchison, T. & S. F. Ry. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185.

4. There is not shown by the averments of the bill and the amendment to be any such custom or usage as would justify the court in granting the relief prayed for. The right of the complainant to such relief depends upon its showing the existence of a custom or usage having the force of law in the express business of the country. It is not enough to allege and prove a custom or usage among one or more express companies to pay accrued charges by the receiving company,

or to transport without prepayment of charges to the point of destination. Before a custom or usage can acquire the force of law, it must appear that it is general and uniform in the business to be affected by it, and that such custom or usage has been peaceably acquiesced in without dispute for a long period of time. The custom or usage set out in the bill is not shown to be of this character. It is certainly beyond the power of the defendants, by any custom or usage established between themselves, to compel all other express companies in this country to submit to the customs and usages which they have adopted. Nor because the defendants consent to pay accrued charges between themselves, and to continue the carriage of articles of trade and commerce to their destination without prepayment, can they be required to do the same for all others. While the method of doing business alleged to exist between the three defendant express companies is certainly highly advantageous to the prompt and speedy transportation of parcels and packages, the law cannot compel them to continue this method of doing business, even between themselves, much less as between themselves and others with whom heretofore they have had no business relations. Whether such a duty can be imposed by legislative enactment we need not consider, for no such exercise of power has as yet been attempted.

In the opinion of the court, the demurrer must be sustained, and, as no amendment can make a better case, the bill and the amendment will be dismissed, at complainant's costs.

NORTH BLOOMFIELD GRAVEL MIN. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1898.)

No. 405.

1. NAVIGABLE WATERS—ACT REGULATING HYDRAULIC MINING—CONSTRUCTION.

Act March 1, 1893 (27 Stat. 507), regulating hydraulic mining in California, creating the California debris commission, and prohibiting and declaring unlawful hydraulic mining directly or indirectly injuring the navigability of the Sacramento and San Joaquin river systems, unless the persons desirous of carrying on hydraulic mining file a petition and obtain a permit from the debris commission to carry on such mining, is mandatory in its requirements, and entirely prohibits any hydraulic mining in said territory until such application has been made and permission given. The provisions of the act apply not only to those who contemplate the establishment of such mining, but also to owners who have already erected impounding works, which are required to be approved by the commission before a permit is issued.

2. SAME—POWERS OF CONGRESS.

Act March 1, 1893 (27 Stat. 507), regulating hydraulic mining in California, to the end that the navigable waters of the state shall not be obstructed or injured thereby, is within the constitutional powers of congress to regulate commerce, which includes navigation, by virtue of which powers it has absolute control of all navigable waters within a state which are accessible to interstate or foreign commerce.

3. SAME—CONSTITUTIONALITY OF STATUTE.

The provision of said act requiring the owners of mining ground in the territory drained by the Sacramento and San Joaquin river systems, before engaging in hydraulic mining thereon, to execute an instrument sur-

rendering to the United States the right to regulate the disposal of the débris, the purpose being to prevent the obstruction of the streams, is not unconstitutional, as requiring the surrender of property rights without compensation, as such conveyances in fact add nothing to the authority already possessed by congress.

4. SAME—INJUNCTION—POWER OF COURTS.

The rule that courts will not interfere by injunction with a lawful business, conducted in such a manner as not to cause or threaten injury to others, will not prevent the granting of an injunction restraining hydraulic mining by one who has not complied with the requirements of the act of congress regulating such business, although it is denied that navigable waters are thereby obstructed or injured, as congress has not left the question of such obstruction or injury to be determined by the courts, but has itself predetermined by the act that such business is necessarily injurious, unless conducted as therein provided.

5. SAME—ENJOINING CRIMINAL ACT—PROTECTION OF PROPERTY RIGHTS OF UNITED STATES.

The obstruction or injury of navigable waters is an injury to the property rights of the United States, and may be enjoined at the suit of the government, though the act is also made by law a penal offense.

Appeal from the Circuit Court of the United States for the Northern District of California.

We adopt the following statement of the learned circuit judge with reference to the pleadings and character of this suit:

"This case was submitted upon bill and answer. It involves the construction of the act of congress * * * approved March 1, 1893 (27 Stat. 507). The bill alleges the appointment and qualification of the commissioners provided for by that act, and the entry upon its duties by the commission. It alleges that the defendant company is, and was at the times mentioned in the bill, the owner and in possession of certain mining ground situated on or near the Yuba river and its tributaries, within the territory drained by the Sacramento and San Joaquin rivers, and is, and was during the times mentioned, engaged in working its mining ground by the hydraulic process; that the waters of the Sacramento river flow into Suisun Bay, and thence, through the straits of Carquinez, into San Pablo Bay, and thence, through the Golden Gate, into the Pacific Ocean; that Feather river flows into the Sacramento, and that Yuba river flows into the Feather; that all of these rivers were, at the time of the cession of the territory of Upper California to the United States by the republic of Mexico, to wit, February 2, 1848, and ever since have been, and now are, public navigable rivers, and free highways, for the uses and purposes of commerce and navigation, and during all of the time mentioned were, and still are, navigable, and navigated, by steamboats and other vessels, drawing from 8 to 16 feet of water, and engaged in commerce and navigation within the state of California; that the Sacramento river during all of the time mentioned was, and still is, so navigable, and navigated, by steamboats and other vessels from its mouth to the mouth of Middle Creek, in Shasta county, above the point of confluence of the Sacramento and Feather rivers; that the Feather river during the same time was, and still is, so navigable from its mouth to the mouth of the Yuba river, and that the Yuba river during the same time was, and still is, navigable from its mouth to a point about one mile above its mouth; that all of the rivers mentioned have their principal sources in the western slope of the Sierra Nevada mountains, which lie to the east and northeast of the Sacramento valley, through which the Sacramento river flows, and in a small part of the eastern slope of the Coast Range mountains, which lie to the west of the Sacramento valley; that all of the waters of the western slope of the Sierra Nevada mountains which lies opposite the Sacramento valley are tributary to the rivers mentioned, and that they have their sources in lakes, springs, small streams, and canyons, which receive their waters from the rain and snow which fall each year to a great depth upon the mountains; that the defendant company, in working its mining ground, so dumps and discharges the débris therefrom as that the same, or a portion thereof, is ulti-

mately carried and flows into the Yuba river and its forks, and, with the débris from other mining works operated by the same process, is thence so carried and flows into the Feather, Sacramento, and other streams forming a part of, and tributary to, the Sacramento river system, and thence into the other waters, bays, and straits already mentioned; that hydraulic mining as now, and for more than 20 years last past, practiced and understood in the state of California, is a process of gold mining by which hills, ridges, banks, and other forms of deposits of earth which contain gold are mined and removed from their position by means of large streams of water which, by great pressure, are forced through pipes terminating in nozzles known as 'monitors' or 'little giants'; that the water is discharged from such nozzles with great force, by a water pressure of from 50 to 400 feet per second, against and upon the hills, ridges, banks, and other deposits, which are usually shattered or broken up by means of blasts of powder, and softened by running water over and along such shattered or broken banks of earth, and undermined by streams of water flowing at the foot of such banks, thus caving down and washing off portions thereof before water is discharged from the nozzles against them; that the clay, sand, gravel, stones, rocks, and boulders of which such gold mines are composed, known as 'mining débris,' together with the gold contained therein, are carried and moved by the streams of water into and through flumes, sluices, and other conduits at or adjacent to the respective mining claims, the gold being arrested therein, and the débris being carried by the water through the flumes, sluices, and conduits, and dumped or discharged into impounding basins or reservoirs, and that a part of such débris is thence carried and flows into the adjacent streams or canyons; that the larger and heavier portions of the débris are deposited in such impounding basins or reservoirs, and the smaller and lighter portions, being not less than 50 per cent. thereof, are carried down the streams, and lodged in the rivers and other channels, and upon the lands adjacent thereto; that a portion of such mining débris, ever since the commencement of hydraulic mining within the state, has, during a large part of each year, been deposited and lodged, and is still being deposited and lodged, in the beds and channels of the rivers mentioned, and will continue to be so deposited and lodged while such hydraulic mining continues. The bill next alleges that the defendant company has failed and neglected and refused to file with the California débris commission a verified or any petition setting forth such facts as will comply with the act of congress upon the subject, and with the rules prescribed by the commission, and has not, nor has any one on its behalf, executed and acknowledged the conveyance mentioned in that act, and, notwithstanding such neglect and failure, that the defendant company has continued to mine, and is now engaged in mining, its mining ground by the hydraulic process. The prayer of the bill is for a writ of injunction perpetually enjoining the defendant, its agents, grantees, lessees, and employés, from operating, or allowing to be operated, by the hydraulic process, its mining ground, until it shall make, present, and file with the débris commission the petition set forth in the aforesaid act of congress, accompanied by the conveyance therein mentioned, and otherwise conform to the rules and regulations prescribed by the commission by virtue of that statute. The answer of the defendant company admits the appointment of the commissioners, and their qualification and organization as alleged, and its failure to file with the commission the petition and conveyance mentioned in the act, and the fact of its mining its ground by the hydraulic process notwithstanding. It alleges that its mines and works are all situated adjacent to Humbug creek, a small tributary of one of the main branches of the Yuba river, and within the territory drained by the Sacramento river system. It admits the fact of the navigability of the Sacramento, Feather, and Yuba rivers, but denies the extent of the navigability alleged in the bill. It admits the sources of the rivers as alleged. It denies that it so dumps and discharges the débris from its mines and works, or any thereof, in such manner that the same, or any material portion of it, is ultimately carried or flows into the Yuba, Feather, or Sacramento rivers, or other streams forming a part of or tributary thereto, or upon the lands adjacent thereto; but avers that only a trifling quantity of the débris from the defendant's mining ground escapes from, or passes beyond, the impounding works

and reservoirs of the defendant company, and that the same consists solely of light, flocculent matter of about the same specific gravity as water, and so finely comminuted as to readily float in and be moved by the slightest movement of the water in which it is suspended, and that all of the matter so escaping from, or passing beyond, the defendant's impounding works, is carried in suspension in the streams of water until it reaches the Suisun Bay, and that from the head of Suisun Bay, by the tidal currents and movements of the water of that bay, of the Carquinez Straits, San Pablo Bay, and the Bay of San Francisco, and the tidal currents passing in and out of the Golden Gate, it is all carried and swept into the ocean at distances remote from the land or navigable streams of the state of California, and does not deposit in any place where it either injures, or threatens to injure, any navigable waters within the jurisdiction of the United States. The answer further denies that any portion of the debris from the defendant's mines or mining works, at any time since the passage of the act of congress in question, has been deposited or lodged in the beds or channels of either of the rivers named, and denies that any of such debris will be so deposited or lodged while it continues the mining of its ground by the hydraulic process. The answer further avers that about the years 1887 and 1888 the defendant erected upon its mining ground, which had been conveyed to it for placer mining purposes by the government of the United States, extensive, complete, and expensive impounding works, which have ever since been so maintained as to successfully, completely, and permanently impound all of the mining debris resulting from its mining operations, upon its mining ground, except such light and inconsiderable portion of the debris therefrom as will not settle in water when affected by the least motion, nor when such water is at rest, unless the same be maintained in a condition of rest for a long period of time, and that such light and flocculent matter, when it passes from the defendant's impounding works, flows into Humbug creek, which creek flows with a rapid current into the South Yuba river, and that the South Yuba river flows with a rapid current into the Main Yuba river, and that the Main Yuba river flows with a rapid current into the Feather river, and that the Feather river flows with a rapid current into the Sacramento river; that the Sacramento river, with a moderate current, flows into Suisun Bay, and that from the head of Suisun Bay to the waters remote from the Golden Gate the waters are constantly agitated and rapidly moved by tidal currents, and that the light and flocculent matter which so escapes from the defendant's impounding works is carried by the currents of the streams mentioned, and by the tidal currents in the other navigable waters named, out of the Golden Gate, and to localities remote from the shores of the Pacific Ocean, and that no part thereof does injure, or threaten to injure, either by itself, or in connection with debris from other mines, any of the navigable waters mentioned in the bill, or any other waters. The answer further alleges that on the 25th day of June, 1888, the United States filed in this court its bill in equity against this defendant, containing all of the averments of the present bill, except the allegations with regard to the act of congress of March 1, 1893 (which was not then in existence), and the appointment of the members of the commission thereby created, and the allegations with respect to the failure of the defendant to file with the commission the petition and conveyance required by that act; that thereafter, and on July 1, 1889, the defendant filed its answer to that bill of complaint, alleging the construction and maintenance of the aforesaid impounding works, and that thereby the debris from its mining ground was sufficiently and permanently impounded and restrained as is alleged in the present answer, and that thereby the navigable waters mentioned were prevented from being injured or threatened with injury from the debris from the defendant's mines; that thereafter a trial was duly had upon the issues framed in the cause, upon which trial it was duly adjudged that the defendant's mining by the hydraulic process did not injure, or threaten to injure, the navigable streams, or any of the navigable waters, of the state of California, or any of the lands adjacent thereto, and that the defendant could continue its hydraulic mining operations by the use of its said impounding works without injuring, or threatening to injure, any of the navigable waters of the state of California, and without injuring, or threatening to injure, the navigability of any of the navigable streams

of the state, and that ever since that time the defendant has maintained its said impounding works, and its hydraulic mining operations have ever since been conducted in the same manner (and in no other manner) that it was in that action adjudicated they might be, without injury to any water or lands; that the mining ground and works described in the bill in the present suit and in the bill in the former suit are the same." 81 Fed. 243.

In the consideration of the questions involved in this case, reference is made in the opinion to the following provisions of the act:

"Section 1. That a commission is hereby created, to be known as the 'California Débris Commission,' consisting of three members. The president of the United States shall, by and with the advice and consent of the senate, appoint the commission from officers of the corps of engineers, United States army. * * * It shall have the authority, and exercise the powers hereinafter set forth, under the supervision of the chief of engineers and direction of the secretary of war."

"Sec. 3. That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the state of California. Hydraulic mining, as defined in section 8 hereof, directly, or indirectly injuring the navigability of said river systems, carried on in said territory other than as permitted under the provisions of this act is hereby prohibited and declared unlawful.

"Sec. 4. That it shall be the duty of said commission to mature and adopt such plan or plans, from examinations and surveys already made and from such additional examinations and surveys as it may deem necessary, as will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from débris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, provided the same can be accomplished, without injury to the navigability of said rivers or the lands adjacent thereto."

"Sec. 9. That the individual proprietor or proprietors, or in case of a corporation its manager or agent appointed for that purpose, owning mining ground in the territory in the state of California mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply with law and the rules prescribed by said commission.

"Sec. 10. That said petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said state, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations, as may be prescribed by virtue thereof, the manner and method in which the débris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said state: provided, that they shall not interfere with the navigability of the aforesaid rivers."

Section 14 provides that upon the completion of such works as may be authorized and required by order of the commission, "if found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act."

"Sec. 15. That no permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impound-

ing dams or other restraining works, if any are prescribed by the order granting such permission, have been completed and until the impounding dams or other restraining works or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same: provided, however, that if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said system and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations."

"Sec. 17. That at no time shall any more débris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected."

"Sec. 22. * * * Any person or persons, company or corporation, their agents or employes, who shall mine by the hydraulic process directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court."

C. W. Cross, for appellant.
Samuel Knight, U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity to restrain appellant from mining, by the hydraulic process, until it complies with the provisions of the act of March 1, 1893, entitled "An act to create the California débris commission and regulate hydraulic mining in the state of California." 27 Stat. 507. The case, by agreement of counsel, was submitted upon the bill and answer, which are fully set out in the statement of facts, to which reference is here made,

The importance of this case, as affecting the rights of the people in this state, demands a thorough examination of the various questions presented by the respective counsel, and of the authorities cited in support of their contentions. It is safe to say, in the outset, that no stone has been left unturned by the respective counsel that would reveal any additional reasons than are presented in their briefs or urged by them upon the oral argument, or furnish any other authorities which support, or tend to support, the views which they have thus advanced.

The general contention of appellant is (1) that, under the act in question, no one is prohibited from carrying on the business of hydraulic mining without first granting to the United States the right to control its mining operations as in said act provided, and obtaining a permit from the California débris commission, but that said act grants to the owner of the hydraulic mine the right to apply for such permit, upon the condition of making said grant, and that, if he obtains such permit, he obtains all the benefits, privileges, and advantages which the law provides under such permit; (2) that in no case will a court enjoin the conduct of a lawful business, so long as the same is conducted as neither to do nor threaten any injury whatever.

The constitutionality of the act is not directly assailed. The diverging lines of the respective counsel are in relation to the proper construction of the act in its entirety, and particularly with reference to the various provisions heretofore quoted in the general statement of the case.

In order that appellant's position may be clearly understood upon this point, we quote from his brief:

"We do not contend, nor have we contended, that the act is unconstitutional; but we do insist that the construction contended for by complainant's counsel would render the act both unconstitutional and against natural right."

In another part of the brief it is said:

"If the contention, however, of complainant's counsel, is correct, that the present act is mandatory in its requirements upon hydraulic miners, then it is certain that congress has made an unconstitutional invasion upon the rights of this state to regulate its own affairs, and has even gone further than the state itself could do under its own constitution; for such law would be distinctly special and unjustly discriminating legislation, since it would apply only to the hydraulic miner, and there is no reason why a miner by this process should be regulated or prohibited from obstructing or injuring navigation, while miners by any other process or farmers, and all other persons, should be permitted to do so."

Again, referring to section 10 of the act, which he claims gives to every hydraulic miner the option whether to avail himself of the privilege of the act or not, he says:

"If this section is mandatory, it is thoroughly unconstitutional, as it requires the miner to surrender his right to the use and enjoyment of his mine, and the right to conduct his business and mining operations in his own way, not detrimental to the rights of others. If he must surrender this, under the behest of law, he must be afforded just compensation; all this upon elementary principles and upon authorities too numerous for mention here."

The real question to be determined is whether the provisions of the act are directory and permissive or mandatory in their character. A judicial interpretation of this question will determine whether appellant's contention is correct or erroneous. We shall endeavor to confine ourselves to a consideration of the material and controlling questions involved herein, without commenting on matters that have been discussed by counsel which are deemed irrelevant, except when a reference thereto is considered necessary in order to show that the arguments or authorities relied upon have no application to this case.

Is the act mandatory or directory and permissive? What was the object and intention of congress in passing the act in question?

It is the first duty of the court, in considering what construction should be given to a statute, to ascertain the intention congress had in view at the time of its passage; its object and purpose; the occasion and necessity of the law; the mischiefs or evils it was intended to prevent; and the remedies it proposed to give. In the determination of these questions a wide field is opened for investigation. The history of the times which brought about the legislation upon the subject always constitutes an important factor, and should never be overlooked. It often furnishes the key that unlocks and makes clear the object, intent, and purpose of legislative bodies in enacting laws.

And especially is this true in the present case, where the questions have been for several years so earnestly pressed upon the public mind as to what could or should be done in order to allow hydraulic mining to be conducted and carried on within the watersheds of the Sacramento, San Joaquin, and other rivers in the state, without producing injury to other interests of equal value and importance.

Hydraulic mining was for many years one of the principal industries largely carried on in several of the mining counties. The decision in *Woodruff v. Mining Co.* (rendered in 1884) 9 Sawy. 441, 18 Fed. 753, and generally known as "The Mining Débris Case," was far-reaching in its effects. The blow, judicially made necessary for the preservation of property rights, was a heavy and severe one. It virtually deprived many persons of their means of livelihood, and prevented property owners having vast and valuable mining interests from working upon or in any manner using their property. It not only crippled this industry, but, for the time being, destroyed it, by enjoining the mine owners from further conducting or carrying on their said business. Communities where such operations had been carried on were paralyzed, and scarcely knew what to do. For a time there were more or less attempts to carry on such work by stealth or secrecy, and thus violate the injunctions that had been issued. These efforts, as a matter of course, proved futile. An anti débris organization was formed; guards were employed, who were looked upon as spies by the miners; proceedings were instituted; and, after much delay and difficulty, service was made upon the owners of the mines, and many of them were found guilty of contempt, and heavy fines were imposed. Those contempt proceedings were expensive upon all parties concerned. The United States finally took active steps to prevent injury to the navigable waters of the state. Mine owners then, in their individual capacity, at great expense, erected restraining dams to impound the tailings and débris, and prevent all injurious matter from flowing down into the navigable rivers. This, for a short time, quieted the intense feeling of bitterness that had been engendered, but it did not meet with the success it was hoped would prevail. Proceedings for contempt were again instituted; some of the parties engaged in mining by these methods were found guilty; and occasionally, at other times, were able to prove their innocence as to the particular acts complained of.

In *Woodruff v. Mining Co.*, 45 Fed. 129, 132, the question as to the right to have the original injunction modified was referred to by the court. Thereafter, in *U. S. v. North Bloomfield G. M. Co.*, 53 Fed. 625, which was a suit to enjoin respondent (appellant herein) from continuing its hydraulic mining operations so as to obstruct or endanger the navigation of certain rivers, an injunction was denied. The circuit judge said:

"In arriving at this conclusion, I am not unmindful of the great damage to navigation that has heretofore resulted from the deposit of mining débris in these streams, nor of the important interests that are involved; but I am convinced that, in the case of this particular mine, the contingency has arisen which was contemplated in the decision of this court in the *Mining Débris*

Case, in providing that the decree might thereafter be modified upon a showing to the court that a plan to obviate the injuries had been successfully executed."

This opinion was rendered October 5, 1892. On the same day the same court rendered a decision in a similar suit of *U. S. v. Lawrence*, Id. 632, and upon the particular facts of that case ordered an injunction to issue as prayed for in the bill. All of these things brought about an organization of the miners having for its purpose, among other things, the procuring of some legislation whereby the right to carry on hydraulic mining might be regulated and protected; that, upon compliance with certain conditions, permits might be given which would authorize and allow people interested in this character of property to pursue their business without further let or hindrance.

In all of the proceedings, in the state and national courts, it was conceded that hydraulic mining was not of itself unlawful or necessarily injurious to any one. As was said in *Yuba Co. v. Cloke*, 79 Cal. 239, 243, 21 Pac. 740, 741:

"The unlawful nature of the business results from the manner in which it is carried on, and the neglect of parties engaged therein to properly care for the débris resulting therefrom, whereby it is allowed to follow the stream, and eventually cause injury to property situated below."

The business of hydraulic mining, if properly conducted, so as to not interfere with the rights of others or with the navigability of the rivers, was never objected to. It was recognized by all classes that, if hydraulic mining could be so conducted and carried on, it would be beneficial, instead of prejudicial, to the state and nation. The agitation of this subject between the miners and agriculturalists, and persons engaged in other business pursuits within the state, brought about the introduction and passage of the act in question, in order to give greater protection to the navigability of the rivers in this state, over which the congress of the United States had jurisdiction, and at the same time to enable the mine owners to avoid the difficulties and disabilities by which they had for so many years been surrounded.

The bare statement of these events, in the order of their occurrence, of itself carries conviction to the mind that congress must have intended to make the provisions of the act mandatory. But a careful consideration of the terms of the act makes this result absolutely conclusive. It changed the rules which had hitherto prevailed, and adopted a new system, perhaps not perfect in all its parts, containing provisions which, it is safe to say, were, at the time of its enactment, if not entirely satisfactory to the miners, agreed to by them as giving greater rights and privileges than they had theretofore for many years possessed. The act created a commission "to be known as the 'California Débris Commission,'" and invested it with certain powers specifically mentioned in its provisions, and gave it jurisdiction over all the mines worked by hydraulic process which are situate within "the territory drained by the Sacramento and San Joaquin river systems in the state of California"; and it declares, in express terms, that hydraulic mining, as defined in section 8 of the act, "directly or indirectly injuring the navigability of said river systems carried on

in said territory, other than as permitted under the provisions of this act, is hereby prohibited and declared unlawful." It further, and in equally explicit terms, declares that mine owners who desire to work by this process "must file with said commission a verified petition, setting forth such facts as will comply with the law and the rules prescribed by said commission." It provides the steps that shall be taken by the commission after the receipt of said petition, and designates the methods, and specifies the manner, in which the preliminary operations for the construction of restraining dams or impounding works at the mines shall be conducted; and upon the completion thereof, and compliance with all the details mentioned in the act, it declares that "permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act." The act is intended to apply, and does apply, to appellant herein, and all others who had, previous to the passage of the act, constructed impounding works. They are placed upon the same plane, subject to the same law, and the rules and regulations adopted by the commission, as those who had not erected such works, but are compelled to do so before engaging in hydraulic mining. The act provides "that if said commission shall be of opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said system, and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations." 27 Stat. 509, § 15.

It would serve no useful purpose to further discuss other provisions in the law. The references already made, and provisions heretofore quoted, clearly show that the act means just what it says. When it declares that certain things must be done before any permit is given, it means that they shall be done; and if these things are not done, as therein provided, no permit can be issued, and if none is procured the working of the mine by the hydraulic process is prohibited and made unlawful. It would also be a waste of time to discuss in detail the kind and character of cases that are to be found in the books wherein the word "may" is construed as meaning "shall," or the word "must," under rare and exceptional provisions, has been held to mean "may." It is enough to say that the language and terms of the act in question, when viewed in the light of the history of the times, and all the surrounding conditions, are clear, certain, positive, and mandatory. Any other view would unquestionably lead to absurd results, which all courts declare should be avoided in the construction of any statute. There would be no positive protection either to the miners, farmers, or the government; litigation and strife, which it was the object of the statute to avoid, would continue to reign supreme.

We have suggested that the act might not be perfect in all its parts. It would not be difficult to criticise some of its provisions, and to mention others that were not absolutely essential or necessary to have been inserted. One instance is pointed out in the opinion of the circuit judge, viz. that the provisions in section 10,

which require a conveyance from the mine owners so as to vest in congress the power to make regulations concerning the manner in which the work thereon might be conducted, were wholly unnecessary, as that power is vested without any conveyance being required. The argument of counsel as to the provisions of section 10 may, therefore, be eliminated from the case, not because they are unconstitutional, but upon the ground that congress has the unquestioned power to regulate the business of hydraulic mining without requiring any conveyance from the mine owners, as will hereinafter fully appear.

The power of congress to pass the act in question, mandatory in its requirements, as we construe it, notwithstanding the array of authorities cited by appellant, cannot, in our opinion, at this late day, be judicially questioned. Congress has the power and authority to control commerce and navigation on the navigable portions of the Sacramento and San Joaquin rivers and their tributaries, and to prevent any obstruction on such streams, or the performance of any act, by any person or persons, which would tend in any manner to interfere with interstate or foreign commerce.

In *Gibbons v. Ogden*, 9 Wheat. 1, 190, 195, Chief Justice Marshall said:

"If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrict it comes too late. * * * But, in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of congress may be exercised within a state."

In *Gilman v. Philadelphia*, 3 Wall. 713, 724, the court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes congress possesses all the powers which existed

in the states before the adoption of the national constitution, and which have always existed in the parliament in England. It is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

Such has uniformly been the construction given to that clause of the constitution which confers upon congress the power to regulate commerce. From an early period in the history of the government it has been so understood and determined. *Willson v. Marsh Co.*, 2 Pet. 245; *Cooley v. Board*, 12 How. 299; *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421; *South Carolina v. Georgia*, 93 U. S. 4, 10; *Mobile Co. v. Kimball*, 102 U. S. 691; *Bridge Co. v. U. S.*, 105 U. S. 470, 475, 479; *Escanaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 682, 2 Sup. Ct. 185; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900; *New York, N. H. & H. R. Co. v. People*, 165 U. S. 628, 631, 17 Sup. Ct. 418; *Railway Co. v. Parsons*, 20 C. C. A. 481, 74 Fed. 408, 411; *U. S. v. City of Moline*, 82 Fed. 592; *Craig v. Kline*, 65 Pa. St. 399, 411, 414.

This admitted control upon the part of the general government over the navigable waters within the respective states is absolute. Does it not, therefore, necessarily follow that, in the exercise of such dominion and control, congress can determine and declare what constitutes an obstruction, injury, or interference to the navigable waters of the state, or an obstruction to commerce thereon, as well as to determine and declare what acts shall be performed, and what character of works shall be constructed, in order to prevent injury to the navigable waters or an obstruction to commerce?

In *Miller v. Mayor, etc.*, 109 U. S. 385, 393, 3 Sup. Ct. 228, 232, the court held that it was competent for congress, having authorized the construction of a bridge of a given height over a navigable water, to empower the secretary of war to determine whether the proposed structure would be a serious obstruction to navigation, and to authorize changes in the plan of the proposed structure. The construction of the bridge in that case was made, under the statute, to depend upon the determination of the secretary of war as to whether the bridge when built would conform to the prescribed conditions of the act "not to obstruct, impair or injuriously modify the navigation of the river." The act further provided that, until the secretary approved the plan and location, and notified the company of the same in writing, the bridge should not be built or commenced. In the course of the opinion the court said:

"It is contended by the plaintiff with much earnestness that the approval of the secretary of war of the plan and location of the bridge was not conclusive as to its character and effect upon the navigation of the river, and that it was still open to him to show that, if constructed as proposed, it would be an obstruction to such navigation, as fully as though such approval had not been had. It is argued that congress could not give any such effect to the action of the secretary, it being judicial in its character. There is in this position a misapprehension of the purport of the act. By submitting the matter to the secretary congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed

the secretary of war as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several states, and navigation being a branch of that commerce, it has the control of all navigable waters between the states, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction, and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by congress and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate."

The contention of appellant that courts will not enjoin the conduct of a lawful business, when the same is being conducted in such a manner as not to cause any injury, or to threaten any injury, as a general rule, is undisputed. But the attempt to apply this rule to the facts in this case begs the real questions involved herein.

Great reliance is placed upon the principles announced in *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128, which, in all essential respects, is entirely dissimilar in its nature and character to the case at bar. That was an action to restrain the driving of piles in the bed of a river in the city, and the erection thereon of a building fronting on a bridge, not upon the ground that such acts constituted any injury to the navigable waters of the state or to any of the property rights of the city, but upon the ground that if said building was erected it might lead others to erect similar buildings, so that, in the course of time, the flow of water might be obstructed, and the city and its inhabitants greatly prejudiced and injured, by obstruction to the circulation of air, and danger of fires and floods, etc. The allegation of the complaint left the effect of the erection of the building in question, in so far as it was claimed it might be likely to result in injury to any private or public interest, to mere prediction and conjecture. It was obscure and defective. The court took occasion to distinguish that action from the class of cases to which this suit belongs. Among other things, the court said:

"The action does not involve any question of obstruction or injury to navigation, or of injury to any public right. * * * The complaint does not show that the proposed building would be a private or a public nuisance. * * * The argument of the learned counsel of the respondents, and the authorities cited on the question whether the proposed building will obstruct the navigation of the river, are impertinent to the case. There is nothing in the case that involves any such question in the remotest degree."

In the light of the character of that action and of these expressions in the opinion, we must confess our inability to fully appreciate the suggestion of appellant's counsel that it is directly in point upon the facts of a case like this, when the court that rendered it expressly said that it does not apply to such a case "in the remotest degree." The

truth is that appellant's argument proceeds upon the erroneous theory that the act under consideration, if construed to be mandatory, is an unconstitutional exercise of legislative power. As that position cannot be maintained upon reason or authority, we might, with propriety, again quote from the same opinion, and say that "the argument of the learned counsel [and the authorities cited by him] are impertinent to the case" under consideration.

Other authorities cited by counsel are based upon the general principles announced in *High on Injunction* (volume 1 [3d Ed.] § 20), as follows:

"The subject-matter of the jurisdiction of equity being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of merely criminal or immoral acts, unconnected with violations of private right. Equity has no jurisdiction to restrain the commission of crimes or to enforce moral obligations and the performance of moral duties; nor will it interfere for the prevention of an illegal act merely because it is illegal. And, in the absence of any injury to property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes or the commission of immoral and illegal acts."

Conceding these views to be correct, wherever applicable, it does not necessarily follow, as claimed by counsel, that no injunction can be maintained in this case.

The argument of appellant that "the act left hydraulic mining without injury to navigable streams exactly where it stood before the passage of the act" cannot be sustained. The question is not left to the courts to determine whether the acts committed by any individual mine owner, in any particular manner, are injurious or not. The fact is that the question as to whether the acts committed by appellant are injurious to the free navigation of the river is settled by the terms of the act itself, which, in all of its provisions, proceeds upon the ground that injury must necessarily result from hydraulic mining, unless conducted and carried on in the manner permitted by the act. Under the law, mine owners engaged in hydraulic mining have no right to use the streams without the permission of the commissioners appointed under the provisions of the act. In other words, the act of congress, of itself, prohibits all hydraulic mining unless its terms are first complied with. The whole case is virtually disposed of in the conclusions already reached, that the act is mandatory and constitutional. But the earnestness of appellant in presenting this branch of the case seems to justify, if it does not demand, some further and independent consideration.

The navigable rivers being "the property of the nation," it follows that any injury to them which affects the commerce of the country is an injury to property rights, and the mere fact that penalties are imposed upon all parties found guilty of violating any of the provisions of the act does not, of itself, prevent the issuance of an injunction to protect the property rights of the government in the rivers. Wherever commerce among the states goes, the power of the nation, as represented by the courts of the United States, goes with it to protect and enforce its rights. The restraining power of equity extends throughout the whole range of rights and duties which are recognized by law. As is said in 3 Pom. Eq. Jur. § 1338:

"Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, a violation of that right will be prohibited, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. * * * The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction."

Having shown the authority of congress to act in the premises, and its power to prohibit any character of business from being conducted which interferes with the commercial navigation of the rivers, does it not follow, as a logical sequence, that a court of equity, in protecting such property rights, must have the jurisdiction and power to issue an injunction, in aid of the enforcement of the regulations which congress has prescribed, in order to preserve the right?

The distinction existing between this case and the character of cases cited and relied upon by appellant, it seems to us, is manifest and clear. A court of equity does not possess any jurisdiction to enjoin the commission of a mere crime. A threat upon the part of an individual, or individuals, to commit an offense against the law, does not, of itself, authorize a court of equity to issue an injunction to prevent it. The penal statutes which impose punishment by fine or imprisonment, or by both, are ordinarily deemed sufficient to deter parties from the commission of such offenses. There must be some interference, either actual or threatened, connected with the property rights of a public or pecuniary nature, in order to vest the court with the power and authority to issue this prohibitive writ. But, when such interference plainly appears, the jurisdiction of the court at once attaches, and cannot be destroyed by the fact that the law declares that such acts may be punished criminally. Whenever an attempt is made to deny a constitutional right given by a statute it is vain and ineffectual, and should, without hesitation, be so declared by the court; otherwise there would be a deprivation of the power of the court in extreme cases to make such statutes effective. As was said by the court in *Boyd v. U. S.*, 116 U. S. 616, 635, 6 Sup. Ct. 524, 535:

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be, 'Obsta principiis.'"

Certainly this duty must apply with equal force to the constitutional rights of the government when they are wrongfully attempted to be invaded, interfered with, or destroyed. The court should undoubtedly, at all times, be cautious in the exercise of this power, but it should not deny the preservation of property rights when other remedies are clearly shown to be wholly inadequate.

In *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 126, 4 South. 106, the court said:

"The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

The varied interests of the government of the United States in interstate commerce, and the free navigability of its rivers, are often en-

titled to greater protection than is afforded by the simple punishment which the statute provides for those who interfere therewith.

In *Attorney General v. Aqueduct Corp.*, 133 Mass. 361, a suit in equity, upon information by the attorney general, was sustained against a quasi public corporation doing and contemplating acts which were ultra vires and illegal, the necessary effects of which were not only to impair the rights of the public in the use of one of the great ponds of that commonwealth for the purposes of fishing and boating, in such a manner as to create a nuisance by lowering the pond and exposing upon its shores slime, mud, and offensive vegetation detrimental to the public health. Numerous cases were referred to as establishing the proposition that a suit in equity could be maintained to restrain a corporation, exercising the right of eminent domain under the power delegated to it by the legislature, from any abuse or perversion of the powers which may create a public nuisance, or injuriously affect or endanger the public interests. In that case the information, among other things, alleged that the necessary effects of the acts that were being performed by the corporation would be to create a public nuisance. With reference to this point the court said: "This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances." In answer to the contention of the corporation that the law furnished a plain, adequate, and complete remedy for this nuisance by an indictment, or by proceedings under the statute for the abatement of the nuisance, the court said:

"Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land, and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy."

And in the course of the opinion, upon a point bearing closer analogy to the case in hand, the court said:

"There is another ground upon which, in our opinion, this information can be maintained, though, perhaps, it belongs to the same general head of equity jurisdiction, of restraining and preventing nuisances. The great ponds of the commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the commonwealth. The rights of fishing, boating, bathing, and other like rights, which pertain to the public, are regarded as valuable rights, entitled to the protection of the government. Inhabitants of *West Roxbury v. Stoddard*, 7 Allen, 158; *Attorney General v. Woods*, 108 Mass. 430; *Com. v. Vincent*, Id. 441. If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief." *Calder v. Bull*, 3 Dall. 386, 388; *Mayor, Etc., of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 98; *Coosaw M. Co. v. South Carolina*, 144 U. S. 560, 567, 12 Sup. Ct. 689; *U. S. v. Mississippi & Rum River Boom Co.*, 3 Fed. 548, 551; *Woodruff v. Mining Co.*, 18 Fed. 753, 769; *Vanderhurst v. Tholcke*, 113 Cal. 147, 150, 45 Pac. 266; *Attorney General v. Birmingham Borough*, 4 Kay & J. 528, 540; 2 Story, Eq. Jur. (12th Ed.) §§ 921-924; 3 Pom. Eq. Jur. § 1349; *Kerr, Inj.* 263; 1 *Joyce, Inj.* 120 (50); 2 *High, Inj.* § 1554.

Under the provisions of the act in question, hydraulic mining, in the territory named, is prohibited unless the terms and conditions

which they impose are complied with. If those provisions are detrimental and injurious, instead of beneficial, to the mining interests they were intended to foster, encourage, and protect, the efforts of all those interested in that particular business should be directed to have the act repealed or amended, instead of attempting to evade it or to destroy its efficacy. While it remains as the law upon this subject, it must be obeyed.

The decree of the circuit court is affirmed.

MALCOMSON v. WAPPOO MILLS et al. (MITSUI et al., Interveners).

(Circuit Court, D. South Carolina. June 2, 1898.)

BREACH OF CONTRACT—RIGHT TO RECOVER DAMAGES—PERFORMANCE PREVENTED BY APPOINTMENT OF RECEIVER.

Damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise, where performance was prevented solely by the action of a court in appointing a receiver for the corporation, and enjoining all others from interfering with its business or property. In such case the breach of contract is *damnum absque injuria*.

Mordecai & Gadsden, for petitioner.

A. T. Smythe and Mitchell & Smith, opposed.

SIMONTON, Circuit Judge. This case comes up upon the intervention of Mitsui & Co., claiming damages as against the Farmers' Mining Company for nonfulfillment of contract. On 14th October, 1897, the Farmers' Mining Company agreed to sell to Mitsui & Co., who on the same day agreed to buy, about 2,000 tons dried Coosaw river phosphate rock, for shipment in December, 1897, or January, 1898, at \$2.40 per long ton. Mitsui & Co. chartered a vessel to receive this rock. On the 18th day of October, 1897, the Farmers' Mining Company was, by an order of this court, placed in the hands of a receiver, and was enjoined from interfering with any of its property. This made the performance of its contract with the interveners impossible. The evidence shows that but for this the contract could have been performed. The rock of the kind and quality contracted for, and in the amount prescribed, being on hand ready for delivery. Mitsui & Co., having heard of the appointment of the receiver, called upon him to fulfill the contract. This, of course, he could not do without an order of court, and was in no wise bound to do. A receiver is not bound by the contracts of the corporation for which he is appointed. *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 Sup. Ct. 86. Having been notified by the receiver that he could not perform the contract, Mitsui & Co. file this intervention. The gist of the action is for damages for breach of contract, and they show for damage that they were compelled to pay for rock of the quality contracted for at the rate of \$2.75 per ton, the excess being \$845. The interveners have taken the proper course by their intervention. If the Farmers' Mining Company can be held liable for damages on this contract, the interveners must come into this court. This is the only way in which to ascertain the liability of the corporation, whether any exists, and the

extent of it. Of course, a recovery would only permit the interveners to get their proportionate share in the assets of the company, without preference of any kind.

The question to be decided is, can damages be recovered against the Farmers' Mining Company for the nonperformance of this contract? "It is a well-settled rule of law that if a party, by his contract, charge himself with an obligation possible to be performed, he must make it good unless its performance be rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse him." *Dermott v. Jones*, 2 Wall. 1. As has been seen, the Farmers' Mining Company fulfilled, or, rather, was prepared to fulfill, the contract in every particular. The complete fulfillment was prevented by the order of this court in the appointment of the receiver. A delivery of the rock by the company after that was impossible. It will be noticed, also, that the completion of the contract on the part of Mitsui & Co. was by the same action of the court made impossible. If the company had tendered the delivery of the rock, the injunction of this court forbade them to accept it. In like manner, they could not have paid to the company the price of the rock. Was all this rendered impossible by the law? A distinction must be taken between cases for the specific performance of a contract and those in which damages are sought for the nonperformance of a contract. The bare fact that the court can decree and enforce the specific performance of a contract shows that its performance is not impossible. And so, when a railroad company contracted with a plaintiff to operate its road, which had been extended with the aid of the plaintiff, and that, if it failed to operate its railroad as provided in the contract, it would forfeit a certain portion of the road, and convey it to the plaintiff, and the railroad company fulfilled its contract until it was placed in the hands of a receiver, and then ceased to do so, the court ordered the contract to be specifically performed, which was not an impossible thing. *Klauber v. Street-Car Co.*, 95 Cal. 353, 30 Pac. 555, cited in *Gluck & B. Rec.* § 4, note 1. But when the contract cannot be specifically performed, and the only remedy is by way of damages, the court will not inflict such damage on the corporation if the breach of contract for which damages are sought has been occasioned by the law, the performance of the contract having been made impossible. *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174. In that case a corporation had entered into a contract with a general agent for his services for a specified time and at a stipulated salary. The contract continuing, and the services being rendered, the corporation was placed in the hands of a receiver, who did not continue the agent in his employment. He sued for damages. He could not recover. The company could not employ him, because this would be a violation of the order of injunction. The agent could not meddle in the affairs of the company, for that equally would violate the injunction. It was *damnum absque injuria*. The question is not free from doubt. A case in the court of chancery of New Jersey (*Spader v. Manufacturing Co.*, 20 Atl. 378, 47 N. J. Eq. 18), takes the opposite view. Both of these are persuasive authorities of rank. I will follow the court of appeals of New York.

The interveners cannot hold the Farmers' Mining Company responsible for the action of the court. The petition is dismissed.

VILAS v. PRINCE.

(Circuit Court, W. D. Wisconsin. July 6, 1898.)

No. 549.

1. EJECTMENT—IMPROVEMENTS AND TAXES.

A receiver's receipt for fees paid on the entry of supposed public land as a homestead is not a sufficient "written instrument" on which to claim a right to recover improvements against a successful plaintiff in ejectment, under Rev. St. Wis. § 3096.

2. SAME—GOOD FAITH OF DEFENDANT.

Lands granted in aid of a railroad were afterwards decided by the secretary of the interior to be still open for entry. A suit in ejectment concerning one parcel was decided by the circuit court in harmony with the secretary's decision, but was appealed to the supreme court. *Held*, that one who entered a similar parcel as a homestead, in full knowledge of the facts, while the appeal was pending, was not a good-faith holder, and as such entitled to pay for his improvements, under Rev. St. Wis. § 3096.

This is an action of ejectment brought to recover a quarter section of land lying in the county of Ashland, Wis., to wit, the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section No. 35 in township No. 48 N. of range 4 W.

It is stipulated that the title of the land is in the plaintiff, and the only question submitted to the court is whether or not the defendant, who has been in possession under a homestead entry, is entitled to recover for the value of his improvements, under section 3096 of the Revised Statutes of Wisconsin, which is as follows: "In every case where a recovery shall be had of any land, on which the party in possession, or those under whom he claims, while holding adversely by color of title asserted in good faith, founded on descent or any written instrument, shall have made permanent and valuable improvements, or shall have paid taxes assessed, such party * * * shall be entitled to have from the plaintiff * * * If he insists upon his recovery the value of such improvements at the time the verdict or decision against him is given, and the amount paid for taxes with interest from the date of the payment. * * *" In this case the taxes have been paid by the plaintiff and his grantor,—the defendant never having paid any,—and the demand is for the value of the improvements. The land is part and parcel of the land granted by congress to the state of Wisconsin on May 5, 1864, to aid in the construction of certain railroads in the state of Wisconsin. The portion of the grant covering the land in question, according to section 3 of the act, was given to aid in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as the state might determine, in a north-westerly direction, to Bayfield, and thence to Superior, on Lake Superior, and conveyed every alternate section of public land designated by odd numbers for 10 sections in width on each side of said road. This portion of the grant was soon afterwards bestowed by the act of the legislature of the state upon the Portage & Lake Superior Railroad Company, the predecessor of the Wisconsin Central Company, which succeeded legitimately to all the rights of the Portage & Lake Superior Company in and to the said land grant. The railroad was completed by the Wisconsin Central Company according to the terms of the grant from the state, and the lands were conveyed by the state to said Wisconsin Central Company by patent on February 25, 1884. The land in question in this case is covered by that patent. The Wisconsin Central Railroad Company conveyed the land to John H. Knight in June, 1887, who afterwards conveyed it to the plaintiff. The lands, until entered upon by one Frank Simer as a squatter in January, 1890, were wild, uncultivated forest lands, upon which Knight, the original grantee from the railroad company, had cut timber and paid taxes. Simer sold out his claim to the defendant, who entered upon the land in August, 1890, as a part of the public domain, claiming it under the homestead law, and has been in possession

ever since. It is stipulated that the land is worth \$5,000, and that the value of the defendant's improvements is \$1,050. On or about January 24, 1890, the secretary of the Interior of the United States decided that the lands of which this tract formed a part were excepted from the aforesaid grant by congress, and were a part of the public domain, and subject to homestead entry, and in November, 1891, ordered them to be opened for settlement under the homestead laws of the United States; and afterwards, in March, 1893, the defendant made his application to enter the land for a homestead at the United States land office at Ashland, Wis. The application was admitted by the officers of the land office, and the defendant paid the expenses of the entry, amounting to \$18, and took the following receipt:

"Receiver's Receipt No. 3,274. Application No. 3,274. Homestead.

"Receiver's Office.

"Ashland, Wis., Mch. 18, 1893.

"Received of John R. Prince the sum of eighteen dollars — cents; being the amount of fee and compensation of register and receiver for the entry of W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, and W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, of section 35, in township 48 N., range 4 W., under section No. 2290, Revised Statutes of the United States.

"R. C. Heydlauff, Receiver."

There were also printed in marginal notes upon the receipt the substance of the various provisions and conditions of the homestead law.

On September 15, 1890, the case of Railroad Co. v. Forsythe was heard in the United States circuit court for the Western district of Wisconsin. This case was also ejectment, and involved the title to another tract of land included in the same grant, and subject to the same conditions, as the land in the case at bar. The court, by Mr. Justice Harlan, in its opinion (see the case reported in 43 Fed. 867), took the same view as had been taken by the secretary of the Interior, that the land had been reserved by the government by the act of congress of June 3, 1856, and by the action of the land department in withdrawing it from market, and did not go to the state under the grant of 1864. This case was taken by writ of error to the supreme court, and the decision of the circuit court reversed (see *Id.*, 159 U. S. 46, 15 Sup. Ct. 1020); the court holding that the land in controversy was within the place limits of the road of the Wisconsin Central Company, and was subject to the full control of congress at the time the grant of May 5, 1864, was made, and passed to the state by operation of that grant, notwithstanding it was withdrawn by the land department in 1856 and 1859 in order to satisfy the grant made by the act of June 3, 1856. This decision confirmed the title of all these lands in the Wisconsin Central Company and its grantees. The company had in fact had the title from the day of execution of the patent from the state, in February, 1884; but the title had been thrown into contention and doubt by the action of the department of the Interior, followed by the decision of the United States circuit court in the Forsythe Case. This case was pending in the supreme court upon writ of error at the time Prince went into possession and made his improvements, and it is stipulated that he had knowledge of this fact, as well as of the decision in the circuit court from which the writ of error was taken. Afterwards, in April, 1896, the secretary of the Interior reversed its decision which declared said lands to be a part of the public domain, and on the 24th of October, 1896, canceled the defendant's homestead entry of the land. The entire history of these land grants, and the action of the land department concerning them, is somewhat extensive and complicated, but perhaps the above statement is enough to present the question now before the court.

William F. Vilas, for plaintiff.

Cate, Sanborn, Lamoreux & Park, for defendant.

BUNN, District Judge, after stating the facts as above, delivered the opinion of the court.

The question presented in this case is one of first impression; there being, so far as we know, no adjudicated cases on the subject.

But, upon principle, we think the defendant is neither holding under a written instrument purporting to give title, nor by color of title asserted in good faith, within the meaning of the law.

1. The receiver's receipt for the \$18 paid is not a written instrument purporting to convey title, but the contrary of this clearly appears from the printed note in the margin, giving the substance, in brief, of the provisions of the homestead law. It shows that he must reside upon the land for five years in good faith for the purpose of making a homestead. He cannot sell, and his possession gives him no right to cut timber, except for the purpose of improving the land. If he should do so, he is subject to be prosecuted civilly and criminally by the government for trespass, as though he had never taken possession. The instances where homesteaders have been convicted for cutting timber from the land claimed are numerous, and the principle well adjudged. The homesteader has a right to earn the land by residing upon and improving it, and that is the extent of his right. The nominal amount of money he pays is not the compensation for the land, which still belongs to the government, but is intended to cover the expenses of surveying and platting, and fees of officers. There is not much analogy between such a case and the one where the land is purchased and paid for, and a receiver's receipt taken. Such a receipt passes the substantial interest in the land, which may be sold or mortgaged; and a judgment is a lien upon it, though technically the legal title does not pass until the patent issues. The issuing of the patent in such case is a clerical or ministerial act, which would be performed at the time of the sale, if the department were not behindhand in its routine business. The case is simply delayed to take its turn with thousands of others. It is quite otherwise with a homestead entry, which conveys no title. It is always understood that such an entry is subject to be canceled by the land department in case the land is not subject to entry, as in this case.

2. The defendant cannot be said to have held in good faith, within the meaning of the law. He knew the title to these lands was in litigation, and that the question was then pending in the supreme court of the United States, which would be the final arbiter of the question. Under the constitution, congress has full jurisdiction and power over the public lands, to regulate and dispose of them as it pleases. It had, by a deliberate act of congress, undertaken to convey these lands to the state for the purposes of aiding in certain public improvements which the government wished to have made. They had been earned by the railroad company long ago, and patents for the land issued to the company by the state. Much of them had been sold by the company, and warranty deeds given to the purchasers, who had gone into possession. They had been rendered marketable and of great value by the action of the company in building the railroad. The even-numbered sections within the place limits of 10 miles on each side of the track, which were reserved by the government, had been rendered equally valuable from the same cause. Congress did not intend to lose anything in making these grants. It was wisely and safely calculated that the sections

along the line of road reserved to the government would be doubled in value by the building of the road, so that the price could be raised from \$1.25 to \$2.50 per acre. They were wild forest lands, valuable principally for the pine timber on them. If the government had held for sale, and sold them for the highest price they would bear, either at public or private sale, as an individual would have done, large sums of money could have been realized to the government from these alternate sections of land-grant lands. The government, no doubt from a noble and generous sentiment of magnanimity, adopted a different course, which was to give the lands to those who would improve them for homes. It must be said that these lands were not well adapted to this purpose, and that the great and beneficent designs of the homestead law, so far as the pine lands in the extreme northern portions of the state are concerned, have been much abused and frustrated, and the law very generally used as a means for getting possession of the lands in order to cut the timber for commercial purposes. The lands were valuable for the pine timber, but poorly adapted to farming purposes,—at least, in the present generation. It would be a noteworthy and instructive chapter in the history of the land laws if the proceedings under the law in that part of the state could be truthfully written out, so that it could be seen what the proper portion of cultivated farms made under the law would bear to the cases where the pine had been stripped from the land, and the farm left desolate. We apprehend it would then appear that the bounty of the government has been much abused. The grounds on which the secretary of the interior held that these lands were still a part of the public domain after congress had by solemn act granted them to the state were certainly somewhat technical. At the time defendant made his claim the question was pending in the supreme court, and the decision of that court would determine the title. Under these circumstances, and with full knowledge of them, to squat upon the land as Simer did, or claim it under the homestead law as Prince, his assignee, did, was simply wagering on the decision of the supreme court. If that decision was against the squatter, he would lose his labor. If in his favor, he would have a valuable tract of timbered land for almost nothing, which he could sell to a lumberman or timber speculator for a large price. He took his chances on the decision of another party's lawsuit, and must be content to abide the result. The remarks of Mr. Justice Brewer in delivering the opinion of the court in the Forsythe Case, with some small changes in the figures, are quite as applicable to the case at bar as they were to that case. He says:

"After years have passed, and all the parties interested in the matter, other than the United States, have treated it as the property of the plaintiff, the defendant, relying upon a technical construction of the statutes, seeks to enter the tract, and thus, for no more than the paltry sum of \$400 (\$2.50 per acre being the double minimum price of land within the limits of railroad grants), to obtain title to property worth, as we have seen, at least \$8,000. The railroad company, under this construction, loses the land it supposed it was entitled to, which it has treated as its own, and has helped to make valuable; the government does not receive the \$8,000, nor, indeed, anything, if

the land be entered under the homestead laws; but a stranger comes in, who has done nothing to create that value, and appropriates it to his own benefit. The iniquity of such a result is at least suggestive."

The conclusion reached by the court is that the defendant is not holding the land under a written instrument, nor in good faith, within the meaning of the law which would entitle him to receive back the value of the improvements, and there will be a judgment for the plaintiff for the recovery of the land.

RIGNEY v. PLASTER.

(Circuit Court, W. D. Missouri, W. D. June 13, 1898.)

No. 2,081.

1. DEEDS—ADMISSIBILITY AS EVIDENCE—CERTIFIED COPIES OF RECORD.

Under Rev. St. Mo. 1889, §§ 4858, 4864, 4865, certified copies of the record of a deed, acknowledged according to the law in force at the time of its execution, but since repealed, are admissible in evidence without proof of the execution of the original, when such deed has been recorded 30 years or more prior to the time of offering such copy in evidence.

2. CONSTRUCTION OF STATUTES.

The intention of a legislative act is often to be gathered from a view of every part of the statute, and the true intention should always prevail over the literal sense of the terms employed. A thing within the intention of the legislature in framing a statute is often as much within the statute as if it were within the letter.

3. EJECTMENT—OUTSTANDING TITLE—INVALID DEED.

An outstanding title to defeat an action of ejectment must be a present subsisting title, which, prima facie, can be asserted in favor of the party holding it, and not one which is dead under the statute of limitations, or presumptively has been abandoned or extinguished. Hence a deed not acknowledged by an officer having authority to take acknowledgments is not admissible to show outstanding title, notwithstanding section 4864, Rev. St. Mo. 1889, authorizes certified copy to be read in evidence.

4. SAME—POWER OF ATTORNEY BY LUNATIC.

A power of attorney given by one non compos mentis is void, and consequently a deed executed under such a power is not admissible in ejectment as evidence of outstanding title.

This was an action of ejectment brought by Alice H. Rigney, by Charles Lyon, her curator, against Elisha Plaster. Plaintiff having recovered a judgment, the cause is now heard on defendant's motion for a new trial.

Geo. H. English and J. H. Bremerman, for plaintiff.

L. H. Waters, for defendant.

PHILIPS, District Judge. This is an action of ejectment to recover possession of certain real estate situate in the county of Carroll, state of Missouri. On trial had to a jury, plaintiff recovered judgment, and the defendant has filed motion for a new trial, assigning as grounds therefor errors committed by the court in the admission and rejection of certain title papers. It is admitted that the land in question was patented by the United States to Henry Richmond, April 20, 1819. The plaintiff claims title by mesne conveyances from said

Richmond. In support of her title, she offered in evidence a deed from said Richmond to John Thompson, dated May 21, 1819. This deed was acknowledged by said Richmond on the 1st day of August, 1819, before Robert Martin, mayor of the city of Philadelphia, in the state of Pennsylvania, and duly filed for record in said Carroll county, on May 5, 1866. It was admitted on the trial that the original deed was not in the possession of plaintiff, and that the same had been lost. The plaintiff offered a duly-certified copy of this deed from the recorder's office of said Carroll county. This certified copy was admitted in evidence by the court, over the objection of defendant; the ground of objection being that said certified copy was and is not admissible in evidence without proof of the execution by said Richmond.

Under the statute of Missouri in force at the time of the taking of the acknowledgment to this deed, the mayor of the city of Philadelphia was authorized to take acknowledgments of deeds to lands situate in the territory of Missouri (Laws Mo. 1818, p. 128, § 6). This statute, in so far as it authorized the taking of acknowledgments outside of the state by the mayor of any city, was repealed by the act of the legislature of Missouri approved February 21, 1825 (Laws Mo. 1825, p. 500, § 13). In the revision of that year of the law regulating conveyances (section 8, p. 218, Rev. Laws Mo. 1825), such acknowledgments, when taken outside of the state, could only be taken before some court of record in the state in which the deed should be executed. The vested rights of parties under grants to lands acquired prior to the repeal were preserved by the repealing act aforesaid.

The contention of defendant's counsel is that, inasmuch as the deed in question was duly acknowledged under the statute of the territory of Missouri, it was entitled to be spread upon the record in the recorder's office of the territory, and that the deed, not having been recorded within one year from its date, was not admissible in evidence without proof of the execution of the original instrument. The plaintiff, on the other hand, contends that the certified copy was and is admissible in evidence by virtue of sections 4858, 4864, and 4865, Rev. St. Mo. 1889.

Section 4858 reads as follows:

"Every instrument of writing, conveying or affecting real estate, and the certificate of the acknowledgment or proof thereof, made in pursuance of any law in force at the time of such acknowledgment or proof, but afterwards repealed, shall be evidence to the same extent, and with like effect, as if such law remained in full force."

Section 4864 is as follows:

"All records made by the recorder of the proper county one year before this law takes effect, by copying from any deed of conveyance, deed of trust, mortgage, will or copy of a will, or other instrument of writing, whereby any real estate may be affected in law or in equity, that has neither been proved nor acknowledged, or which has been proved or acknowledged, but not according to the law in force at the time the same was recorded shall hereafter impart notice to all persons of the contents of such instruments; and hereafter when any such instrument shall have been so recorded for the period of one year, the same shall thereafter impart notice to all persons of the contents of such instruments, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice thereof."

This is followed by section 4865, which declares that:

"Certified copies of such records as are contemplated in the next preceding section shall not be received in evidence until the execution of the original instrument or instruments from which such records were made shall have been duly proved according to law, except where such record shall have been made thirty years or more prior to the time of offering the same in evidence."

Section 4858 covers the deed in question, as the certificate of acknowledgment was made in pursuance of the law of the territory in force at the time of such acknowledgment, and which law was afterwards repealed. This being so, why does not a certified copy of the deed come clearly within the enabling provisions of sections 4864 and 4865? Attention to the language of section 4864 makes this clear. In the first place, it covers "all records made by the recorder of the proper county one year before this law takes effect." This was the enactment of 1887 (Laws Mo. 1887, p. 183). This record was made by the recorder of the proper county more than one year prior to 1887. This is followed with two specified instances in which copies of such records may give notice to all subsequent purchasers and incumbrancers: First, where the recorded instrument has not been proved or acknowledged; and, second, where it has been proved or acknowledged, but not according to the law in force at the time the same was recorded. At the time this deed was admitted to record, in 1866, it had not been acknowledged according to the law then in force in the state of Missouri (Gen. St. Mo. 1865, c. 109, § 9). It is expressly provided by said section 4865 that certified copies of such records as are contemplated by said section 4864 shall be received in evidence "where such records shall have been made thirty years or more prior to the time of offering the same in evidence." This record was made in 1866, and was offered in evidence in 1898, more than 30 years after it was made.

The court might be content to rest this question on the suggestion made by defendant's counsel in support of his extraordinary position,—that it is unnecessary to inquire into the reason the legislature had in the particular phraseology referred to in section 4864, as the statute itself stands for a reason; but the court is unwilling to admit by its silence the contention of counsel that sections 4864 and 4865 admit of the construction placed on them, to wit, that if the deed in question had not been acknowledged at all, or if it had been acknowledged by some officer not authorized by the statute then in force to take acknowledgments of deeds to lands in Missouri, yet if such deed had been recorded in the recorder's office of the proper county one year prior to 1887, and for thirty years prior to the time it was offered in evidence, a certified copy of such deed would be admissible in evidence without proof of its execution, while a deed properly acknowledged, and recorded one year prior to 1887, and more than thirty years prior to the time it is offered in evidence, would not be admissible without further proof of its execution. It is inconceivable that the legislature intended any such distinction in its remedial legislation. No sufficient reason can be assigned for such absurdity in legislation as that an unacknowledged deed, or one improperly acknowledged, if

recorded the required length of time, is admissible in evidence by a certified copy of the record, without proof of the execution of the original instrument, while requiring proof of the execution of the original deed which had been properly acknowledged. The certificate of acknowledgment certainly entitled it to a greater credence as to authenticity than the absence of such certificate. The supreme court of this state has never since 1887 given such construction to this statute. On the contrary, in *Crispen v. Hannavan*, 72 Mo. 548-555, Judge Hough clearly expressed his disapproval of imputing to the legislature any such intent or purpose. He refuted the idea that copies of conveyances regularly acknowledged according to the laws of the state in force at the time of acknowledgment and recorded, etc., cannot be offered in evidence without accounting for the absence of the original, while copies of the record of conveyances which have not been acknowledged according to the law of this or any other state, or which have not been acknowledged at all, may be read as original evidence, and without in any way accounting for the original. "We cannot believe that such was the intention of the legislature. The statute dispenses with proof of the execution of the original after the record has attained a certain age; but it does not dispense with proof of its loss or destruction, so as to make the copy evidence." It is among the recognized canons of interpretation of statutes that the intention of a legislative act is often to be gathered from a view of every part of the statute, and the true intention should always prevail over the literal sense of the terms employed. "When the expression of a statute is special or particular, but the reason is general, the expression should be deemed general; and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity." 1 Kent, Comm. p. 462. Again, a thing within the intention of the legislature in framing a statute is often as much within the statute as if it were within the letter. *Riddick v. Walsh*, 15 Mo. 519; *Schultz v. Railroad Co.*, 36 Mo. 13; *State v. King*, 44 Mo. 283; *In re Bomino's Estate*, 83 Mo. 441.

What the legislature of Missouri was aiming to accomplish was to make these ancient records admissible in evidence without proof of the identity of the party executing them, because not only of the great inconvenience, but practical impossibility, in many instances, after the lapse of so many years, of making proof of the execution. In the instance under review, the deed was made 79 years ago, rendering proof of the identity of the party executing it out of the question. The legislature undoubtedly supposed that it was providing for every conceivable case, in *pari materia*, by the provisions of sections 4864 and 4865. But, as already stated, it is sufficient to say that the copy of the deed in question comes expressly within the letter of the statute.

The defendant complains of the action of the court on the trial in excluding from evidence a certified copy of deed purporting to have been made by said Richmond to one John H. Martin, bearing date July 20, 1819, and acknowledged on the same day before one S. J. Prescott, at the city of Boston, state of Massachusetts, who signed

himself as "Notary Public and Jus. Peac. & of the Quorum," and filed for record in the recorder's office of Carroll county, February 16, 1865. It will be perceived that this deed is subsequent to the one under which the plaintiff claims, but was recorded one year anterior to the deed by Richmond to Thompson. It is conceded that, under the law in force in the territory of Missouri at the time of the acknowledgment, such an officer as the one described by the taker of the acknowledgment was not authorized to take acknowledgments to deeds outside of the territory to lands situate within the territory. The defendant does not claim title under this deed, but offered it in evidence for the purpose of showing an outstanding title in the grantee, Martin, to defeat the record title of plaintiff. It is insisted by defendant's counsel that, inasmuch as this deed was recorded prior to the one under which plaintiff claims, it gave priority of title to the grantee, Martin. No evidence was offered by defendant to show either that such a man as John H. Martin ever lived, or that he had ever asserted any right or claim to, or that he had ever seen or been in possession of, the land in question. It is the well-settled law respecting an outstanding title to defeat an action of ejectment that it must be made to appear by the party offering it that it is a present, subsisting title, living and operative, and such a one as the stranger in whom it is vested could assert and maintain, *prima facie*, against the plaintiff. *Jackson v. Hudson*, 3 Johns. 386; *Peck v. Carmichael*, 9 Yerg. 325.

The supreme court of this state, in *McDonald v. Schneider*, 27 Mo. 410, speaking to a parallel question of a deed made by plaintiff's ancestor, through whom plaintiff was claiming title, to one Bradley, said:

"The deed to Bradley was upward of 20 years old. There had been no possession under it for more than 20 years by Bradley or those claiming under him. It is a well-established principle that an outstanding title in a third person, set up as a bar to recover in an action of ejectment, must be such a one as the owner of that title himself could recover on if he were asserting it in an action. It must be a present, subsisting, and operative title. Now, it is obvious that the title of Bradley, set up in this action, was not such a one. *Prima facie*, he could not have maintained a suit upon it. Why, then, should a stranger be permitted to use it as a defense in an action of ejectment? There were no circumstances in evidence which relieved it from the objections with which it was encountered."

This same principle is reaffirmed in *Totten v. James*, 55 Mo. 496, in which Napton, J., asserts that such a deed was properly excluded as an outstanding title, because it was barred as to the plaintiff by the statute of limitations. This doctrine is maintained by the supreme court of the United States in *Greenleaf v. Birth*, 6 Pet. 312. The presumption arises in respect of such claimed title, which has not been asserted in any form for so long a period that it has been extinguished. Counsel in argument seem to lose sight of the fact that it is an outstanding title that defeats the action, and not the mere fact that there is an outstanding deed. It is a title outstanding in a third party, which, *prima facie*, can be asserted in favor of the party holding it, and not one that is dead under the statute of limitations, or presumptively has been abandoned or extinguished.

It is next assigned for error that the court erred in excluding from evidence two papers offered by the defendant for the same purpose,—

of showing an outstanding title. One of these is a certified copy of what purports to be a power of attorney, executed by plaintiff on the 13th day of December, 1875, to one William Morgan, empowering him to sell this land. The power of attorney was duly acknowledged and recorded January 24, 1876. The other was a deed made by said Morgan to said land on the 1st day of November, 1876, to one James S. Bently, purporting on its face to have been executed in pursuance of said power of attorney. This deed was filed for record November 15, 1876. These instruments were executed about 22 years before they were offered in evidence, without any pretense that the defendant claims title under the grantee, Bently, or that said Bently ever asserted any claim or title to the property by virtue of his deed, or that he had ever been in possession of said land; and therefore it was bad as an outstanding title, even had plaintiff been *compos mentis*. It is held by the supreme court of the United States in *Dexter v. Hall*, 15 Wall. 9, that the power of attorney of a lunatic, or of one non *compos mentis*, is void, and, of consequence, there being no power in contemplation of law vested in the attorney to execute, his deed would be void. As the jury necessarily, under the issues in this case, and under the charge of the court, found that prior to 1875, and continuously thereafter, to the bringing of this action, January, 1896, the plaintiff was insane, the effect was to render this power of attorney and deed unavailing even had they been submitted to the jury. But, aside from this, it was bad as an outstanding title after the lapse of 20 years from its execution without further evidence. The presumption could reasonably be indulged that the grantee, Bently, became aware of the insanity of Mrs. Rigney, and abandoned the whole matter.

It is also complained that the court erred in excluding from the jury a paper purporting to have been a lease covering this land, made by one Hayden, in 1868, to William F. Plaster, the ancestor of the defendant, Plaster. No reason was assigned to the court at the time of this offer which, under any conceivable aspect of the case, would have warranted the court in permitting it to go to the jury. It certainly was not offered as an outstanding title; nor was there any offer to show that William F. Plaster entered into possession of the land under said lease as color of title, for said lease was so short lived by its terms as to create no color of title; and there is no pretense that said Hayden had any color of title to said land at the time of the execution of the lease. Afterwards, in August, 1868, said Hayden obtained a tax deed to said land, which was admitted in evidence, on the defendant's insistence, as color of title. No possible injury could have been done to the defendant by the exclusion of said contract or lease, for the reason that under the charge of the court to the jury, and by their verdict, they necessarily found as a matter of fact that in October, 1872, when the plaintiff obtained her deed to the property in question, neither the defendant nor William F. Plaster, under whom he claims, was in adverse possession of the property, and that the statute of limitations, by reason of such adverse occupancy, had not begun to run prior to October, 1872; and therefore the alleged lease, even had it been admitted in evidence, could have cut no possible figure in the case.

Other questions of law and fact raised by this motion for new trial and on argument were fully and properly submitted to the jury, without any exception thereto on the part of either plaintiff or defendant. The motion for new trial is denied.

JOHNSTON v. KLOPSCH.

(Circuit Court, E. D. New York. July 7, 1898.)

No. 3,806.

1. CONSTRUCTION OF STATUTES—PLEADING—COPYRIGHT SUITS.

Rev. St. § 914, conforming pleadings in an action at law in a federal court to those in the state court, and section 4969, providing that in all actions arising under the laws respecting copyrights the defendant may plead the general issue and give special matter in evidence, are to be construed together, and full effect given to both.

2. PLEADING IN COPYRIGHT SUITS.

In an action to recover penalties for infringement of a copyright, under Rev. St. § 4965, brought in a federal court in a state which has adopted the code system of pleading, an answer containing a general denial, taken in connection with the provisions of section 4969, secures all rights reserved to the defendant under the federal statutes, and accordingly a common-law plea is inappropriate.

Motion to strike out plea. The action was brought under Rev. St. § 4965, as amended, to recover \$20,000 as penalties for infringement of copyright. The defendant interposed a plea that he "comes and defends the wrong and injury when," etc., and says "that he is not guilty of the supposed grievances above laid to his charge in manner and form as the said plaintiff hath above thereof complained against him," etc., "and of this he, the said defendant, puts himself upon the country," etc., "and the said plaintiff doth the like," etc.

Max J. Kohler, for the motion.

G. H. Crawford, opposed.

LACOMBE, Circuit Judge. The motion is granted. *Celluloid Mfg. Co. v. American Zylonite Co.*, 34 Fed. 744. The system of code pleading provides a method for "pleading the general issue" which harmonizes with the other pleadings therein provided for, and which should be followed, since sections 4969 and 914, Rev. St., are to be construed together, and full effect given to both. An answer which contains a general denial of all the averments of the complaint, taken in connection with the provisions of section 4969, to the effect that defendant may, upon the trial, "give special matter in evidence," secures all rights reserved to defendant under the federal statutes, without the incongruity of combining a code complaint with a common-law plea. Ten days from date of entry of order is given defendant to answer.

COLLINSPLATT et al. v. FINLAYSON et al.

(Circuit Court, S. D. New York. August 6, 1898.)

1. TRADE-MARKS—UNFAIR COMPETITION—GEOGRAPHICAL NAMES.

The false use of a geographical name will not be allowed by the federal courts, when it is so used to promote unfair competition and to induce the sale of spurious goods.

2. SAME—IMITATIVE LABELS—PROOF OF SALES.

The federal courts do not require specific proof of purchases by individuals actually deceived, when the labels themselves show an attempt at deception which is well calculated to deceive.

This was a suit in equity by Hawtry Collinsplatt and others against Alexander M. Finlayson and another to enjoin unfair competition in trade. The cause was heard on motion for a preliminary injunction.

Roger Sherman, for the motion.

De Los McCurdy, opposed.

LACOMBE, Circuit Judge. Whatever may be the decisions in the state courts, it is abundantly settled by authority in the federal courts that they will not tolerate a false use of a geographical name, when it is so used to promote unfair competition and to induce the sale of spurious goods. Nor do these courts require specific proof of purchases by individuals actually deceived, when the labels themselves show an attempt at deception which appears to be well-calculated to deceive. In the case at bar it is conceded that the gin made and sold by defendants is not made at Plymouth, but is distilled in this country. They are seeking to palm off a domestic as an imported article. Inspection of the labels must carry conviction to any unbiased and intelligent mind that the later label was prepared by some one who had seen the earlier one, and that it was designed, not to differentiate the goods to which it was affixed, but to simulate a resemblance to complainant's goods sufficiently strong to mislead the consumer, although containing variations sufficient to argue about should the designer be brought into court. This is the usual artifice of the unfair trader. It does not deceive the first purchaser from the manufacturer, but it is sufficient to mislead the subsequent retail purchaser, and thus, being sold at a less price than the genuine article, it eventually, if not enjoined, will interfere with the sales of the genuine article. It is quite common in such cases to find assertions by defendant that his goods are very superior to complainant's; that he has no intention to deceive anyone; that his labels are not at all an imitation; that in designing a form of package he has carefully endeavored to select a design which should distinguish his goods from all other goods in the world, including complainant's; and that his sole object has been to establish and maintain a distinct reputation for his own goods, as something different from complainant's. When there is a marked similarity in the labels, but little weight is given, by a court of equity, to such statements, and the mere circumstance that they are sworn to does not tend to increase respect for them, nor for the conscientiousness of the affiants who make them. The pendency of a similar action in the state court seems to present no

bar to the relief asked for. The injunction is continued until trial, with a further clause enjoining the use of the word "Plymouth" upon any packages containing gin not in fact made in Plymouth.

BURNETT et al. v. HAHN.

(Circuit Court, S. D. New York. August 6, 1898.)

INFRINGEMENT OF TRADE MARK AND NAME — CEASING SALE AFTER SUIT BROUGHT—INJUNCTION.

When the article sold is inferior and spurious, and the packages sufficiently resemble complainant's to make it apparent that the design is to deceive the consuming public, injunction will be granted, although defendant is a dealer only, who purchased from the originator of the fraud, and, since action brought, has voluntarily ceased to deal in the goods.

Solomon Leistenstein, for the motion.

George Hahn, opposed.

LACOMBE, Circuit Judge. The label in this case does not bear as close a likeness to complainants' as is found in the Plymouth Gin Case (Collinsplatt v. Finlayson, decided to-day, 88 Fed. 693), but the spurious character of the goods sold is frankly admitted. The label somewhat resembles the complainants'; the style of bottle and of capsule are close copies; the label, by the use of the Union Jack, suggests an English origin; the designation "Old Tom," long associated with gin made by complainants and their predecessors, is used by defendant; while the statement that defendant's gin is manufactured by "Sir Edward Bruce & Co.," at the "Royal Distillery, London," is strongly suggestive of the words on complainants' labels, "Sir Robert Burnet & Co.," and "Vauxhall Distillery, London." In view of the concession upon the argument that the packages contain a cheap domestic gin, it is perfectly apparent that the designer of this form of package has been chiefly concerned in an attempt to deceive the consuming public. Defendant is a dealer only, who has purchased from the originator of the fraud with the intention of selling to others. Neither that circumstance, however, nor the further one that he has voluntarily ceased to deal in the goods since action begun, should deprive the complainants of their injunction, if otherwise entitled to it. The fraud being palpable, complainants may take injunction against the sale of gin in packages such as Exhibit B, or in similar packages, which, by collocation of label, bottle, stopper, capsule, and description, suggest the presence in the package of complainants' product, when the gin so sold is not in fact made by "Sir Edward Bruce & Co.," and was not in fact distilled at the "Royal Distillery, London."

N. K. FAIRBANK CO. v. LUCKEL, KING & CAKE SOAP CO.

(Circuit Court, D. Oregon. July 15, 1898.)

TRADE-MARKS—UNFAIR COMPETITION.

One using "Fairbank's Gold Dust" as a name for washing powder is not entitled to enjoin the use by another of the words "Gold Drop," where the packages, though similar in size and shape, are totally dissimilar in the

style of letters used, the arrangement of words, and the designs of the respective labels, so that there is no likelihood of deceiving purchasers using any care whatever.

This was a suit in equity by the N. K. Fairbank Company against the Luckel, King & Cake Soap Company for alleged infringement of a trade-mark.

Fenton Bronaugh & Muir, for plaintiff.
Cake & Cake, for defendant.

BELLINGER, District Judge. This is a suit to restrain the infringement of the trade-mark "Gold Dust," used to designate a washing powder manufactured and sold on the market by the complainant company. The appropriation complained of consists of the use of the name "Gold Drop" to designate a washing powder manufactured and sold by the defendant company in packages similar in size and shape to those of complainant. The defendant's packages are dressed up in a manner wholly different from those of complainant, and there is no resemblance between the two, except what is furnished by the similarity in size and shape of the packages of the two manufacturers, and by the use of the word "Gold" on each. Complainant's packages are distinguished by the name "Fairbank's Gold Dust Washing Powder." The style of letters used, the arrangement of words, and the designs of the respective labels, are totally dissimilar. There is nothing in defendant's packages to deceive purchasers, and there is no likelihood of deception of a purchaser exercising any care whatever, much less of a purchaser exercising ordinary care. If a retail merchant delivers defendant's manufacture to a customer who supposes he is purchasing complainant's goods, the deception of such purchaser is due to his blind reliance upon the person with whom he deals. Any inspection of the package, however careless, will necessarily lead to a disclosure of its character and origin. Such imposition can occur irrespective of the name and appearance of the package sold. If such a deception is practiced, or is liable to be practiced, it does not afford ground for relief in equity. The test is whether the substituted package is, from its name and dress, calculated to deceive purchasers. The word "Gold" is one of three words in the name adopted by complainant, "Fairbank's Gold Dust" washing powder, while the name adopted by defendant is "Gold Drop" washing powder. It is the use of this one of the three words constituting the name adopted by plaintiff that is relied upon as the ground for relief. If, with this, the goods complained of were dressed up in such a manner as to induce intending purchasers to believe they were buying plaintiff's goods, the plaintiff would be entitled to the relief prayed for. But the total dissimilarity in the dress of the respective packages, and the absence of all imitative devices, makes it impossible, so far as appearances go, to mistake one manufacturer for the other. Careless and indifferent purchasers may have defendant's washing powder palmed off on them for that of complainant; but equity cannot interfere on that account to guard against the dishonesty of dealers, nor the failure of buyers to see what is plainly to be seen. It is only in a clear case that equity will inter-

fere to restrain the freedom of individuals in the conduct of their business. Complainant is not entitled to the relief prayed for, and the decree will be that the bill of complaint be dismissed.

FLOMERFELT v. NEWWITTER et al.

(Circuit Court, S. D. New York. July 8, 1898.)

1. DESIGN PATENTS—ANTICIPATION.

An inventor may take out a patent for mechanical construction and a separate patent for the design of the same article, and hence the mechanical patent is immaterial on the question of anticipation of the design patent.

2. SAME—PRIOR USE—TESTIMONY FROM RECOLLECTION.

Testimony of a witness as to the date when an alleged anticipating article came into his possession, merely from recollection, unsupported by any other proof, and not fixed in his mind by any other occurrence which can be itself located in time, is insufficient to prove prior use.

3. SAME.

Proof that six pairs of cuff button links, like those covered by a patent, were made by another prior to the date of the alleged invention, is sufficient to invalidate the patent, though they never went into general use.

4. SAME—DESIGN FOR CUFF BUTTONS.

The Flomerfelt design patent, No. 24,091, for a cuff button, is void because of prior use.

This was a suit in equity by James A. Flomerfelt against Morris J. Newwitter and another for alleged infringement of a patent for a design for cuff buttons.

Edwin H. Brown, for complainant.

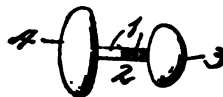
R. B. McMaster, for defendants.

LACOMBE, Circuit Judge. Design patent, No. 24,091, for a design for a cuff button, was issued to complainant, March 12, 1895. The specification describes the design as "consisting essentially in the shank portion, 2, of the cuff button, having double inclined or forwardly projecting or converging front or outer edge, 1, as combined with or viewed in connection with its angularly disposed heads, 3, 4, at opposite sides of the shank, said heads being inclined towards each other from the rear towards the front of the button, whereby the general planes of the heads tend or lean towards the planes of the two adjacent forwardly converging, angularly disposed parts of the front edge, 1, of the button shank, all as shown more clearly in the figure."

Fig. 1.



Fig. 2.



The precise shape and style of ornamentation of the heads are not material. It is the shape of the shank or link, and the disposition of the heads relatively thereto, that constitute the design. Defendants' cuff button is plainly an infringement, and the only questions to be discussed are anticipation and prior use.

Anticipation is not shown by the prior patents in evidence. The design appears in patent No. 518,595, April 24, 1894, issued to the same patentee (complainant), for the mechanical contrivance of a rigid shank, so shaped and connected with the heads as to "clamp the cuff against the sides [of the shank], and maintain the ends of the cuff separated and in a rigid position." This patent, however, is immaterial, as complainant had the right to take out a patent for mechanical construction and a separate patent for the design of his buttons.

The cuff button shown in English patent No. 12,394, of 1888, to Sommer, certainly would not appear to be the same in design as complainant's to an observer not an expert, giving such attention to details as the ordinary purchaser usually gives, which is the test with design patents. The button of the Ireson English patent, No. 1,171, of 1889, is still further removed, since it has no single rigid shank, but two short shanks connected by a ring link, and capable of assuming different positions relative to the heads. In the Williams United States patent, No. 277,095, of May 8, 1889, the shank is only slightly convex, not presenting the appearance of the W of the patent in suit. In the Smitten United States patent, No. 400,132, of March 26, 1889, the heads are not angularly disposed. The button of the Peck United States patent, No. 470,411, of March 8, 1892, is much like the Williams button. The Watson United States patent, No. 538,395, is not prior. Application was filed January 31, 1895, and complainant's application October 30, 1894.

A button was produced by the witness Pappie which is similar in all respects to complainant's; but, although he says he thinks he came into possession of it in 1892, his recollection as to the date, unsupported by any other proof, and not fixed in his mind by any other occurrence, which can be itself located in time, is insufficient to prove prior use.

Most of the testimony is directed to an exhibit known as the "1879 Link" or the "Ox Bow." The shank of this exhibit is a little flatter than complainant's, and the sharp projection at 1 in the figure is rounded off. Nevertheless, it resembles the button of the patent so closely as to be an anticipation, if prior in time. It is unnecessary to discuss the details of the testimony. Suffice it to say that it satisfies the court that, at a date some years before the application for this patent, at least six pairs like this "1879 Link" were made in the factory of the witness Devereaux. Entries in books and changes in business arrangements of sufficient importance to fix dates in the minds of the principal witnesses enable them to fix, relatively to such entries and transactions, the date of the manufacture of these links. It is true that they never went into general use, not pleasing the taste of the trade, but they are not for that reason to be rejected as an abandoned experiment. The design was completed, and was used at

least for a short time by two or three of the witnesses. That seems to be sufficient to constitute a prior use. Defendants may take a decree dismissing the bill.

CARY MFG. CO. v. DE HAVEN.

(Circuit Court, E. D. New York. March 29, 1898.)

1. PATENTS—PROCESS AND PRODUCT—METAL BOX STRAPS.

The Cary patents, No. 441,354, for a "method and machinery for making metal box straps," and No. 441,353, for a box strap cut with beveled edges from a sheet of metal, and having such edges "curled inward upon themselves," and pressed down upon the edges of the band, construed, and held not to cover either the process or product of rolling the straps between ordinary flat rollers, even if this produces curling inward of the beveled edges, as described in the patent.

2. SAME.

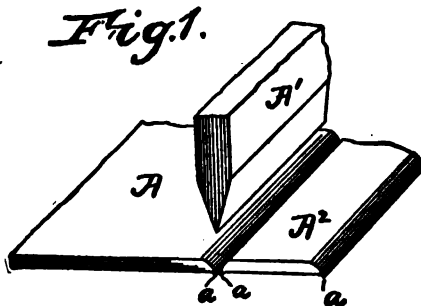
The Cary patent, No. 403,247, for an improvement in reels for box straps, held valid as to claim 2, as disclosing patentable invention in the combination, and also held infringed.

Final hearing, upon pleadings and proofs, of bill in equity alleging infringement of three patents issued to S. C. Cary, and assigned to complainant.

A. G. N. Vermilya, for complainant.

Comstock & Brown (Albert Comstock, of counsel), for defendant.

LACOMBE, Circuit Judge. The patents are three in number: No. 403,247, issued May 14, 1889; No. 441,353, issued November 25, 1890; and No. 441,354, issued November 25, 1890. No. 441,354 is for improvements in "the method of and machinery for making metal box straps." Box straps are made by cutting strips of metal of proper width from a metal sheet, and uniting said strips endwise to constitute a metal strap of indefinite length. The action of the cutting or slitting knife in separating the bands or strips from the sheet edge produces a sharp and somewhat inclined edge or "burr" on each side along the bands or strips. The specification states:



"The knife, as it passes through the sheet metal, deflects or bends it more or less along the line of the cut to somewhat below or beyond the plane under face of the sheet, and, as it makes the cut, forces or carries the metal to a sharp edge on each side of the cut, as plainly shown at a. These sharp

edges, *a*, in bands thus cut from a metal sheet, prevail on the bands from end to end, and are very objectionable when the bands are employed to constitute a box strap, as they are exceedingly liable to cut and wound the hands of the users of the strap. The object of my invention is to remove this objectionable feature from metal box straps of the class described."

It is, of course, obvious, that such sharp edge or burr could be removed with a chisel or a file, or be beaten down by strokes with a hammer, and that the results obtained by the blows of a hammer might also be obtained by running the strip between flat-surfaced rollers, under pressure, is elementary mechanics. By the latter operation the metal in the burr would be forced back into the plane of the surface of the strip. The patentee evidently assumed, and assumed correctly, that his machine must do more than this if he expected to claim that it exhibited patentable novelty in the product. Apparently, at that time, he had not persuaded himself that he would be entitled to the exclusive control of elementary processes of metal-working simply because he was the first to apply them in the manufacture of box straps. He therefore sets forth in his specification that his invention consists "in curling the side edges [burrs] of the bands or strips over upon themselves, respectively, and pressing them closely to the body of the bands," and in "mechanism by which the said bands or strips have their side edges rolled or curled over upon themselves," etc.

It is unnecessary to describe in detail the machine by which the patentee accomplished this result. Its characteristic feature is a pair or pairs of "rollers which are grooved peripherally, and the members of each pair of which are mounted and geared so as to * * * adapt them to receive the band or strap between them edgewise, with the strap edges inserted in the peripheral grooves on the rollers." The specification, after more fully describing the machine, says further: "By this means the said sharp edges are curled inwardly upon themselves, and pressed to the band body," etc. The first claim is:

"(1) The method of making metal box straps, which consists in cutting metal bands or strips of the desired width from a sheet of metal, joining said bands or strips together endwise to constitute a metal strap of indefinite length, and, either before or after said bands or strips are thus jointed endwise, rolling or curling the side edges thereof over and upon themselves, respectively, and pressing them to the body of the band, substantially as and for the purpose set forth."

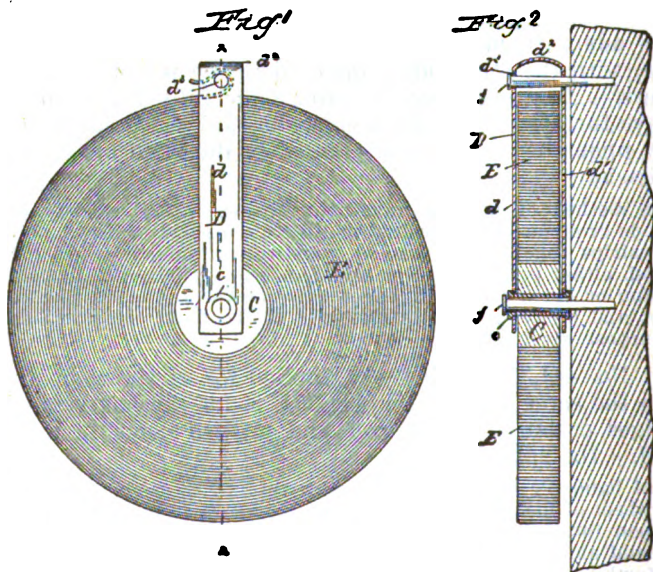
Patent No. 441,353, which was applied for at the same time, and issued on the same day, as No. 441,354, is for the box strap with its sharp edges or burrs curled over and pressed down in the manner described. Its claim is:

"A metal band for box straps, cut with thinned or beveled edges from an edge of a sheet of metal, and having said thinned or beveled side edges curled inward upon themselves, respectively, and pressed closely to the band body at, upon, and along said side edges thereof, substantially as and for the purpose set forth."

The contention of complainant that a box "strap that had the burr removed, even though only passed between flat rollers, would be included in the claim," cannot be sustained. The process of removing

inequalities in the surface of metal by passing between flat rollers was known to the art probably before the patentee was born. A court may surely take judicial notice of elementary mechanical operations. The complainant's contention that claim 1 of patent 441,354 covers and secures to him the exclusive right to apply that operation to slitted steel bands, for the purpose of removing the burr, is preposterous. There is not a scintilla of evidence to show that defendant curls the sharp edges or burrs over upon themselves, either by the use of grooved rollers or other mechanical equivalents. If running the strip between flat rollers will of itself produce the "curling over," which was the alleged improvement of Cary's patent, then the patentee invented nothing except an unnecessarily complicated machine for producing a result already secured in a more simple manner. The evidence shows that defendant's strips pass through flat rollers only. These would throw down any burr to a position flat with the strap. Afterwards defendant's strap is coiled up on a winder between flanges of iron on each side to guide the strap, the flanges being three-fourths of an inch apart, and the strap five-eighths of an inch wide. The suggestion of the patentee that this operation produces the "curling over" accomplished by his grooved rollers is not persuasive. On these two patents there must be a decree for defendant.

The third patent, No. 403,247, is for an improvement in reels for box straps. Precisely what it is will be apparent from the drawings and specification:



"C is a spool journaled to revolve freely upon a shaft, c, in a frame, D. This frame, D, consists of two arms, d and d¹, which extend from the shaft, c, parallel to each other, to a point somewhat beyond the line of the circumference of the intended coil of strap upon the spool, and which are united

together at their extended or outer ends, as shown at d^2 . In each said outer end is formed an opening, d^3 , the openings registering with each other in both said ends, as shown. The said frame, D, may be conveniently formed of a metal band bent upon itself flatwise about midway its ends, to constitute the two parallel arms, d and d^1 , and the shaft, c , may be seated in the free ends of the band, the openings, d^3 , being punched in the band near its bend, as shown. The shaft, c , is a hollow shaft, as shown, and the arms, d and d^1 , are sufficiently distant from each other to permit the spool, C, to revolve on its shaft between them, as shown. A box strap of metal is coiled flatwise on the spool, C, and when the coil is complete, as described, a pin or nail, f , may be forced into the corresponding openings, d^3 , in the outer end of the frame, so that the end of the coil may rest against or be turned backward over said pin, as shown in Fig. 1, and the resiliency or spring-like action or tendency of the entire coil acts to press the strap end against said pin snugly, and hold the coil firmly in position on the spool and in the frame. Thus coiled and held, the strap is adapted for transportation. It is designed and intended that the coiled strap in the described frame reel shall be mounted, at the place where it is severed, into definite desired lengths for sale or use, upon some convenient support, as the side of a shop-counter or a post. To accomplish this, the reel is mounted upon the support—such as is shown at E—by driving a nail or pin, f^1 , through the hollow shaft, c , and into the support, and driving a nail or pin, f , through the corresponding openings, d^3 , in the frame and into the support, as shown. By this means the framed reel is held firmly in position on the support, and the spool and coil are free to revolve on the shaft, c , of the former in unreeling the strap. Furthermore, the fastening nails, together with the hollow shaft, c , may be made to serve to draw or hold the sides, d , d^1 , of the frame closely to the edges of the strap coil, so as to hold the strap from uncoiling without the exertion of force by the operator on the free end of the coil. The strap coil will also, by its resiliency as it is uncoiled, when not held by the frame side, d , d^1 , be carried against and held by the pin, f , and prevented from unreeling."

A modified form is also shown in drawings and specification, wherein the frame, D, extends entirely across the strap coil, being a mere duplication of the device above described. The first claim of the patent covers the single or radial frame; the second claim covers the double frame, and infringement of such claim is not disputed. It reads:

"(2) A reel for metal box straps, consisting of a spool, C, adapted to have the metal strap coiled upon it, an axle, c , upon which said spool is journaled, and a frame, D, composed of parallel arms, d and d^1 , in which said axle is mounted, and which extend diametrically across said spool, and reach in opposite directions beyond the rim thereof, as described, and are united at their outer ends, and therein have the respective corresponding openings, d^3 and d^4 , adapted to receive fastening pins, substantially as and for the purpose set forth."

Three prior patents are cited in defense: Cockcroft, No. 193,487, July 24, 1877; Leistner, No. 233,358, October 19, 1880; and Keuffel, No. 338,602, March 23, 1886. Neither of them is claimed to be a complete anticipation, but it is contended that they show the state of the art to be such as to preclude the court from finding patentable invention in the Cary reel. Complainant's brief epitomizes what was wanted when Cary entered the field, viz.:

"Something cheap, which would hold the coil in shape for shipping; not interfere with its handling during that operation; be readily secured in such position that the straps might be uncoiled and used, a little at a time; permit its ready uncoiling then, but hold the coil with a tension during the uncoiling of so much as was needed at the time, that too much might not run off; and also hold it from uncoiling during the time the strap was not being used."

That the patentee's device secures all these advantages is apparent from the specification and drawings. Some of these advantages, however, were secured by like instrumentalities already employed for such purposes. Other of the patentee's instrumentalities are obviously those of an ordinary skilled workman. Thus, a radial arm, bent over so as to clasp the roll and prevent its slipping off the reel, is shown in Cockcroft, and the use of double arms is suggested. The hollow center axle is also found in the art, and it certainly was not invention to punch nail holes in the arms so as to fasten the device against a post, nor to bend the end of the coil over a nail to keep it from reeling out when not in use. Nowhere in the prior art, however, is there found the device for "braking," whereby the arms are tightened upon the coil or loosened if required. In view of the evidence as to the favorable reception accorded by the trade to the Cary reel, I am not prepared to hold that there was no invention in his combination, which obtains from the old instrumentalities this novel function, besides their old and obvious ones. The patent is an extremely narrow one. It would not be infringed by defendant's device if the latter had its arms rigid against compression, so that they could not act as a brake; but, on the proof as it stands, the combination of claim 2 seems to exhibit patentable novelty, and it is certainly convenient and useful. The claim does not specifically set forth this element of the combination functionally, but the reference therein to the "openings therein, d' and d'', adapted to receive fastening pins, substantially as and for the purpose set forth," is sufficient to warrant the court in reading into the claim, in order to uphold the patent, the function set forth in the specification in the sentence beginning, "Furthermore, the fastening nails," etc. Complainant may, therefore, take the usual decree on claim 2 of this patent. No costs to either side.

UNION HARROW CO. v. ROBERT C. REEVES CO.

(Circuit Court, S. D. New York. July 22, 1898.)

PATENTS—INVENTION—HARROWS AND CULTIVATORS.

The La Dow patent, No. 301,729, for improvements in disk-harrows, consisting mainly in the interposition of buffer-heads or equivalent mechanism between the inner ends of the disk-gangs for receiving their side thrust without coupling the axles together, *held* to involve patentable invention.

This was a suit in equity by the Union Harrow Company against the Robert C. Reeves Company for alleged infringement of a patent. Final hearing on pleadings and proofs.

John M. Gardner, for complainant.

Emanuel Jacobus, for defendant.

LACOMBE, Circuit Judge. The patent in suit is No. 301,729, issued July 8, 1884, to complainant's assignor, one Charles La Dow. The specification states that the invention—

"Relates to wheel-harrows and cultivators in which mechanism is employed for reducing friction, and for adjusting the angles of the disk-gangs, and also for adapting the gangs to better conform to the irregularities of the soil.

* * * The objects of my invention are as follows: First, to provide the disk-gangs with mechanism between their inner ends to receive their side thrusts without coupling their axles together; second, to provide means by which the end friction of the journals of the disk-gangs will be reduced; third, to provide in a disk-harrow, having two opposing disk-gangs, buffer-heads made with the inner ends of the gang-axles, whereby the inner disks of the opposing gangs will be held uniformly apart during all stages of adjustment or operation. * * * One of the advantages gained by the organization of parts described in these objects of invention is that by the use of buffer-heads between the gangs the front edges of the inner disks can (when set at an angle to each other) be brought sufficiently near together to cut all the earth between the gangs, and the side thrust of one gang is counteracted by the side thrust of the other acting against the buffers, which are not inclosed in boxing, and, when set at an angle, revolve with a planetary motion around their respective centers, thus avoiding any rubbing friction between the gangs when set at angles or when vibrating," etc.

The claim alleged to be infringed is:

"(1) In a disk-harrow, the combination of a pole, crossbar, disk-gangs capable of being set at an angle to the line of draft, and buffer-heads or equivalent mechanism between their inner ends for receiving their side thrust without coupling their axles together."

The use of two gangs of disks set at an angle to each other prevailed long before the complainant's patent. If set at one angle, the tendency of the gangs when driven through the soil was to run apart; if set at another, to come together. If allowed to come together, the inner disks would soon be destroyed. It would seem, as defendant suggests, that it should not have required inventive talent to devise buffer-heads to take the strain and relieve the inner disks; but in the face of the evidence that the trouble existed for years, and that the manufacturers who were continually appealed to for a remedy produced only such devices as rigid axles, separating yokes, and universal joints, whose action was far from satisfactory, it must be concluded that there was invention in La Dow's device, simple though it be, which at once commanded extensive sales. The nearest, and indeed the only, approach to it in the prior art, is La Dow's own (patent 187,392, of February 13, 1877), which shows two balls fixed on the inner ends of the gang-axles, and inclosed in a box, so that they would not ride over each other or jam. The defects of this device are made plain by the testimony and the exhibits, but it seems to have required more than the ordinary workman's skill to discard the box, and flatten down the balls into buffer-heads; otherwise, it would surely not have taken seven years to make the advance. Inspection of defendant's device demonstrates infringement. Complainant may take usual decree for injunction and accounting.

EWAN v. TREDEGAR CO.¹

(District Court, E. D. Virginia. April 20, 1882.)

DEMURRAGE—DELAY IN DISCHARGING.

If the ship is prevented, after getting into her dock, from securing a fit place for discharging by any cause over which she has no control, then

¹ This case has been heretofore reported in 5 Hughes, 401, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

any delay occasioned by the crowded condition of the dock is chargeable to the consignee. But, when a place for unloading is furnished by the consignee within the 24 hours allowed after receiving notice of arrival, delay occurring, not by any insufficiency of carts to receive the cargo, but by reason of the vessel delivering from but one hatch, when she might have used two, is chargeable to her, and she can recover no demurrage therefor.

This was a libel by J. B. Ewan, master of the schooner Sarah Schubert, against the Tredegar Company, to recover demurrage for delay in discharging a cargo of coal at Richmond, Va.

Wyndham R. Meredith, for libellant.

Charles S. Stringfellow, for respondent.

HUGHES, District Judge. It appears from the evidence in this case that the schooner arrived at Richmond on the night of the 15th of November, 1881, and went across to the Richmond & Danville Railroad wharves. Her engagement was to notify the consignee of her arrival, but there is no proof that the notice was received by the respondent until the forenoon of the 17th. The allegation in the libel that notice of arrival was given by telephone on the 16th is not proved. The schooner was bound by contract to be, not merely in the harbor of Richmond, but at the usual place of unloading there. In the present instance she was bound to be in the dock at Richmond; that being the usual place of unloading. 1 Pars. Shipp. & Adm. 313, note 1, and Abb. Shipp. Eng. (Ed. 1881) p. 243, note o, and page 244, notes a-c. If she was prevented, after getting into the dock, from securing a fit place for discharging her cargo, by any cause over which she had no control, then the lay days occasioned by the crowded condition of the dock would have been chargeable to the consignee. The consignee, not the ship, is answerable for delay from the crowded condition of the harbor. But there does not seem to have been any delay in this case from this cause. The schooner came into the dock about 3 p. m. on the 17th, and the unloading began the next morning at 8 a. m.,—that is to say, within 24 hours after arrival and notice to consignee; for, supposing that notice was given on the morning of the 17th, the consignee was not bound to commence unloading within the 24 hours recognized by the contract. The unloading seems to have been delayed a day and a fraction of a day beyond the period provided for in the contract. The weight of evidence is mostly in favor of the proposition that this delay was not caused by an insufficiency of carts provided by the consignee to receive the coal, but was caused by the coal being delivered from one only of the two hatches of the schooner, and not from both hatches. This was the fault of the schooner, and not of the consignee. I do not think the schooner is entitled to recover demurrage in this case, and the libel must be dismissed, with costs.

DAVIS et al. v. COUNTY COURT OF RANDOLPH COUNTY et al.

(Circuit Court, D. West Virginia. August 4, 1898.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

A cause is not removable unless all the parties on one side are citizens of different states from those on the other side, or unless there is a separable controversy wholly between some of the parties who are citizens of different states, in which the question at issue can be fully determined between them.

2. SAME—SUIT FOR INJUNCTION.

A suit by taxpayers of a county against the county court and a citizen of another state, to restrain the court from erecting a new court house, and the other defendant from executing a contract to build it, entered into with the county court, is not removable by the nonresident defendant on the ground that there is a separable controversy, as any injunction against either defendant necessarily operates upon both.

C. W. Dailey, for plaintiffs.

J. L. Wamsley and E. D. Talbott, for defendants.

JACKSON, District Judge. This is a bill filed by James Henry, John P. Davis, and R. D. Darden, who are citizens, residents, voters, and taxpayers of the county of Randolph, in the state of West Virginia, who sue on behalf of themselves and all of the taxpayers of the said county, against the county court of Randolph county, Patrick Cricard, a commissioner and president of said court, J. W. Gooden and Omar Conrad, commissioners, who are all citizens and residents of Randolph county, W. Va., and John P. Conn, a citizen and resident of the state of Pennsylvania. The purpose and object of this bill is to restrain the county commissioners from the erection of a new court house at Beverly, in Randolph county, and to restrain the defendant Conn from executing a contract entered into with him by the county court on the 6th day of June, 1898, for the construction and erection of the court-house building, as provided for in the contract.

It is not necessary for the court at this time to consider the various questions involved and raised by the pleadings in this case. It appears from the bill that the plaintiffs and the defendants are all citizens of West Virginia, except the defendant Conn, who is a citizen and resident of Pennsylvania. The defendant Conn filed his petition in the circuit court of Randolph county for the removal of this cause to the United States circuit court for this district, claiming that he had a separable controversy between himself and the plaintiffs. It is now heard upon a motion to remand the cause upon the ground that it is not a cause that can be removed into the United States court, for the reason that there is no separable controversy between the plaintiffs and defendants in this case. I was inclined to think, when I first heard this motion, that the relief sought by the defendant Conn could be had independent of his co-defendant, the county court, but upon further reflection I have reached the conclusion that the defense of the defendants is one and inseparable, and that the case cannot proceed, as against one of the defendants, without the presence of the other.

In the case of Dickinson and others, citizens and taxpayers of the county of Kanawha, in the state of West Virginia, against the county court of Kanawha county and the Vulcan Road-Machine Company, a Pennsylvania corporation, a similar question was raised, which was decided by this court. The county court of Kanawha county had entered into a contract with the Vulcan Road-Machine Company for the erection and construction of two bridges in the county of Kanawha, as provided for in the contract. The case was removed from the circuit court of Kanawha county to the United States court, sitting at Charleston. A motion was made to remand the case, upon the ground that there was no separable controversy between the plaintiffs and any of the defendants. After mature consideration, I remanded the case, for the reason that the plaintiffs and one of the defendants, the county court, were citizens and residents of the same state, and there did not exist such a separable controversy between the plaintiffs and defendants as would confer jurisdiction upon this court. (Not reported.)

This ruling would seem to be a precedent to control my action upon this motion. It has been held that in an action by resident taxpayers against county officials and bondholders, one of whom is a nonresident, to restrain the collection of a tax levied for the payment of illegal bonds, and to cancel the bonds, there is no separable controversy with relation to the county officials and bondholders. *Anderson v. Bowers*, 40 Fed. 708. This case seems to me to rule the point at issue upon this motion. It is very clear that, unless all the parties on one side of the controversy are citizens of different states from those on the other side, or that there is a separable controversy wholly between some of the parties, who are citizens of different states, in which the question at issue can be fully determined as between them, then the case cannot be removed. *Hyde v. Ruble*, 104 U. S. 407; *Ayre v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90; *Coney v. Winchell*, 116 U. S. 227, 6 Sup. Ct. 366; *Safe-Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32; *Brooks v. Clark*, 119 U. S. 503, 7 Sup. Ct. 301.

The plaintiffs in this bill seek to restrain the defendants from the erection of the court house under the contract before referred to. To make the injunction now existing effective, it should operate against both defendants, who are the only parties to the contract. The court could not dissolve it as to Conn, the petitioner, and at the same time permit it to stand as to his co-defendant the county court. Such action would be unjust to both of the defendants, and possibly result in expensive litigation.

The relief asked for by the plaintiffs in their bill grows directly out of the contract between the two defendants, and it is not perceived what decree the court could enter in this case, if it retained it, that would not operate upon both of the defendants. It follows that, as the county court is a citizen of the same state as the complainants, the suit is not removable, and the case will be remanded, for the reasons assigned, to the circuit court of Randolph county.

ATLANTIC & V. FERTILIZING CO. v. CARTER et al.¹

(Circuit Court, E. D. Virginia. July, 1882.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

The provision in Rev. St. § 639, allowing the removal of a part only of a suit, was repealed by the act of March 3, 1875, § 2, which provides for the removal of the whole suit when there is a separable controversy, the parties to which have a right of removal.

This was a creditors' bill filed in the circuit court of Loudon county, Va., by the Atlantic & Virginia Fertilizing Company, in behalf of itself and such other lien creditors of Benjamin F. Carter as might choose to come in. The defendants were Benjamin F. Carter, Rebecca M. Carter (his wife), Edward Nichols (substituted trustee), B. P. Noland (trustee), the Virginia Marble Company, Phœbe Hoge, and R. H. Dulaney.

The purpose of the bill was to ascertain the liens on a tract of some 400 acres of land belonging to the defendant Carter, and to procure a sale thereof for the satisfaction of the same. The bill showed that, besides various liens therein set out, the defendants Carter and wife had executed a deed conveying to the defendant the Virginia Marble Company all the marble, sandstone, etc., contained in the said tract, with a perpetual right of entry thereon for the purpose of quarrying and removing the same, subject, however, to a defeasance or forfeiture of said rights on the abandonment of the work by the said company, and its failure to prosecute the same for two years consecutively. The bill charges that a forfeiture had occurred by default of the said company for the period specified.

In April, 1881, complainant filed an amended bill, making one William Wright a party defendant, and alleging that he claimed to have an interest in and possession of about 100 acres of the said land under a deed of lease from the Virginia Marble Company. The amended bill asked that the rights of both the Virginia Marble Company and Wright, as its lessee, be declared forfeited, that possession of the lands be surrendered to Carter, and that the same be sold, as prayed in the original bill, free from any claims of the lessee and sublessee. After further proceedings in the cause, the defendant Wright on May 1, 1882, filed a petition and bond for the removal of the cause to the proper federal court, alleging that he was a citizen of Indiana, and that the other parties to the suit were citizens of Virginia, that he had expended fully \$25,000 on the property, and that the suit could be determined, so far as concerned his rights, without the presence of the other defendants. The petitioner prayed "that the said suit, so far as your petitioner's rights are involved, may be removed for trial into the circuit court of the United States for the Eastern district of Virginia; * * * such removal being in pursuance of section 639 of the Revised Statutes of the United States," etc. This petition was granted by the state court, and that part of the cause involving the petitioner's rights was accordingly removed into this court. The matter is now heard on complainant's motion to remand. In support of the motion it was contended (1) that Wright, being but a subtenant, was bound, on common-law principles, by the acts and forfeitures of his landlord, the Virginia Marble Company, and could have no standing in court independently of it, and that the question whether a forfeiture had been incurred was still in the state court; (2) that Rev. St. § 639, was no longer in force, so as to authorize the removal of part only of a suit.

O. P. Janney, for petitioner.

John M. Orr and Payne & Alexander, for complainants.

¹ This case has been heretofore reported in 4 Hughes, 217, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

HUGHES, District Judge. I do not think the first point of complainant is well taken. This is a court of equity. The original suit is a cause in equity, and the part of it now here is a controversy in equity. The petitioner, Wright, has, by concession, expended \$25,000 in developing a quarry on the 100-acre tract which he claims to have leased. If there is any forfeiture, it is through his laches. Under such circumstances, objections to a proceeding which are merely technical, and founded upon old principles of the common law, will not be heard to defeat the right of this court to a jurisdiction conferred by law, or the right of a nonresident to remove his controversy to this tribunal, if authorized to do so by express statutes of the United States. But I do not think the controversy is properly here. That part of the act of congress which was passed in 1866, and which now stands as section 639 in the Revised Statutes, is no longer in force, to authorize the removal of a part only of a suit from a state into a federal court, leaving the remainder in the court in which it originated. It was in that respect repealed by the second clause of the second section of the jurisdictional act of March 3, 1875, which authorizes the removal of the whole suit in any case in which there is a controversy to which citizens of different states are parties actually interested. See Supp. Rev. St. p. 174. This meaning seems apparent enough from the tenor of the clause. But, if it were before doubtful, the language of the supreme court of the United States in *Barney v. Latham*, 103 U. S. 212, settles the question, which was as follows:

"While the act of 1866 in express terms authorized the removal only of the separable controversy between the plaintiff and the defendant or defendants seeking such removal, leaving the remainder of the suit, at the election of the plaintiff, in the state court, the act of 1875 provided, in that class of cases, for the removal of the entire suit. That such was the intention of congress is a proposition which seems too obvious to require enforcement by argument. While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclusion that congress intended to leave any part of a suit in the state court where the right of removal was given to, and was exercised by, any of the parties to a separable controversy therein. Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the federal court, and leaving others in the state court, for determination. It was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue or are sued proper, though not indispensable, parties. Rather than split up such a suit between courts of different jurisdictions, congress determined that the removal of the separable controversy, to which the judicial power of the United States extended, should operate to transfer the whole suit to the federal court."

So, also, in *Hyde v. Ruble*, 104 U. S. 407, the supreme court expressly held that section 639 was repealed by the act of March 3, 1875.

Pursuant to this authoritative exposition of the effect of that clause of the act of 1875 which has been alluded to, the motion to remand must be granted, and that part of the suit which is here be remanded to the state court.

HALL et al. v. GAMBRILL et al.

(Circuit Court, D. West Virginia. August 3, 1898.)

1. POWER TO SELL LAND—WHEN COUPLED WITH AN INTEREST — AGREEMENT FOR COMMISSION.

The fact that a power to sell land authorizes the agent to retain a percentage of the purchase money in payment for his services does not make it a power coupled with an interest, as the interest of the agent is only in the proceeds of the land arising from the execution of the power.

2. SAME—CONSTRUCTION OF INSTRUMENT.

An instrument by which the owner of land authorizes another to sell the same at not less than a stated price, and to retain a percentage of the proceeds in payment for his services, and which further provides that any security taken for deferred payments shall be payable to the owner, who shall execute proper conveyances on receipt of full payment, does not empower the agent to make a contract of sale, without the approval of the owner, which the latter can be compelled to execute.

3. PRINCIPAL AND AGENT—FRAUDULENT CONTRACT BY AGENT—SPECIFIC PERFORMANCE.

A court of equity will not enforce against an owner of land a contract of sale made by his agent under authority given six years before, where the land has greatly appreciated in value meantime, and the agent, without advising his principal of such fact, made the sale for a price grossly inadequate at the time, though within the terms of his original authority.

W. W. Arnett, T. F. Barrett, and R. F. Fleming, for plaintiffs.

F. P. Moats, W. G. Peterkin, and B. M. Ambler, for defendants.

JACKSON, District Judge. This is a bill filed by Cyrus Hall and Ray C. Coulter against J. H. Gambrill and Robert G. Gambrill to compel the defendant J. H. Gambrill to convey to R. C. Coulter 563½ acres of land in Ritchie county, W. Va., which Hall, as the agent of Gambrill, sold to Coulter under a power of attorney executed by J. H. Gambrill to Cyrus Hall on the 6th day of September, 1889; claiming that under the provisions of the contract he had an interest coupled with a power,—which contract reads as follows:

"This agreement, made and entered into by and between James H. Gambrill, of the county of Frederick, in the state of Maryland, of the first part, and Cyrus Hall, of the county of Kanawha, in the state of West Virginia, of the second part, this 6th day of September, in the year eighteen hundred and eighty-nine, witnesseth, that the party of the second part agrees and binds himself to sell certain tracts of land for the said party of the first part; the same being all that residue of a certain tract of land purchased by the said J. H. Gambrill at a sale made by George Loomis, special commissioner of the circuit court of Ritchie county, W. Va.; it being the same tract of land, or a part thereof, purchased by Charles Gambrill from Virginia S. Hall, administratrix of Smith C. Hall, deceased; also, 207 acres purchased by Chas. Gambrill from David McGregor, and conveyed to him by deed now of record in the clerk's office of the county court of said Ritchie. To the said deed, reference is here made. The said sales to be made for not less than five dollars (\$5) per acre; the payments to be not less than one-third cash, and the deferred payments to be secured by good and sufficient liens, with notes as collateral security; the same to bear interest from the day of said sale. The said party of the second part hereby agreeing to perform all necessary work in the sale of said lands, draw all deeds of conveyances, mortgages, and notes, in legal and proper form, and for which to receive, as compensation for said services, twenty per cent. (20 per cent.), to be received of the net receipts of said sales, but the 20 per cent. to be received only as the purchase

money is collected, unless the party of the second part shall sell the lands for one-half cash. Then and in that event he is to receive his 20 per cent. commissions (that is, the whole amount) out of the one-half cash received, but does not bind himself to collect all deferred payments, if the party of the first part desires it. It is hereby agreed and understood that all mortgages, notes, and securities are to be made payable to the said James H. Gambrill, or his order, who will, when the same have been paid, and the purchase money has all been fully paid, execute, with himself and wife, good and sufficient deeds of conveyances to said lands to the purchasers of the said lands; 20 per cent. to be for all legal services heretofore rendered in defense of title to said lands, or that may be rendered. In testimony whereof, witness our hands and seals the day and date first above written."

The answer of Gambrill to the bill contests the construction of the contract as claimed by Hall, and denies his right to execute a contract as his agent without first submitting the contract to him. It also alleges that Hall conspired with Coulter to sell him this land, in which Hall, after the sale, was to have a contingent interest. It also alleges that the land was sold far below its value; that though Hall had been the agent ever since September 6, 1889, he had never succeeded in disposing of or selling the land, and that in the early part of the year 1895 oil developments suddenly sprung up in close proximity to these lands, by which the value of them was greatly enhanced, and they were sought after, and claimed to be oil territory; that Hall well knew this, and that he had made overtures to certain parties to purchase the land from him, as agent, with the understanding that the land should be purchased in the name of his son, and that there would be a bargain in it. It is claimed that all of Hall's acts in this matter are fraudulent. Cross bills were filed in this case by J. H. Gambrill and Robert Gambrill against Cyrus Hall and Ray C. Coulter to set aside the contract entered into between Hall and Coulter, and for other purposes, to which Hall and Coulter filed separate answers.

In the view the court takes of this case, it is unnecessary at this time to consider any question except the one which arises upon the construction of the contract. That question is vital, as fixing the scope of power granted to Hall by Gambrill under the power of attorney made on the 6th day of September, 1889. It does not appear that Gambrill ever signed any other paper authorizing Hall to sell the land, nor did he ever execute any contract or agreement with Coulter, through Hall, for the sale of the land to Coulter. The only agreement made with Hall was the power of attorney entered into on the 6th day of September, 1889, authorizing him to sell the land, at which time the land was in a state of wilderness, and before its value had increased. It is claimed by the plaintiffs in this action that this power of attorney executed by Gambrill to Hall conferred a power upon Hall, coupled with an interest. An inspection of the power of attorney shows that Hall was authorized to sell the land at a sum not less than \$5 per acre,—one-third in cash, and deferred payments to be secured by good and sufficient liens. Hall was to perform all necessary work in the sale of the land, draw deeds of conveyance and mortgages, and to receive as a compensation 20 per cent. of the net receipts of said sales, which was to be paid him as the purchase money was collected. The notes to secure the deferred payments were to

be made payable to Gambrill, and, in the event a mortgage was taken upon the land, it also was to be made payable to him. I do not concur in the position of Hall, that by the terms of this agreement he acquired an interest, coupled with a power, which authorized him to sell this land, and to compel Gambrill, the owner, to execute the contract made by him. It is very clear to my mind that at the time the contract was entered into the object and purpose of the parties were to sell the land at any fair consideration that could be obtained for it, but under no circumstances was it to be sold for less than \$5 per acre. The fact that Hall was to be paid a commission of 20 per cent. out of the proceeds arising from the sale of the land did not vest in him an interest in it. It was simply a contingent commission, which he was entitled to whenever a sale was made by him under the power of attorney; but the power of attorney, upon its face, expressly declares that the notes and securities taken in payment of the deferred installments were to be made payable to the said Gambrill, or his order,—stipulating that, when all the purchase money had been paid, the said Gambrill and his wife were to execute good and sufficient deeds of conveyance of said land to purchasers. This clause in the power of attorney clearly shows that Gambrill never intended to part with his title to the land, except upon terms satisfactory to himself. He did not, by the terms and conditions of the power of attorney, place the property in the hands of Hall, to sell upon any terms that he (Hall) should contract for, but the whole scope of the power of attorney shows that the contract must be made with Gambrill's approval before he would execute a deed. Hall could not make a deed for the land, or any portion of it, for the reason that he had nothing in the land to convey, having no interest of any kind in it. The words employed in the contract do not seem to be susceptible of any other meaning. The contract confers upon Hall a power to sell, but it does not grant an interest in the land to be sold by him. To create an interest of this character, the power must be irrevocable. By the terms of this contract, there is no actual transfer of any interest in the land. If, instead of agreeing to pay a commission in the event of a sale of the land, Gambrill had conveyed an undivided interest in the land to Hall, he would then have had an interest in it, not contingent, but actual; but he did not convey any interest in it. It was said by Judge Marshall in the case of *Hunt v. Rousmanier's Adm'r*, 8 Wheat. 174, that:

"The power must be ingrafted on an estate in the thing. * * * 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But, if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. * * * The power ceases when the interest commences, and therefore cannot, in accurate law language, said to be coupled with it."

Such is undoubtedly the law. Applying the principle as stated by Chief Justice Marshall,—the power ceases when the interest commences, and therefore cannot be coupled with it,—can it be said that Hall had any interest in the contract until he exercised the power to sell? Clearly, he had no interest that would accrue to him until after the sale was made. His commissions were the only interest he had,

under the contract, and the same were contingent upon a sale. There was, under the power of attorney, no actual transfer of any interest in the land by Gambrill to Hall. He was a mere agent of Gambrill to negotiate a sale, subject to the approval of Gambrill; and, when the sale was negotiated and approved, then he was entitled to his commission for making the sale, and not before. A failure to sell before a revocation of the power would terminate all interest he had under the contract, which clearly shows that his interest was contingent on being able to sell the land, and was in no sense an interest running with the land.

Other questions which arise under this contract might be referred to,—more particularly as to whether or not the power of attorney from Gambrill during the six years subsequent to September, 1889, had not been revoked before the pretended contract made by Hall with Coulter was executed. As to that question, it is unnecessary to express an opinion. It, however, appears to me that the equities of the case are clearly with Gambrill. Hall has this property, under the power of attorney, from 1889 to 1895, before he succeeded in making any negotiations for the sale of it. He was paid from time to time sums of money amounting to nearly \$200 for his attention to the property. In the early part of the winter of 1895 it became apparent, by the development of the oil fields, that this land was likely to be valuable oil property. It was then, for the first time during the six years that he had authority to sell the land, that he succeeded in entering into any negotiations for the sale of it. He never informed his principal as to the condition of the country, and the enhancement of the value of the land, and the proximity of it to the oil fields; and he negotiated a sale of the land, as appears from the evidence, at a price far below its value. His agency commenced about six years before the land was sold, and, after the land had greatly increased in value, Hall undertook to sell it, without ever informing his principal of the increased value of it. A court of equity will not lend its aid to enforce the execution of a contract which is unjust, or deprives either party of his just rights. At the time Gambrill authorized Hall to sell this land, and fixed the minimum price at \$5 per acre, it was in a forest condition; but six years afterwards the land had increased in value to nearly \$100 per acre, and it then became the plain duty of Hall to notify his principal of the increase in value of the land, before he attempted to sell it, and, if he failed to do this, it would be an utter disregard of his duty. In the case of *Proudfoot v. Wightman*, 78 Ill. 553, it was held, upon a bill to enforce the specific performance of an alleged contract for the sale of some lots in Cook county, Ill., that where a party had been authorized in 1865 to sell the premises at \$150 per acre, and in 1868 the land had increased to the value of \$500 per acre, it was the plain duty of the agent to notify his principal of the increased value of the land, before attempting to sell, and if this duty was disregarded, and an attempt made to sacrifice the property, it would be a fraud upon the rights of the principal, which a court of equity could not tolerate. The case cited is almost parallel with the case at bar, and would seem to be conclusive of the questions at issue arising upon the contract in this case. For the reasons as-

signed, I am of opinion that the bill in this case should be dismissed, with costs, and that the relief prayed for in the cross bill should be granted.

FAYERWEATHER et al. v. RITCH et al.

(Circuit Court, S. D. New York. July 18, 1898.)

1. PLEADING JUDGMENT.

When what is decided in one case becomes material to be ascertained in another, it may be set forth and shown by allegation and proofs outside the record, which are not inconsistent with or contrary to the record.

2. CONCLUSIVENESS OF JUDGMENT.

In an action in the supreme court of New York between the beneficiaries under a will and the executors, the next of kin, who claimed that releases of their interest in the estate were procured by fraud on the part of the executor, were made defendants. The judgment of the special term for plaintiffs against the executors recited that the next of kin "recover their costs to be taxed, together with the sum of \$900 as an extra allowance," without any statement of facts found as required by Code Civ. Proc. § 1022, which provides that, where such statement is omitted, the general term, in an appeal upon a case containing exceptions, shall review all questions of fact. The appeal to the general term was not upon a case containing exceptions, and the court imputed that the issue of fraud in obtaining the release had been determined by the trial term, and held that there was not sufficient preponderance of evidence to render such determination erroneous. Such decision was affirmed in the court of appeals. *Held*, that, unless the issue of fraud in obtaining the releases was in fact tried and determined, such adjudication was not conclusive upon the next of kin, in an action by them against the executors to recover the portion of the estate so released.

3. DUE PROCESS OF LAW.

In an action between beneficiaries under a will and the executors, the next of kin, who claimed an interest, on the ground that releases of their interest were obtained by fraud, were made defendants. The special term decided the case upon grounds not involving this issue of fraud, and without passing upon that point. The general term decided the case, on appeal, without any finding as to that point, and the court of appeals affirmed the decision upon matters of law only. *Held*, that the rights of the next of kin had been decided without due process of law.

Roger M. Sherman, for plaintiffs.

C. N. Bovee, Jr., and John E. Parsons, for defendants.

WHEELER, District Judge. This suit is brought by the plaintiffs, citizens of Iowa, against the defendants, Ritch, Bulkley, and Vaughan, of New York, to reach assets of the estate of Daniel B. Fayerweather, late of New York, alleged to be now in the hands of the defendants as executors or trustees, and to belong in part to the plaintiffs as next of kin, and has been heard on demurrer to the bill. By a law of New York passed April 13, 1860 (Laws 1860, p. 607, c. 360):

"No person having a husband, wife, child or parent shall by his or her last will and testament devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more."

According to the allegations of the bill, Mr. Fayerweather died leaving an estate of about \$6,000,000, a widow, and these next of kin, and a will and codicils devising and bequeathing the residue of his estate, after several specific bequests, to these defendants, and leaving writings, separate from the will, by which the defendants were to pay over the residue to numerous colleges and charitable institutions; that the will and codicils have been proved and established; that the devise or bequest of more than one-half his estate to such institutions was within the prohibition of this law of the state of New York; that the shares of next of kin in residue of the half as so attempted to be disposed of, after lawful devises and bequests, belonged to the plaintiffs; that, by concealment and misrepresentation of these defendants, the plaintiffs were induced to release their interests in the estate; that a suit has been had in the courts of the state in which their shares, with the rest of this residue of the estate, have been decreed to the colleges and charitable institutions, notwithstanding the fraud in procuring these releases; and that this judgment is inoperative against them, because this issue of fraud was not there tried, and because the proceedings which were had did not constitute due process of law.

As by that law the devise or bequest would "be valid to the extent of one-half and no more" of the estate, it would seem to be apparent that, but for the releases, the plaintiffs would be entitled to their shares, respectively, in the residue of the half of the estate remaining in the hands of these defendants as executors or trustees, so undisposed of; and that if the releases are void, and have so been from the beginning, for the fraud and concealment alleged in procuring them, the plaintiffs are still entitled to their shares in this residue of the estate, and they still have a right to proceed for the recovery of their shares in this court, as citizens of a different state from the defendants, and to have the issue as to the validity of the releases tried here, if it has not been tried and determined at all, or by due process of law, elsewhere. So the question made on this demurrer is whether the proceedings in the state court, as set forth, amount, in view of the allegations of the bill in respect to them, to an adjudication that is final and conclusive as to the existence and force of the releases.

The suit appears to have been commenced in a supreme court of the state by the trustees of Amherst College, and those of two other colleges, against these defendants Ritch, Bulkley, and Vaughan as executors and trustees, and against these plaintiffs, among others, as claimants, and to have ended in the court of appeals. The proceedings through a special term are made a part of the bill; the rest are left to appear as set forth by allegation. The complaint, after alleging the will, the codicils, the probate, and the writings, by which the defendants would be bound to pay over to those and other colleges the residue of the estate, further alleged that the plaintiffs here "claim to have some interest in the said residuary estate as next of kin," and prayed that it be adjudged and decreed that all of said residuary estate devised and bequeathed to the defendants Ritch, Bulkley, and Vaughan, as executors and trustees, except the par-

ticular bequests, was then held by those defendants in trust for those plaintiffs there, and the several institutions mentioned, and, further, that the ultimate rights of those plaintiffs should be determined by the judgment in the action, in accordance with the allegations of the complaint. The plaintiffs here appeared as defendants there, and set up the fraudulent obtaining of the releases, and alleged that they were not bound thereby, and prayed that the defendants Ritch, Bulkley, and Vaughan, as executors and trustees, might be required to account to them for their shares in the residue of the estate, after paying over the specific bequests.

When what is decided in one cause becomes material to be ascertained in another, it may be set forth and shown by allegations and proofs dehors the record, which are not contrary to nor inconsistent with the record. *Miles v. Caldwell*, 2 Wall. 35. And upon this demurrer the allegations of the bill are to be taken as true when not contrary to, nor inconsistent with, the record of the proceedings as set up. The cause appears, from the proceedings, to have come on to be heard before the court at special term, and, as to the decision there, the bill alleges:

"And said court thereupon made and rendered its decision without considering, passing upon, or including in judgment the said issues, and omitted to decide upon these complainants' right to the affirmative relief by said answer prayed in respect to said releases."

The decision filed was this:

"The grounds upon which the issues have been decided are that the defendants Thomas G. Ritch and Henry B. Vaughan, for themselves and on the part of Justus L. Bulkley, promised Daniel B. Fayerweather, now deceased, and induced him to believe, that if he would make them and the defendant Justus L. Bulkley residuary legatees of his estate, as provided in the codicils to his will, dated December 13, 1884, and November 15, 1890, the said residuary legatees would sell and convert said residuary estate into cash, and divide the same equally, share and share alike, among the twenty corporations mentioned in the ninth paragraph of the said Daniel B. Fayerweather's will, dated October 6, 1884, including the plaintiffs, after paying \$100,000 to the Northwestern University; and that the said Daniel B. Fayerweather made the said Ritch, Bulkley, and Vaughan his residuary legatees in and by the said codicils in reliance upon the said promises and inducements, and died leaving the said Ritch, Bulkley, and Vaughan his residuary legatees in the belief so induced by them that they would sell, convert, and distribute the residuary estate as aforesaid; and that the said Ritch, Bulkley, and Vaughan have attempted to dispose of the said residuary estate in violation and disregard of the said promises. And the court does hereby direct that judgment be entered upon the issue of this action that the residuary estate devised and bequeathed to the defendants Ritch, Bulkley, and Vaughan by the said last will and testament and codicils of Daniel B. Fayerweather, deceased, was received and is held by them in trust for the plaintiffs herein, and the several institutions named in the ninth paragraph of the said will, and for the Northwestern University in the sum of \$100,000; that the said residuary estate, except that part thereof necessary to provide for the payments mentioned in the third paragraph of the plaintiffs' prayer for relief, was received and is now held by the said defendants in trust to sell and convert the same into cash, and to divide the same, giving to the Northwestern University \$100,000, with its just and equitable proportion of the income, earnings, and interest accrued upon the trust fund, as between it and the institutions named in the ninth clause of the will, and the said several corporations mentioned in the ninth paragraph of said will the remainder thereof, share and share alike."

The judgment or decree entered thereupon, after reciting the filing of the pleadings of the respective parties, the taking of proofs on their behalf, and due deliberation thereon had, and that a decision had been duly made and filed decreeing the residue to the institutions mentioned, proceeded as to these plaintiffs:

"Seventh. That the defendants John B. Reynolds and Morris R. Beadsley, as executors, and Mary W. Achter and Emma S. Fayerweather, recover from the defendants Thomas G. Ritch, Justus L. Bulkley, and Henry B. Vaughan, as trustees, their costs to be taxed, together with the sum of \$900 as an extra allowance to be paid out of the trust fund."

This judgment or decree indicates rather that these plaintiffs were dismissed with costs, as not proper parties, than that the validity of the releases was at all passed upon, and the allegations of the bill do not appear to be contrary to, nor inconsistent with, it in this respect. The bill alleges an appeal to the general term of that supreme court, and that the judgment at special term was there affirmed. 31 N. Y. Supp. 885.

The statute under which the case was tried at special term and the appeal had to the general term appears to be section 1022 of the Code of Civil Procedure of the state as amended by chapter 688, Laws 1894, which provides that:

"The decision of the court, or the report of a referee, upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon; or the court or referee in deciding the issues may file a decision stating concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form a part of the judgment roll. In an action where the costs are in the discretion of the court, the decision or report must award or deny costs, and if it awards costs it must designate the party to whom the costs to be taxed are awarded. Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the general term of the court in which the action is pending shall review all questions of fact and of law and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to."

The bill further alleges in respect to the appeal that it was taken "to the general term of said supreme court sitting as a court for the correction of errors, and not exercising any original jurisdiction," without stating that the appeal was upon a case containing exceptions, and that the general term held that the right of the parties to the property and estate did require the consideration of said issues, and that it became the duty of said court to require and order that said issues should be in fact considered, passed upon, and included in judgment by the trial court, and that:

"Nevertheless said court at said general term did not so require or order, but by various fictions of law imputed to said trial term and court below that it had determined said issues, and had decided in favor of the plaintiffs in said action, contrary to the truth and fact, and thereupon pretended to adjudge and determine, as such court for the correction of errors, that there was not sufficient preponderance of evidence to support the asserted invalidity of said releases to render such imputed determination of said trial court erroneous as matter of law, but that such imputed determination was supported by evidence sufficient to relieve the same from the assignment

of error in so deciding." "It was competent for said general term to have exercised an original jurisdiction and to have adjudged said issues, and thereupon to have modified said judgment so as to include the actual determination thereof; but said general term did not exercise its power, but confined its action wholly to the consideration of errors in the record."

As the proceedings are not set out in the bill, nor brought forward by answer or otherwise, these allegations, so far as they are consistent with the law, must also, on this demurrer, be taken to be true. The statute does not seem to require that an issue of fact in a case should be tried before decision, unless the appeal is upon a case containing exceptions, and this judgment may have been properly affirmed without trying the issue as to these releases, and thereby room have been left, under the law, for the judgment or decree to have been rendered, and still these allegations be true.

The bill further alleges that on appeal the court of appeals affirmed this decision of the general term (36 N. Y. Supp. 376) upon matters of law merely, and did not try that issue. As to this Judge Vann said (Trustees, etc., v. Ritch, 151 N. Y. 382, 45 N. E. 876):

"We are of the opinion, therefore, that where the decision of the special term does not state the facts found, and the judgment entered thereon has been affirmed by the general term, upon an appeal to this court all the facts warranted by the evidence, and necessary to support the judgments below, are presumed to have been found. Hence, upon such an appeal, we have no more control over the facts than we have when specific findings are made by the special term and affirmed by the general term. This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin, in procuring the releases, out of the case; for it cannot be said, on the record before us, that evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law."

As that case is made to appear from the allegations of the bill as admitted by the demurrer, the judgment or decree was entered without the issue as to the validity of the releases having been by either of the courts at any time tried and determined upon evidence, as a matter of fact. That judgment or decree was not against these plaintiffs for the recovery of money or property, but was against Ritch, Bulkley, and Vaughan for such a recovery of money from them where the rights of the plaintiffs were only collateral; and that recovery, upon the case as made to appear, did not so necessarily involve the decision and determination of this collateral issue as such a recovery of money or property from these plaintiffs themselves would. A general finding and judgment against a party for the recovery of money or of property seem to draw into the judgment, and to conclude all questions which might arise in determining the right of recovery against that party; but, when an outside or collateral issue only is involved, to make the decision upon that conclusive it should appear that this very question was involved and actually decided somewhere in the proceedings. *Cromwell v. Sac Co.*, 94 U. S. 351. Of course, this court cannot review the decisions of any court of the state having concurrent jurisdiction, or otherwise having jurisdiction, on account of any supposed error or irregularity in the proceedings or decision or judgment. Accordingly, it cannot with any propriety inquire into any of the pro-

ceedings in question otherwise than for the purpose of determining whether the issue raised in this case was tried there, or perhaps whether the proceedings there afforded opportunity, by due process of law, for the trial of the issue, if a trial was had.

An inspection of the proceedings, such as has been afforded and had, and as they must be viewed on this demurrer, fails entirely to show that the issue of fraud in the execution of the releases was, by either of the courts in which the proceedings were pending, in any wise tried and determined. It does not appear to be claimed here that such issue is shown to have been tried in any other way than as the determination of the issues in favor of the plaintiffs there would draw into them the determination of all of the rights of these plaintiffs here, as they were made and became defendants there. It is said that the judgment was the same as if upon a general verdict against these plaintiffs, and that it involved the determination of those issues as to these plaintiffs here as defendants there, as well as against the defendants Ritch, Bulkley, and Vaughan, defendants there, as executors and trustees. That suit was not, however, an interpleader by Ritch, Bulkley, and Vaughan, according to the course of equity procedure, where the claimants would be brought in and required to litigate their claims between themselves, respectively, but was for the recovery of property of those defendants only, and the rights of these plaintiffs were only collaterally involved as a defense excluding the rights of the plaintiffs there in the determination of the case against the defendants there of whom a recovery was sought. This issue only so involved would not seem to be conclusive upon the rights of the plaintiffs, unless the proceedings should show clearly that it was in fact tried. As the proceedings, in the light of the allegations concerning them, do not so show, these plaintiffs do not appear now to be concluded by that judgment.

Again, the plaintiffs would not be so concluded unless they had an opportunity to try the issue upon which their rights depended in a proceeding which would amount, as instituted and carried forward, to due process of law. If the case had been tried, as it is alleged to have been tried, without allowing an answer by these plaintiffs setting forth their rights, and an opportunity to bring evidence to support it, probably no one would now claim that they were concluded by the judgment. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841. As the proceedings went forward, the special term decided the case upon a ground which did not involve the determination of this issue of fraud in the procurement of the releases, and that court appears not to have in any way passed in any manner upon the question. The general term is alleged to have decided the case upon other grounds without any finding upon that question, and this allegation is admitted by the demurrer. The court of appeals appears merely to have affirmed the decision of the general term upon matters of law only. This alleged course of proceeding, which must be taken to be that had, left these plaintiffs without any opportunity to have this question tried in either court. If the course of procedure cut off the right to try the question raised by the

answer, it would be as much short of due process of law as the decision of a case involving such a question without allowing an answer would be. Demurrer overruled; defendants to answer over by September rule day.

RANDLE et al. v. ABEEL.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1898.)

No. 665.

RAILROADS—REGULATION BY STATE COMMISSIONERS—REFUNDING OF CHARGES.

A provision in an order made by the railroad commissioners of Texas, whereby a certain railroad company "is authorized to refund its own and the charges of" a certain other company, under the condition prescribed by the regulations in force, *held* to be merely permissive, and not to give an absolute right to have such charges refunded.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This is an appeal by G. H. Randle, a resident citizen of McLennan county, Tex.; George H. McFadden, a resident citizen of the city of Philadelphia, in the state of Pennsylvania; John H. McFadden, a resident citizen of Liverpool, England; and J. Frank McFadden, of said city of Philadelphia and the state of Pennsylvania,—from a final decree of the circuit court of the United States for the Eastern district of Texas, at Galveston, wherein the said appellants were interveners, against Alfred Abeel, receiver of the Waco & Northwestern Railroad. In appellants' petition in intervention they allege and set up that on August 11, 1894, the railroad commission of Texas, under and by virtue of the laws of the state of Texas, adopted, fixed, and established a schedule of rates for local and joint application on cotton in bales from and to all points in the state of Texas, known and called "Commodity Tariff No. 1," substantially as follows:

"To apply between stations east, north, and west of and including Houston:
"Distance. Rates.

* * * * * 59"

Over 125 miles.
"Fourth. The rates from points east, north, and west of Houston to Galveston * * * shall be made by adding 6 cents per 100 pounds to the rates from the same points to Houston."

—Whereby the rate so fixed was 65 cents per 100 pounds from any and all points on said Waco & Northwestern Division and said Texas Central Railroad to Galveston, Tex.; and on said day, by said tariff, said commission made and established among others, the following rules and regulations:

"Fifth. For the purpose of concentration, cotton may be shipped at full tariff rates to compress stations, distant from all points on the Gulf coast 100 miles or more of railroad mileage, with the following adjustment of freight charges before and after such concentration, provided that there shall be no compress in operation at original shipping point, or at a station intermediate between such point and the point at which it is desired to concentrate: (1) Each railroad company shall refund only its own charges for the service of concentration. (2) The entire charge for concentration shall be refunded when the point of concentration is directly intermediate between shipping point and final destination, as reached by the line on which such cotton originates, and the rates from original shipping points and concentrating point to such destination are the same,"—which said schedule of rates, and which said rules and regulations, went into effect on September 1, 1894, and have continuously since then remained in effect and force. That afterwards, on September 18, 1894, upon the joint application of said Alfred Abeel, receiver, by his general freight agent, J. E. W. Fields, and the Texas Central Railroad Company, by its chief clerk in the traffic department, W.

F. McMullin, the said commodity tariff and the said rules and regulations were amended substantially as follows: "(1) On cotton in bales between Oliver station and Alexander to Waco, the rate shall be 40 cents per 100 pounds. (2) Said roads [Waco & Northwestern Division and Texas Central Railroad] are exempted from the operation of section 1, fifth paragraph, of rules and regulations governing the concentration of cotton; and the Waco & Northwestern is authorized to refund its own and the charges of the Texas Central Railroad, under the terms and conditions prescribed in said sections 2 and 3 of paragraph 5 of rules and regulations of commodity tariff No. 1. On all through business originating north of Oliver station, the mileage rates prescribed in commodity tariff No. 1 shall apply,"—which said amendment went into effect on September 21, 1894, and has continuously since then been in effect and operation.

The interveners, as shippers of cotton, claim a right under these regulations to have the charges for concentration refunded to them, and by their petition seek to recover from the receiver the sum \$7,363.85, being the balance of a much larger sum, part of which had in fact been paid. The cause was referred to a master, who, after hearing the evidence, made an elaborate report, recommending the disallowance of the entire sum as to the intervenor, G. H. Randle, but finding that the firm of George H. McFadden & Bro. were entitled to recover the sum of \$48.30, with interest. Exceptions to the report were overruled by the court, and a decree entered pursuant to the master's recommendations. From this decree the present appeal was taken.

A. C. Prendergast, for appellants.

A. P. McCormick, Geo. Clark, and D. C. Bolinger, for appellee.

Before PARDEE, Circuit Judge, and SWAYNE and PARLANGE, District Judges.

PER CURIAM. The master's report is very elaborate in findings of fact and conclusions of law regarding the intervention of Randle and others. The master specifically finds as follows:

"I find that the special permission given by the railroad commission to the Waco & Northwestern Railroad, upon the joint application of said railroad and the Texas Central Railroad, to refund, in addition to its own, also the charges of the Texas Central Railroad, was not mandatory, but simply permissive, and did not require said Waco & Northwestern to refund the whole of the concentration charges of said two railroads."

This finding is correct, and disposes of the present appeal, rendering it unnecessary to consider other questions raised in the case. The decree appealed from is affirmed.

LOS ANGELES CITY WATER CO. et al. v. CITY OF LOS ANGELES et al.

(Circuit Court, S. D. California. May 31, 1898.)

No. 734.

1. WATER COMPANIES—CONTRACT WITH MUNICIPAL CORPORATION—REGULATION OF RATES.

A provision in a contract between a water company and a municipal corporation that the mayor and common council "shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part, or their assigns," except that they shall not reduce the same below a stated price, refers, not to a right of regulation given the city by the contract itself, but to a power which the city already had, or which might be conferred by legislative action; and, if the city was authorized to make the stipulation in respect to minimum rates, neither

It nor the legislature could thereafter lawfully reduce rates below the minimum.

2. MUNICIPAL CORPORATIONS—EXTENT OF POWERS.

Municipal corporations possess the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved against the corporation.

3. SAME—CONTRACTS AS TO WATER WORKS.

Charter authority "to provide for supplying the city with water" gives the city power to contract with a water company in respect to rates to be charged to consumers.

4. SAME.

Even if the power of a city to regulate water rates is legislative or governmental, and not a special legislative grant for private purposes, the city may still, by contract, abridge such power, under an implied as well as an express legislative grant.

5. SAME—REASONABLENESS OF CONTRACT.

In determining the question whether a contract between a city and a water-works company was reasonable, the contract should be construed, not in the light of subsequent developments and newly arising conditions, but with reference to the conditions surrounding the parties at the date of the contract.

6. SAME—LEASE OF WATER WORKS.

A contract by the city of Los Angeles in 1868 to lease its water works for a period of 30 years, in consideration of a rental of \$1,500 annually, and the cancellation of certain large claims of the lessees against the city,—the lessees to furnish water for all public and municipal uses free of charge, and to extend pipes and mains to answer all the needs of the inhabitants,—held, a reasonable contract, binding upon the municipality.

7. SAME—POWER TO REGULATE WATER RATES.

The California statute of May 3, 1852 (St. Cal. 1852, p. 171), providing for the incorporation of water companies, and which contains a provision preventing any municipality from depriving itself, by contract with such corporation, of the power to regulate water rates, does not affect the power of a municipality to limit its rights in this respect by a contract granting a water-works franchise to individuals, as distinguished from a corporation organized under the act; nor is its power to so bind itself affected by the fact that such individuals intend to organize a corporation, and assign their franchise to it.

8. SAME—LEGISLATIVE RATIFICATION OF CONTRACT.

Whatever a legislature may originally authorize a municipal corporation to do, it may, if the state constitution interposes no obstacle, subsequently ratify; and such ratification is equivalent to an original grant of power, operative, by relation, as of the date of the thing ratified.

9. SAME—DECLARATIONS OF MUNICIPAL OFFICERS.

A municipal corporation is bound by the declarations of its officers, where such declarations accompany, and are explanatory of, an act done by the officer in the scope of his authority.

10. SAME—ESTOPPEL.

Where, by contract between a city and a water-works company, the right of the company to take water from a certain river is limited so as not to exceed a specified amount without the previous consent of the city, a subsequent consent of the city to the taking of a larger quantity cannot be withdrawn during the life of the contract, after large expenditures have been made by the company in reliance upon such consent.

11. SAME—ORDINANCE REDUCING WATER RATES—ACQUIESCENCE OF COMPANY.

Where a city, by ordinances passed each year, assumes to regulate the rates to be charged by a water company, acquiescence by the company in the reduction made by one such ordinance is not an acquiescence in the ordinance of the succeeding year.

12. SAME—INJUNCTION—EQUITY JURISDICTION.

An injunction against the enforcement of an ordinance reducing water rates will not be refused on the theory that the ordinance, if void at all, is void upon its face, and therefore throws no cloud upon complainant's rights, when such invalidity only appears in connection with a certain contract, and with evidence allunde showing what water rates were charged at the date of such contract.

13. SAME—INJUNCTION—EQUITY JURISDICTION.

An ordinance wrongfully reducing water rates, where the constitution and laws of the state apparently denounce severe pains and penalties upon collections of higher rates than those prescribed by the ordinance, so affects the water company's property rights, and hinders it in the collection of its lawful compensation, that equity will afford protection against such an ordinance, even though the city is taking no active steps to enforce it.

14. SAME—EFFECT OF APPEAL.

Where a city annually passes ordinances regulating water rates for each year, an injunction against such an ordinance, which is illegal, will not be denied merely because the particular ordinance in question would necessarily expire before an appeal from a decree awarding the injunction could be disposed of.

White & Monroe and J. S. Chapman, for complainants.

W. E. Dunn and Lee & Scott, for defendants.

WELLBORN, District Judge. This suit, which is now under submission on the pleadings and an agreed statement of facts, was brought to annul an ordinance of the council of the city of Los Angeles adopted February 23, 1897, fixing water rates during the year commencing July 1, 1897, and ending June 30, 1898, on the ground that said ordinance impairs the obligation of the contract hereinafter mentioned, and is therefore repugnant to the constitution of the United States. The material facts of the case are these:

On July 22, 1868, the city of Los Angeles, as party of the first part, and John S. Griffin, P. Beaudry, and Solomon Lazard, as parties of the second part, entered into a contract whereby said city, for the considerations below indicated, leased its water works to said Griffin, Beaudry, and Lazard, and their assigns, for a term of 30 years, with the right to lay pipes in the streets, and sell and distribute water for domestic purposes to the inhabitants of said city, and to receive the profits thereof, and with the additional right to take water from the Los Angeles river at a point at or above the present dam: provided, that the said parties of the second part should at no time take from said river, for the use of said water works, more than 10 inches of water without the previous consent of the mayor and common council of said city, and that they would within 60 days from the date of the contract select the point where the water should be taken from said river; and the city bound itself not to make any other lease, sale, contract, grant, or franchise to any person, corporation, or company for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of the contract, and reserved the right to regulate water rates, as follows:

"Always provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part, or their assigns: provided, that they shall not so

reduce such water rates, or so fix the price thereof, to be less than those now charged by the parties of the second part for water."

For the lease and grants aforesaid the parties of the second part undertook and promised to pay said city a yearly rental of \$1,500; to cancel certain claims of said parties against said city, amounting to about \$8,000; to lay down in the streets of said city 12 miles of iron pipes, of sufficient capacity to supply the inhabitants of said city with water for domestic purposes, and extend said pipes as fast as the citizens desiring water for domestic purposes would agree to take sufficient water to pay 10 per cent. per annum upon the cost of such extensions, and erect one hydrant, as protection against fire, at one corner of each crossing of streets where pipes were, or might thereafter be, laid; to erect an ornamental fountain on the public plaza, at a cost not to exceed \$1,000; to construct and erect within two years such reservoirs, machinery, ditches, and flumes as would secure to the inhabitants of said city a constant supply of water for domestic purposes; to furnish water free of charge for the public school houses, hospitals, and jails; to keep in repair all of said improvements at the cost and expense of the parties of the second part for said term of thirty years; and to return said water works to said party of the first part, at the expiration of said term, in good order and condition, reasonable wear and damage of the elements excepted, upon payment to said parties of the value of the aforesaid improvements, to be ascertained as provided for in the contract; to give a bond in the sum of \$20,000 for the performance of said contract; and to pay all state and county taxes assessed upon said water works during said period of 30 years. Griffin, Beaudry, and Lazard applied for and procured said contract on behalf and for the benefit of themselves and other persons, with the intention of forming a corporation to carry out said contract, and afterwards, about the middle or latter part of August, 1868, themselves and said other persons being the incorporators, organized, under the laws of the state of California, the Los Angeles City Water Company, for the purpose of supplying the inhabitants of said city with water for domestic purposes, etc., under the terms of said contract, and assigned all their rights and franchises under said contract to said company, by a written instrument dated June 12, 1869, and recorded in the office of the recorder of said county of Los Angeles June 15, 1869. On April 2, 1870, the legislature of California passed an act, hereinafter set forth, in terms ratifying and confirming said contract.

Griffin, Beaudry, and Lazard did nothing personally in carrying out said contract, or constructing or maintaining said water works; but said company, after it was organized, took possession of said water works, and has performed all of the above-mentioned obligations of said contract, except the one providing for the return of the water works at expiration of lease, and in such performance has laid 320 miles of pipe, erected over 500 hydrants for protection against fire, and constructed 6 reservoirs, with an aggregate capacity of nearly 66,000,000 of gallons, and is now, as it has been at all times since the contract was made, furnishing the city of Los Angeles with water for the extinguishment of fires, and for

the public schools, hospitals, and jails in said city, free of charge. The aforesaid extensions of the water works were rendered necessary by the growth of said city, whose population in 1868 was between 5,000 and 6,000, and is now about 103,000. During the whole of the year 1868 the territorial limits of the city of Los Angeles were as follows: Four square leagues, in a square form, the center of which was the center of the old pueblo plaza. About 1872 the limits were extended 420 yards south of the former south boundary; and within the past three years, and prior to July, 1897, the limits were further extended so as to take in between 10 and 15 square miles of additional adjoining territory. Immediately after the extension of the said limits the Los Angeles City Water Company began to extend its pipes over the said addition to the city as the same was settled up and improved, and ever since has been, and is now, furnishing water to the people in said district added to the original territory of the city, and, upon the demands of the city council, erected fire hydrants within the said additional territory, and furnished water free of charge, and has in all respects continued to lay pipes, erect fire hydrants, and furnish the inhabitants with water for domestic uses, in like manner as it has conducted the same business within the original limits of the city as established by the act incorporating it. And so with the more recent extensions of the city limits, to wit, those made within the last three years, the company has also extended its pipes in portions of those limits, and furnished water in the same way. The quantity of water required to supply the domestic wants of the people of said city is 1 inch of water, measured under a 4-inch pressure, to every 100 inhabitants. To meet the increased demands upon it for water under said contract, said company has, among other things, purchased the system known as the "Beaudry System of Water Works," and also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles river, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East Side Spring-Water Company,—the same mentioned in paragraph 10 of the complaint. In the growth of the city, its settlement extended to localities of higher elevation than those occupied by its inhabitants at the time of said contract, and the point originally selected for the diversion of the water of the Los Angeles river for supplying the city and its inhabitants, as in said contract provided, was so located in said river that it was impracticable to there maintain dams and diversion works that would not occasionally be swept away or rendered useless by floods; and the surface water of the river after severe storms became muddy, and unfit for supplying the inhabitants with water for domestic uses; and in the year 1889 the Crystal Springs Land & Water Company made excavations in the places referred to in the bill of complaint, and laid the pipes therein as alleged; and the water that has been used by the Los Angeles City Water Company for supplying the city with water as provided in

said contract has ever since been obtained from that source, except that from time to time a further supply of water has been taken from the Los Angeles river in order to supply said inhabitants, which diversions have been at or near the place where the said underground pipes are laid; and that by these means the water can be delivered to the higher elevations, and the underground waters, as to quality and amount, are thus protected against the influences of floods.

The Los Angeles City Water Company, ever since its incorporation, has taken more than 10 inches of water, measured under a 4-inch pressure, from the Los Angeles river; and the amount taken has increased with the increase of the population of the city, and the demands of the municipality itself for water for extinguishing fires, and the other public purposes referred to in the said contract, and the amount has increased until now it requires from 1,000 to 1,500 inches of water, measured under a 4-inch pressure, for such purposes; and during the summer season the amount of water used by the Los Angeles City Water Company for the purposes aforesaid runs from 1,000 to 1,500 inches, under a 4-inch pressure, inclusive of the water obtained by the underground excavations, which latter furnish from 650 to 690 inches, measured under a 4-inch pressure. The city of Los Angeles has always had flowing in the Los Angeles river, at the point from which said Los Angeles City Water Company has always diverted water from said river, a quantity of water sufficient to have supplied said Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water for domestic purposes and municipal uses, and has never objected, up to October 20, 1896, to said Los Angeles City Water Company taking as much water from said river as it might require for said uses; and during all of said period said city has never objected to said company's taking from the surface stream of said river at said point as much water as said company needed for said uses. On October 19, 1896, the council of the city of Los Angeles adopted a resolution requiring the Los Angeles City Water Company to pay to the city of Los Angeles an amount of money equal to 40 per cent. of the gross rates received by said company from the consumers of water as rental for all water taken by said company from the Los Angeles river, and before the 21st day of October, 1896, to attorn to the city of Los Angeles, as tenant of said city, for all of the water so taken from said river, and to agree to pay said rental to said city, and, in case of failure to attorn and agree to pay said rental, to refrain from diverting, taking, or interfering with any of the water mentioned in said resolution, except 10 inches, after the 20th day of October, 1896. On October 19, 1896, the city attorney, in writing, notified the Los Angeles City Water Company and the Crystal Springs Land & Water Company of said resolution, and demanded compliance therewith, delivering a copy of said resolution to each of said companies. Neither of them ever attorned to said city for said water or any part thereof, or ever agreed to pay any rental for the

same. After the passage of said resolution, and ever since said notification, up to the present time, the Los Angeles City Water Company has continually taken from the Los Angeles river, at a point above the northern boundary of said city, for the purposes of distribution and selling the same in said city, a quantity of water varying from 400 to 1,000 inches, measured under a 4-inch pressure. On the 19th day of April, 1870, the common council of the city of Los Angeles accepted, and the mayor approved, the following report:

"To the Honorable the Mayor and Common Council of the City of Los Angeles, and the Los Angeles City Water Company: The undersigned, commissioners duly appointed on behalf of your honorable bodies to adjust, fix, and establish the rates and charges of the Los Angeles City Water Company (a corporation duly incorporated under the laws of the state of California for the purpose of supplying the inhabitants of Los Angeles city with pure, fresh water, respectfully report that they have established water rates and charges for domestic purposes, taking as a guide, as near as can be, the charges and rates for domestic purposes charged in July, 1868; that your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows, to wit." (Then follow the rates agreed upon.)

The commissioners referred to in said report had been previously selected, two by the city, and two by the Los Angeles City Water Company. In June, 1871, the city council, on a report of a committee constituted similarly to the one above mentioned, established the same rates as those established in April, 1870. On the 13th of August, 1874, a committee, constituted in the same manner and for the same purposes as the committee already mentioned, reported that they had established water rates and charges for domestic purposes, taking as a guide, as near as possible, the charges and rates for domestic and other reasonable objects and purposes charged in July, 1868. The report was adopted, and a committee appointed, in conjunction with the city attorney, to draft an ordinance embodying the rates fixed in said report; and thereafter, on August 20, 1874, an ordinance so drawn was adopted by the council of said city, and the rates established by said ordinance were the same as those established in 1870 and 1871. Since and including the year 1880 the city council of the city of Los Angeles has in February of each year passed an ordinance fixing the rates to be charged by all corporations and persons within said city supplying water to the inhabitants thereof, to be in force from one year from and including July 1st, which rates have been less than the rates charged in 1870, as contained in the ordinance hereinbefore mentioned, and the Los Angeles City Water Company has collected the rates thus fixed by the city of Los Angeles, and no more; but in the year 1896 the council of the city of Los Angeles passed an ordinance fixing the rates to be charged for water for the year commencing July 1, 1896, and ending June 30, 1897 at less than they had ever been fixed before, and a suit was then brought by the complainants herein, in this court, against the city of Los Angeles, to set aside the said ordinance; and in February of the year 1897 the city of Los Angeles passed the ordinance which is assailed in this suit, making a still further reduction in the rates. The action of the Los Angeles City Water Company in collecting the rates fixed by said

several ordinances constitutes the only acquiescence (if it be an acquiescence) in the action of said council. If the rates established in 1870 were collected for the year beginning July 1, 1897, and ending June 30, 1898, the revenues received by the Los Angeles City Water Company from said rates would be more than \$50,000 in excess of the amount which would be received under the rates named in the ordinance of February, 1897. In January, 1882, the Los Angeles City Water Company furnished to the council of the city of Los Angeles a statement of its transactions for the preceding year; protesting at the same time against the establishment of any rates less than those which were in force at the date of the lease hereinbefore mentioned, to wit, July 22, 1868. In January, 1883, said company again furnished said council with a statement showing the names of the consumers of water, the rates paid during the year preceding the date of the statement, and also an itemized statement of the expenditures made for supplying water during the year preceding, but expressly denying any legal right on the part of the council to demand said statement, or to fix any rates less than those which were in force in July, 1868. Similar statements, accompanied by similar protests, were made annually thereafter, up to and including the year 1889; and since that time unverified statements or reports, showing its receipts and expenditures, have been made by said company to the city council each year. Article 14 of the present constitution of California, adopted in 1879, is as follows:

"Article XIV. Water and Water Rights.

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law: provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water-rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and water-works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use.

"Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

To carry out these provisions of the constitution, the legislature of California passed an act entitled "An act to enable the board of supervisors, town council, board of aldermen," etc., which was approved March 7, 1881 (St. Cal. 1881, p. 54). In the year 1888, the electors of the city of Los Angeles, pursuant to provisions of the

constitution of said state authorizing them so to do, adopted a charter for said city, which charter was, under the provisions of said constitution, submitted to the legislature of said state for its approval, ratification, and adoption; and the said charter was on the 31st day of January, 1889, adopted by said legislature, and thereupon became, and ever since has been, the charter of the said city of Los Angeles; and by the said charter it is provided, in section 193, as follows:

"The rates of compensation for use of water to be collected by any person, company or corporation in said city shall be fixed annually by ordinance and shall continue in force for one year, and no longer. Such ordinance shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Should the council fail to pass the necessary ordinance fixing the water rates within the time hereinbefore prescribed, it shall be subject to peremptory processes to compel action at the suit of any party interested." St. 1889, p. 503.

The ordinance of 1897, now sought to be annulled, was passed pursuant to the foregoing constitutional and statutory provisions.

The facts showing the connection of S. G. Murphy and the Crystal Springs Land & Water Company with the litigation need not be enumerated, since the defendants waive all questions as to the joinder of these parties, and said facts are not material to any point determined in this opinion. The agreed statement of facts contains certain stipulations in regard to the issues submitted which are likewise immaterial here, but which will be carried into the final decree.

Complainants' contention, succinctly stated, is that said ordinance of February, 1897, impairs the obligation of the contract of July 22, 1868, between the city of Los Angeles and the assignors of the Los Angeles City Water Company,—Griffin, Beaudry, and Lazard,—in that the rates fixed by said ordinance are less than the rates charged at the date of said contract, and therefore said ordinance is repugnant to the constitution of the United States, and ought to be annulled. This contention clearly involves a question of federal cognizance.

The defenses to the suit are as follows: First, that said contract, in so far as it purports to limit the right of the city to regulate water rates, was, on the part of the city, unauthorized, and is void; second, that the evidence fails to show that the rates fixed by said ordinance of 1897 are less than the rates that were charged by the assignors of said water company at the date of said contract; third, that said water company since October, 20, 1896, has continuously violated a material provision of said contract, by taking from the Los Angeles river more than 10 inches of water, measured under a 4-inch pressure; fourth, that there has been such acquiescence by the water company in the right of the city to regulate water rates unrestrained by said contract as now precludes complainants from obtaining the relief sought; fifth, that the injuries resulting from said ordinance are not irreparable, and complainants have adequate legal remedies. These defenses will be considered separately, and in the order of their statement.

1. A question has been raised by the defendants as to the proper construction of that clause of the contract above mentioned limiting the right of the city to regulate water rates, and it will be best to

determine that question before passing upon the validity of said clause. The contention of defendants is that said clause refers exclusively to a right of regulation given the city by the contract itself, and was not intended as a limitation upon any power which had been, or might thereafter be, conferred by the legislature of the state. This contention is not well taken. The contract does not grant, nor purport to grant, to the city any right in respect to the regulation of rates; the language being that "the mayor and common council of said city shall have, and do reserve, the right to regulate water rates," etc. The use of the word "reserve" shows that the parties were contracting, not with reference to a right which it was supposed the lessees were granting to the city, but with reference to a right or power which they assumed the city already possessed. The parties manifestly intended by the clause now under consideration that the lessees should have a right to the minimum rates prescribed, namely, the rates that were then charged; and, if the city was authorized to make such an agreement, neither it nor the legislature of the state could thereafter lawfully reduce the rates below the minimum so agreed upon. Whether or not these minimum rates are collectible by actions at law before they have been established by the city need not be determined here. I now come to the question of authority.

The city of Los Angeles was incorporated by an act of the legislature of California passed April 4, 1850, which simply described the boundaries of the city, and declared it to be incorporated according to the provisions of the act entitled "An act to provide for the incorporation of cities," passed March 11, 1850, fixed the number of councilmen at seven, and made said city successor to all the rights, claims, and powers of the pueblo of Los Angeles in regard to property. Section 2 of the aforesaid act of March 11, 1850, is as follows:

"Sec. 2. When any city is incorporated by a special act of the legislature, such act may simply define the boundaries of the city, and declare it incorporated, in which case it shall be deemed incorporated according to the provisions of this act; or may declare it incorporated under the same, with such changes as may be specially named."

Section 7 of said act gives to any city incorporated thereunder power to grant franchises, hold and receive property, real and personal, within said city; to lease, sell, and dispose of the same for the benefit of said city. St. Cal. 1850, p. 86. Section 11 of the same act provides that the city council "shall have the power * * * to establish a fire department, and to make regulations to prevent and extinguish fires; * * * to provide for supplying the city with water." Did these acts of the legislature empower the city of Los Angeles to make the agreement in question? "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. * * *" 1 Dill. Mun. Corp. p. 115,

§ 89. This text is cited with approval by defendants in their brief, and, without referring to the numerous cases also cited in the same connection, may be accepted as a clear summary of the law on the subject to which it relates. The power of the city of Los Angeles to agree upon water rates, I think, is fairly implied in the power "to provide for supplying the city with water," and therefore falls within the second class of powers enumerated by Judge Dillon. Two cases, and only two cases, directly in point, have been called to my attention: *Santa Ana Water Co. v. Town of San Buenaventura*, 56 Fed. 339, and *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 O. C. A. 171, 76 Fed. 271. Both of these cases sustain the conclusion which I have just announced; and, in the former case, where the facts were strikingly analogous to those in the case at bar, Judge Ross held valid an agreement whereby the town of San Buenaventura granted to the assignors of the Santa Ana Water Company "the unrestrained right to establish such rates for the supplying of water to private persons as they may deem expedient, provided that such rates be general." From the opinion of Judge Ross I quote as follows:

"The doctrine is firmly established that the state may, by a contract, restrict the exercise of some of its most important powers;" citing *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, and *Water-Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273. " * * * The principle controlling the decisions cited is a just and plain one. The duty is imposed upon the legislative power that creates a municipal corporation to provide for the necessary elements of gas and water. It may, at its discretion, do so directly; or it may, in the absence of any constitutional inhibition, say, directly, or through the municipal corporation so created, to its individual citizens, in the language of the supreme court (*In re Binghampton Bridge*, 3 Wall. 74): 'If you will embark with your time, money, and skill in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' 'Such a grant,' said the court in the case from which the quotation is taken, 'is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.'"

Defendants cite a large number of cases to the effect that a general power conferred upon a municipal corporation to supply the city with water does not include authority to grant an exclusive franchise therefor to others. This proposition, however, is not now before the court, since the defendants admit that the fact of an exclusive franchise having been granted to the complainants' assignors, if such was the case, does not vitiate the contract in other respects. To my mind there is a clear and broad distinction, so far as concerns the power of a municipal corporation to make them, between the grant of an exclusive franchise to supply the city with water, and an agreement which abridges the right of such corporation to regulate the price of the water so supplied. The grant of an exclusive franchise is not an indispensable, or even appropriate, means to the procurement of water, and, besides, creates a monopoly (and it is upon these grounds that many of the decisions holding such grants inoperative are rested); while an agreement fixing the price to be paid for water does not destroy, nor is it inimical to, competition, and is both appropriate and indispensable to a reasonable and convenient exercise of the

general power to supply water. In procuring water, or any other commodity, by purchase, one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that general power, without limitation, in a municipal corporation, to supply the city with water, does not include power to agree upon price, it seems to me, would be a solecism. In *State v. Laclede Gaslight Co.*, 102 Mo. 485, 14 S. W. 974, and 15 S. W. 383, the court says:

"It is not open to doubt or dispute that this power to make and vend gas carries with it, as an invariable incident, the right to fix the price of the gas thus made and sold. No other conclusion can be drawn from the premises. A sale implies a price. It would be but the granting of a barren right indeed which would confer power to incur expense and perform labor, and yet deny the power to fix and to reap the fruits of that labor, to wit, the price. Whatsoever the law necessarily implies in a statute or in a contract is as much part and parcel thereof as if expressly stated therein. So that by the terms of the charter of the respondent company its right to fix the price of its product was as much a part of its charter as if it had been, in terms, set forth in section 5 of the original act of incorporation."

The words of the grant in the case at bar, "power * * * to provide for supplying the city with water," are clear and unambiguous, and, in my opinion, admit of no other reasonable construction than that they were intended to confer upon the city of Los Angeles, so far as concerns the means necessary to supply the city with water, powers as ample as the legislature itself possessed. This delegation of power to the city was not, of course, a relinquishment by the legislature of its control over the subject. The legislature could at any time revoke the power delegated to the city, and provide directly, through agencies of its own selection, for supplying the city with water, provided such revocation or provision should not impair any previously vested rights. In *Illinois Trust & Savings Bank v. City of Arkansas City*, supra, the words of the grant were:

"Full power and authority to contract for and procure water works to be constructed for the purpose of supplying the inhabitants of such cities with water."

While this phraseology is more diffuse, the grant it makes is neither clearer nor broader than the grant in the case at bar; and with reference to the former the court of appeals for the Eighth circuit said:

"The powers granted to this city by the legislature of the state of Kansas to contract for and procure water works are plenary and unlimited, save by the duty to exercise them with reasonable discretion, and it is not the province of the court to contract or clip the legislative grant."

Grants of this power have been upheld in some well-considered cases, on the ground that the power is a business or proprietary power, as distinguished from a governmental or legislative power. *Illinois Trust & Savings Bank v. City of Arkansas City*, supra; *City of Cincinnati v. Cameron*, 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co. v. City of Baltimore*, 13 C. C. A. 375, 66 Fed. 140; *State v. Mayor, etc., of City of Great Falls (Mont.)* 49 Pac. 15, 21; 1 Dill. Mun. Corp. § 27. In the first of these cases the court says:

"In contracting for water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp. § 27; *City of Cincinnati v. Cameron*, 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co. v. City of Baltimore*, supra, and cases cited under it."

In *City of Cincinnati v. Cameron* the court says:

"The power given to a city to construct sewers is not a power given for governmental purposes, nor is it a public municipal duty imposed upon the city, like that of keeping streets in repair, but it is a special legislative grant to the city for private purposes. The sewers of the city, like its works for supplying the city with water, are the private property of the city. The corporation and its corporators, its citizens, are alone interested in them. The outside public, as people of the state at large, have no interest in them, as they have in the streets of the city, which are public highways. *City of Detroit v. Corey*, 9 Mich. 165."

If, however, it be conceded, contrary to these authorities, and as claimed by defendants, that the power of a city to regulate water rates is legislative or governmental, the city may, by contract, abridge such power, under an implied as well as an express legislative grant; and this rule is recognized by many of the authorities upon which defendants rely. Thus, in one of them it is said:

"Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, so they cannot, without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. * * * 1 Dill. Mun. Corp. (4th Ed.) § 97.

It is worthy of note that the words, "without legislative authority, express or implied," are not found in the first three editions of Judge Dillon's work. I take it, therefore, that a review of the subject made by him subsequent to said editions satisfied him that the governmental as well as business powers of a city could be abridged by contract, if there were legislative authority therefor, and, that such authority could arise by implication as well as by express grant. See, also, *State v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 293; *Santa Ana Water Co. v. Town of San Buenaventura*, supra; *Illinois Trust & Savings Bank v. City of Arkansas City*, supra. As already stated, most if not all of the cases cited by defendants on this point, some of which are specially referred to below, relate to exclusive franchises; and in many of these cases the franchises are denied, not because they involve the exercise of governmental functions, but upon the grounds that they are monopolies, and unnecessary to the accomplishment of the general objects of the grants; and herein lies the wide distinction between such cases and the case at bar. In *Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co.*, 24 Fed. 308, 309, it is said:

"Again, exclusiveness of occupation is not necessary to the full performance of a street-railroad company of all its functions. The running of a street rail-

road on one street is in no manner interfered with by the running of a similar road on a parallel street. Doubtless the profits of the one will be increased if the other is stopped. Monopoly implies increase of profits. But the question of profits is very different from that of the unimpeded facilities for transacting business. The latter may be granted without any exclusiveness. And power to grant all facilities for transacting business does not imply power to forbid all others from transacting like business. Even where a charter is granted by the legislature directly, it grants no exclusive right, unless the exclusiveness is expressly named. As said by Judge Dillon (2 Mun. Corp. § 727): 'But a legislative grant of authority to construct a street railway is not exclusive, unless so declared in terms; and therefore the legislature may at will, and without compensation to the first company, authorize a second railway on the same streets or line, unless it has disabled itself by making the first grant irrevocable and exclusive.' And, if a direct grant from a legislature carries no implication of exclusiveness, why should it be presumed that the legislature intended to vest in a city the power to give exclusive privileges, when it has in terms granted no such power? Will the power to create monopolies be presumed, unless it is expressly withheld? That would reverse the settled rule of construction, which is that nothing in the way of exclusiveness or monopoly passes, unless expressly named."

Again, in another case relied on by defendants, the grant of an exclusive right of selling to the city of Helena all water required by it, etc., for the period of 20 years, was held to be void on the ground, among others, that it was a monopoly; the court saying:

"Then, the power to provide the city with water, by making a proper contract with some person to erect water works and sell water to the city, being conceded, the next question that presents itself is as to the power of the city to make this particular contract. Is the present such a contract as to be beyond the power of the city council to enter into so as to bind the municipal corporation? Does this contract create a monopoly? For, if it does, it goes beyond the power of a city council. Monopolies may be created, but they must be called into being by the sovereign power alone. A city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter, or other acts of the legislature. Monopolies are contrary to the genius of a free government, and ought not to be encouraged by the people, or countenanced by the courts, except when expressly authorized by positive law."

Not only does the court rest its decision upon the ground that the franchise was a monopoly, but it expressly recognizes the power of the city to abridge by contract, in some degree, its governmental functions, as follows:

"But it is insisted by the council for respondents that the making of this contract or the passing of this ordinance is ultra vires, because it ties up and embarrasses the functions of future councils. Every ordinance in the nature of a contract would do this to some extent, and, unless the contract entered into by means of this ordinance should bind the city corporation for an unreasonable time, this objection would not be fatal."

The grant of power to the city in that case was as follows:

"The city council shall have power to provide the city with water, erect hydrants and pumps, build cisterns and dig wells in the streets, for the supplying of engines and buckets, * * * to provide for the prevention and extinction of fires." *Davenport v. Kleinschmidt* (Mont.) 13 Pac. 254.

The court then holds that, under the peculiar terms of the contract in question, 20 years was an unreasonable time for it to continue. This feature of the case, however, I will consider in a subsequent and more appropriate connection.

In Illinois Trust & Savings Bank v. City of Arkansas City, 22 C. A. 179, 76 Fed. 279, the court says:

"This city, then, had the power to grant to the gas company the privilege of using its streets for water pipes, and it had power to rent hydrants of that company, when this contract was made. For the purposes of this discussion, we shall concede that it had no power to make the privilege of the gas company to use its streets exclusive, because such a grant tends to create a monopoly. The general rule is that the legislature alone has the power to make exclusive grants of this character, and that this authority does not vest in the municipality, unless it is expressly granted to it by its charter."

In Omaha Horse Ry. Co. v. Cable Tramway Co., 30 Fed. 328, the monopoly feature of the grant there under discussion was referred to thus:

"This rule of construction against the grantee, which applies in all legislative grants, obtains with the greater force in a case like the one at bar, where the grant claimed is not merely the right to do something, but of a right to exclude all the rest of the public from doing that thing. He who says that the state has given him a franchise, a right to do that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise, the right to do, but also the right to exclude all others of the public from exercising the same right, and the state, as the representative of the public, from according the same right to another."

In Saginaw Gaslight Co. v. City of Saginaw, 28 Fed. 529, in considering the question whether the common council of that city had power to confer an exclusive franchise upon the plaintiff to light its streets with gas for 30 years, the court said:

"That the state, in its sovereign capacity, may grant a monopoly of this description, and that such monopolies will be protected against a subsequent conflicting grant, has lately been settled by the supreme court in *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, and *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 6 Sup. Ct. 265. But whether, under a charter simply authorizing a municipal corporation 'to cause its streets to be lighted,' it may grant an exclusive privilege of this description for a term of years, is a widely-different question. Bearing in mind that the powers of the municipality are strictly limited by its charter, it is needful to inquire whether the grant of an exclusive franchise is a proper and reasonable method of exercising its authority to furnish gas to its inhabitants. We think it entirely clear that the city is not bound to manufacture and furnish the gas itself, but may contract with any individual or company for the city, and, as an incident thereto, may authorize the use of its streets for laying pipes and mains. * * * It is clear, however, that there is no authority expressly given to confer upon any corporation an exclusive right to occupy its streets for a number of years. * * * The common law of England declares that monopolies cannot emanate from the crown, and can only be conferred by act of parliament (*Bac. Abr. tit. 'Monopoly'*), and a by-law which creates a monopoly is void (*Jac. Law Dict.*). The great weight of authority in this country is in the same direction," etc.

In State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 293, the court says:

"Now, we concede that the streets of a city may be appropriated to authorized purposes, promotive of the convenience and welfare of its inhabitants, and not substantially interfering with the public easement or right of travel. And from partial appropriations of this character rights of private property may arise which cannot rightfully be disturbed. But, when it is sought

to couple with such partial appropriation a stipulation that no further use of unoccupied portions of the streets shall be thereafter permitted or made for similar purposes, this is not the exercise of the power of appropriation, but an attempt to prohibit its exercise; and, when the effect is to create a private monopoly, the power of the city council thus to divest itself of authority conferred upon it, as a public agent, for the benefit of others, must be clearly shown."

In that case, however, the court holds that even the power to grant an exclusive franchise may arise by implication as well as from express terms; the language of the court being as follows:

"And, assuming that such a power may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through an agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority. But we have referred to these authorities as our justification for saying that when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book, in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

This review of defendants' citations shows that in each case the franchise claimed was denied, not because it was legislative or governmental in its nature, but because it was a monopoly, and in the first case for the additional reason that the franchise was not necessary to the accomplishment of the general objects of the grant. Neither of these reasons applies to the case at bar. The abridgment of the right of the city to regulate water rates does not create a monopoly, and is a necessary means to the proper exercise of the general power to supply the city with water.

Defendants further insist that the rates fixed by the ordinance of 1897 are not unreasonable, or, in other words, that they allow to complainants a fair income on their investment. The question, however, as to the reasonableness or unreasonableness of the rates fixed by the ordinance is not here involved. The only question, so far as concerns the matter of reasonableness, is whether or not the contract of July 22, 1868, was reasonable; and in determining this question the contract should be construed, not in the light of developments that have since been made, but with reference to the conditions which surrounded the parties at the date of the contract. The fact that said contract, because of the rapid growth of the city of Los Angeles, has proved largely remunerative to the complainants, does not make the contract unconscionable. On this point the following extract from the case of *Illinois Trust & Savings Bank v. City of Arkansas City*, 22 C. C. A. 182, 76 Fed. 283, may be aptly quoted:

"It cannot but be clear to all who are familiar with the condition of cities of the second class—cities whose population was between 2,000 and 15,000—in the state of Kansas in 1872, when this grant was made, that it was not the intention of the legislature of that state to limit the terms of these contracts to the single year during which the terms of office of the members of the city councils continued. The cities were young and poor, but they were ambitious and sanguine. They did not have the ready money to construct the water works which the health and comfort of their inhabitants required. It is hardly possible that any individual or corporation could have

been induced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose, and of the promise of rental for its hydrants for the limited term of a single year. These facts the members of the legislature must have known, and they undoubtedly granted this plenary power to contract for the very purpose of enabling the cities to procure a supply of water for their inhabitants by grants of privileges to private parties to use their streets for that purpose for a reasonable term of years, and by covenants to pay rentals for hydrants for a like term. In any event, the legislature made this grant; and it thereby vested in the mayor and council of the city the right to make such contracts for such terms as, in their discretion, they thought proper."

In another case it has been held that:

"Where a city with a population of 5,000, and an assessed valuation of property of two and a quarter millions of dollars, contracts with a person giving him the exclusive privilege of laying water mains in the city for 30 years, and providing that he shall furnish the city with 50 fire hydrants, for each of which it shall pay him a rent of \$80 per year for the 30 years, with a stipulation that at the end of 10 years it may, at its option, buy the water works, at a price commensurate with the productive value thereof, the contract will not, after the city has enjoyed the benefit of it for over 10 years, be held so unreasonably oppressive or contrary to public policy as to be void." *Fergus Falls Water Co. v. City of Fergus Falls*, 65 Fed. 586.

It is noticeable that in the case last cited the city of Fergus Falls was paying \$80 per year for each hydrant, while in the case at bar the city of Los Angeles gets the use of the hydrants, now 500 in number, free of charge.

In *Davenport v. Kleinschmidt*, *supra*, where the court held that 20 years was an unreasonable period for the continuance of the contract, the reasons for the ruling are thus stated:

"Is 20 years a reasonable time? The city charter provides for the election of the mayor and half the aldermen in April of each year. City Charter, art. 4, § 1. The complaint alleges the taxable property of the city of Helena to be not more than \$5,000,000; that the bonded indebtedness of the city amounts to \$19,500; that the floating debt, in outstanding warrants, amounts to \$15,000. Four per cent. of the taxable property of the city would amount to \$200,000. The charter permits the levy of taxes to the extent of three mills on the dollar for general purposes, and the same for fire department purposes. City Charter, Amend. 1885, p. 25. On the present valuation, these levies might amount to \$15,000 each, if the taxing power was exerted to the limit. The city of Helena was chartered in 1881. Twenty years ago it was a mining camp on the banks of Last Chance gulch, containing a few hundred people. The last official census of the city, taken in 1880, shows a population of not more than 4,000. Reliable data place the present population at about 10,000. The ordinance provides that Woolston shall receive for the water running through each of the first 150 hydrants provided for, \$20 per year out of the general fund, and \$80 per year out of the fire department fund; being \$100 for each hydrant altogether, and amounting in the aggregate, for the 150 hydrants, to \$15,000 per annum. Then, as the mains are extended, additional hydrants are required to be erected, and for these Woolston is to receive \$13 per year out of the general fund, and \$52 per year out of the fire department fund; making in the aggregate \$65 per year for each additional hydrant. If ten miles more of pipe should be laid, at least 100 additional hydrants must be paid for, at an annual cost of \$6,500. If the whole cost of the 150 hydrants were to be paid out of the fire department fund, it would take every dollar which could be placed into that fund, at the present valuation. This ordinance is designed to be irrevocable and unchangeable for the period of 20 years. We have a right to consider all these things in determining whether or not 20 years is a reasonable time for such a contract

to run. Under all the circumstances indicated, we cannot consider that the city council has the right to bind such a city as Helena by such a contract for so long a period. We are not called upon to indicate what would be a reasonable time for which the city might make such a contract, if at all. It is sufficient for us to say in this case that 20 years is not a reasonable time. It is useless to argue that, if the council has power to bind the city for 20 years, it has the power to bind it for 100 or 1,000 years, or, on the other hand, to say that, if the council cannot bind the city for 20 years, it cannot do so for 1 year or 1 month. Such assertions of extreme cases may answer for illustration, but as arguments they are fallacies, which cannot bear the strong light of reason." *Davenport v. Kleinschmidt* (Mont.) 13 Pac. 256.

Thus, it will be seen that the 20-year limit in the contract was held unreasonable, mainly, if not wholly, because of the expenditures which the city was annually incurring for hydrants. Here there is no such expenditure. If the city of Los Angeles, however, was paying for its hydrants at the lowest rate above mentioned (\$65 per year for each hydrant), the expenditures on this account (there being 500 hydrants) would amount in the aggregate to \$32,500 per annum. The case last cited therefore does not support, but is against, defendants' contention; for, according to the theory of that case, the large benefits which the city of Los Angeles has enjoyed under the contract of July 22, 1868, in the way of free water and hydrants for municipal uses, saves the contract, if there were nothing else to do so, from the charge of unreasonableness. See, also, *McBean v. City of Fresno*, 112 Cal. 159-169, 44 Pac. 358, and *State v. Mayor, etc., of City of Great Falls* (Mont.) 49 Pac. 15-21.

Defendants further contend that the limitation in said contract as to water rates is void because of the act of May 3, 1852 (St. Cal. 1852, p. 171). Said act, however, is not applicable to the case at bar, for the reason that Griffin, Beaudry, and Lazard at the date of said contract were not incorporated under that or any other act. The following extract from the case of *Santa Ana Water Co. v. Town of San Buenaventura*, 56 Fed. 348, 349, is directly in point here:

"A statute of the state approved May 3, 1852 (St. 1852, p. 171), providing for the incorporation of water companies, declared, in its third section: 'This act shall not give to any company the right to supply any city with water unless it shall be previously authorized by an ordinance, or unless it be done in conformity with a contract entered into between the city and the company. Any contracts hereafter so made shall be valid and binding in law, but shall not take from the city the right to regulate the rates for water, nor shall any exclusive right be granted, by contract or otherwise, for a term exceeding twenty years.' By this act it was declared, as will be observed, that no contract entered into between a city and a company incorporated under the provisions of the act should 'take from the city the right to regulate rates for water.' That provision had no application to Arnaz and his associates, for the reason that they were not incorporated under that or any other act."

But it is insisted by defendants that, even if the contract in question does not violate said act of 1852, it is inconsistent with the policy of the state, as manifested in said act; citing 1 Dill. Mun. Corp. § 319. Defendants, it seems to me, mistake the scope and purpose of said act of 1852. Said act was, as shown by its title, simply "An act to provide for the incorporation of water companies," and does not purport to abridge the powers of municipi-

pal corporations, except in their dealings with the private corporations created under said act. The powers of municipal corporations in their dealings with individuals are unaffected by said act of 1852. Defendants' claim, therefore, that it was the policy of the state, as shown in said act, to apply its provisions to individuals, when, by a familiar rule of construction, individuals are excluded therefrom, is untenable. This is well illustrated by section 31, art. 4, of the constitution of California of 1849, and the judicial interpretation thereof. That section prohibits the granting of franchises by special legislation to private corporations, yet the supreme court of the state holds, as hereinafter fully set forth, that grants of franchises to individuals are not within the prohibition.

It is insisted by defendants that the case at bar is distinguishable from that of *Santa Ana Water Co. v. Town of San Buenaventura*, supra, and comes within the reasoning in *City and County of San Francisco v. Spring Valley Water Works*, 48 Cal. 493,—because Griffin and his associates procured their contract with the intention of forming a corporation to carry out the same, and that soon thereafter, pursuant to said intention, the Los Angeles City Water Company, one of the complainants herein, was organized by them. Now, I do not think that the power of the city to enter into the contract, or the validity of the contract, can be affected by the fact that the assignors of the water company, at the time they procured the contract, intended to assign it to a corporation thereafter to be formed. Suppose that, after the making of the contract, Griffin, Beaudry, and Lazard had changed their purposes, and concluded to carry out the contract as individuals, and had actually done so; could it be contended that the contract, if to-day held by them, would be invalid, because when they procured it they purposed its assignment to a contemplated corporation? No one, I think, would so contend. The case of *City and County of San Francisco v. Spring Valley Water Works*, supra, is widely different from the case at bar. Here the contract was not conditioned upon the individuals to whom the franchise was granted (Griffin and his associates) organizing themselves into a corporation, while in *City and County of San Francisco v. Spring Valley Water Works* a condition similar to the one indicated did exist, and was the essential ground of the decision, as shown by the following extract from the opinion of the court:

"This brings us to the consideration of the Ensign act, so-called. The first seven sections confer upon Ensign and his associates certain privileges, and impose upon them certain duties, in respect to furnishing the city and county of San Francisco with water for the extinguishment of fires and other municipal uses. Section 8, already quoted, provides that 'this act shall not take effect unless the parties named in section one shall, within sixty days after its passage, duly organize themselves in conformity with the existing laws regulating corporations now in force in this state.' The grant, therefore, was not to take effect until Ensign and his associates had become a corporation under existing laws. It took effect as a grant, not to Ensign and his associates as private individuals, but to the corporation when formed. It was an attempt by the legislature to confer, by special grant, upon a

private corporation about to be formed, certain peculiar privileges, and to subject it to certain duties, not common to other corporations formed under the same general law. For the reasons already stated, this was not within the constitutional power of the legislature. When Ensign and his associates became a corporation under the general law, they took only such rights as were derived from that law, and were subject only to such duties as it imposed. The legislature, by special act, could not increase or diminish either." 48 Cal. 514.

Nor does the present case come within the implied suggestion of the court in *Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075, that the intention of individuals to organize a corporation to carry out the object of a franchise granted to them, other circumstances concurring, might invalidate the grant, for the reason that it does not appear in the case at bar that the city council acted with reference to such intention, or had any knowledge of its existence, or that the contract was made for the purpose of evading the constitution. There is no intimation by the court in the case of *Water Co. v. Estrada* that a mere intention on the part of the grantees, undisclosed to the granting party, could invalidate the grant. What the opinion in that case does suggest (and even that was outside the facts) is that if the individuals to whom a franchise is granted intend, at the time of the grant, to form a corporation to carry out their contract with the city, and this intention is known to and acted upon by the city, and the contract is made for the purpose of evading the constitution, then it is invalid. None of these circumstances, however, except the intention of the individuals, are shown to have existed here, while there are strong reasons for presuming that there could not have been any intention to evade the constitutional inhibition against grants of franchises to private corporations by special legislation. *City and County of San Francisco v. Spring Valley Water Works*, 48 Cal. 515, the first case to hold that the provision of the constitution which inhibited the creation of private corporations by special legislation included the grant of a particular franchise to a corporation already existing, was not decided until July, 1874, more than six years after the date of the contract, and more than four years after the ratifying act. That decision, therefore, could not have in any way affected the parties to said contract. *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398, which, contrary to the ruling in the *Spring Valley Water Works Case*, held that the grant of a private franchise to an existing corporation was not repugnant to the constitutional inhibition against the creation of private corporations by special legislation, was decided in July, 1863, which was five years prior to said contract; and it is reasonable to presume that the parties to said contract accepted that decision as correct and final, and therefore there was no occasion for any purpose or effort to evade the constitution.

Defendants further contend that since the Los Angeles City Water Company was incorporated subsequent to the act of April 22, 1858 (St. Cal. 1858, p. 218), providing, among other things, that water rates should be fixed by commissioners, of whom two were to be appointed by the water company and two by the city, and,

if they could not agree, a fifth to be selected by the sheriff, and since the constitutional provision hereinbefore quoted, prescribing a different mode of establishing water rates from that contained in the act of 1858, was in effect an amendment of said act (*Water Works v. Schottler*, 110 U. S. 362, 4 Sup. Ct. 48), binding upon corporations previously organized, said company can have no right to collect rates other than those established in the mode prescribed by the constitution, and that the fact of said company being the assignee of a contract which gave the grantees and their assigns the right in question cannot alter the case, as the company had no power to acquire such a right; quoting the following from *People v. Stanford*, 77 Cal. 378, 379, 18 Pac. 88, and 19 Pac. 693:

"The defendant the Potrero & Bay View Railroad Company claims the right to maintain a railroad, and to run cars thereon, upon the streets described in the answer, to collect fares, etc., under and by virtue of the act of April 2, 1866, purporting to grant to certain persons, alleged to be assignors of the Potrero & Bay View Company the right to lay down and maintain an iron railroad along and upon certain streets, and upon acts amendatory thereof and supplemental thereto. The act of 1866 was not a grant of a mere proprietary interest in lands, but was, if valid, a grant of a franchise. The constitution of 1849 provided: 'Corporations may be formed under general laws, but shall not be created by special act,' etc. Article 4, § 31. The true construction of that constitutional provision is that private corporations must derive their powers from general laws, and not from special statutes. *City and County of San Francisco v. Spring Valley Water Works*, 48 Cal. 513. It follows that, if the grant of the franchise of laying down and maintaining a railroad within the limits of San Francisco to certain persons therein named was a valid and operative grant, yet the defendant corporation acquired no right to the franchise by assignment from such persons. To uphold such assignment would be to give to the particular corporation through it a franchise which other corporations of the same class could acquire only by grant from the supervisors, as provided in the general laws. *San Francisco v. Spring Valley Water Works*, supra."

Defendants' counsel, in their examination of the case last cited, evidently failed to observe the fact that the clause quoted by them, and on which they rely, was from the opinion of a department, and that said clause was expressly overruled, on rehearing, by the court in bank, as follows:

"As to other questions arising upon the answer, they relate to the special answer to the second count of the complaint, which count of the complaint was held in the former opinion to be bad. We adhere to that opinion so far as it relates to these questions, except so far as it holds that a duly-organized corporation cannot take an assignment from its lawful owners of a franchise to lay down and maintain a street railroad. This is based upon the constitutional provision that 'corporations may be formed under general laws, but shall not be created by special act.' Const. art. 4, § 31. This provision applies to the formation or creation of corporations, and to the powers directly conferred upon them by legislative enactment, and cannot, in our judgment, be construed as prohibiting the assignment of a franchise to a legally created corporation by persons having the lawful right to exercise and transfer the same." *People v. Stanford*, 77 Cal. 371, 18 Pac. 85, and 19 Pac. 693.

The other case cited by defendants in this connection (*Water Works v. Schottler*, supra) is directly against their contention that the Los Angeles City Water Company could not acquire from individuals a contractual right to collect water rates other than those

fixed in the mode prescribed by its charter. This is shown so clearly by Judge Ross in *Santa Ana Water Co. v. Town of San Buenaventura*, 56 Fed. 347, 348, already mentioned, that I quote from his opinion as follows:

"In the case entitled *Water Works v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, the question arose whether the right conferred upon water companies organized under that act to participate in the fixing of the rates to be charged for water furnished by them constituted a contract protected by the constitution of the United States against impairment by subsequent action of the state. The court held that the provision in the statute of 1858 in respect to the fixing of water rates was but one of the corporate privileges granted by the state; that it was part and parcel of the charter of the corporation, and nothing else, and therefore fell within the power conferred by section 31, art. 4, of the constitution of the state, in existence when the act was passed to alter or repeal it. Chief Justice Waite, in delivering the opinion of the court, said: 'The organization of the Spring Valley Company was not a business arrangement between the city and the company, as contracting parties, but the creation of a new corporation to do business within the state, and to be governed as a natural person or other corporations were or might be. Neither are the charter rights acquired by the company under the law to be looked upon as contracts with the city and county of San Francisco. The corporation was created by the state. All its powers came from the state, and none from the city and county. As a corporation it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grew out of contracts lawfully made, depend alone on the statute under which it was organized, and such alterations and amendments thereof as may from time to time be made by proper authority. The provision for fixing rates cannot be separated from the remainder of the statute by calling it a contract. It was a condition attached to the franchises conferred on any corporation formed under the statute, and indissolubly connected with the reserved power of alteration and repeal.' It will be observed that while the court held that each and every right conferred by the statute under which the company was incorporated was a part and parcel of its charter, and that only, and therefore subject to alteration or repeal, the right of any company to contract with the city or town in any way allowed by law was expressly recognized and declared."

Judge Ross, later, at page 351, after referring to *People v. Stanford*, supra, announces his conclusion on the point under consideration as follows:

"The construction placed upon the constitution of the state by the highest court in existence under it is binding on this court, and, under the construction thus adopted by the supreme court of California, it is obvious that the complainant corporation was competent to take by assignment whatever rights the contract of January 4, 1869, conferred upon Arnaz and his associates, and that were assignable by them."

Complainants urge another ground in support of the contract, namely, that, if it was made without original authority on the part of the city, it has been subsequently validated by the act of April 2, 1870, which, so far as material here, is as follows:

"Section 1. The following acts, contracts and ordinances of the mayor and common council of the city of Los Angeles are hereby ratified and confirmed: The contract and lease for the care and maintenance of the Los Angeles City Water Works, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry and Solomon Lazard, on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight (1868); and also the ordinance confirmatory of the same, passed July the twenty-second (22d) eighteen hundred and sixty-eight (1868) which contract and ordinance are recorded in

the office of the county recorder of Los Angeles county, in Book one of Miscellaneous Records, pages four hundred and twenty-eight (428) to four hundred and thirty-one (431). * * * St. Cal. 1869-70, pp. 635, 636.

Defendants argue that the effect of said act, if operative, would be to confer a franchise on the Los Angeles City Water Company, and therefore the act is violative of that provision of the constitution of the state, then in force, prohibiting the creation of private corporations by special act; citing *Road Co. v. Cole*, 51 Cal. 381, *City and County of San Francisco v. Spring Valley Water Works*, 48 Cal. 493, and other cases. The provision of the constitution referred to (article 4, § 31) is as follows:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes."

This argument of defendants seems to me to be unsound. Assuming, for the purposes of said argument, that the city of Los Angeles was not originally authorized to make the contract of July 22, 1868, still I think that the equivalent of such authority was supplied by said act of April 2, 1870, and said contract thereby made as valid as it would have been had full authority existed from the outset. Whatever a legislature may originally authorize, it can, if the constitution under which it exists interposes no obstacle, subsequently ratify; and such ratification is equivalent to an original grant of power, operative by relation, as of the date of the thing ratified. This, according to all the authorities, is the theory and effect of a ratifying act.

"Ratification, as it relates to the law of agency, is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority; and this results as effectually to establish the duties, rights, and liabilities of an agency as if the acts ratified had been fully authorized in the beginning." 1 Am. & Eng. Enc. Law (2d Ed.) p. 1181. "By the ratification of the unauthorized act the relation of principal and agent, with all the rights and duties incident thereto, is as fully established as if the authority had been conferred originally. The ratification relates back to the time of the performance of the acts, as expressed in the familiar maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*'" (Id. p. 1213); that is, "Every subsequent ratification has a retrospective effect, and is equivalent to a prior command" (1 Bouv. Law Dict. p. 220).

Again it has been said:

"Until ratification, no liability to principal exists; but, after ratification, liability relates back to the time when the obligation was undertaken. In other words, to adopt the exposition of an eminent German commentator, when an agent undertakes an act for another person, the legal character of the act remains undetermined until such other person decides whether or not he will ratify. The contract is not void, but occupies the same position as one that is conditional. The third party contracting is bound from the time of the institution of the contract, and not merely from that of the ratification. The agent cannot, even in this intermediate period, release the third party from liability. A fortiori such release is not worked by the intervening death or other incompetency of the agent. * * * It has just been noticed that the principal, by the act of ratification, puts himself in his agent's place. From this it follows that the ratification acts retrospectively; and nowhere is this more unhesitatingly expressed than in the Roman law. The principal, so that law assumes, puts himself, by the ratification, back into the period in which the contract was executed. * * * Whart. Ag. §§ 76, 77.

In *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125, the court said:

"Since what was done in this case by the constitutional majority of qualified electors, and by the board of supervisors of the county, would have been legal and binding upon the county had it been done under legislative authority previously conferred, it is not perceived why subsequent legislative ratification is not, in the absence of constitutional restrictions upon such legislation, equivalent to original authority."

Further in the same case the court quotes from *Sykes v. Mayor*, etc., 55 Miss. 137, as follows:

"The idea implied in the ratification of a municipal act performed without previous legislative authority is that the ratifying communicates authority, which relates back to, and retrospectively vivifies and legalizes, the act, as if the power had been previously given. Such statute is of the same import as an original authority."

See, also, *Grogan v. City of San Francisco*, 18 Cal. 590; *People v. Brooks*, 16 Cal. 27; *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243; *Zottman v. City of San Francisco*, 20 Cal. 97; and *Taylor v. Robinson*, 14 Cal. 396.

From these authorities it results that the act of April 2, 1870, is, in legal contemplation, the same as an act conferring power originally upon the city to make the contract with Griffin and his associates. Such, indeed, is the admission of defendants themselves, in one paragraph of their brief, which is as follows:

"The act does not purport to vest in the city the power generally to make contracts with reference to providing a supply of water, but it attempts to confirm a particular contract, and is of exactly the same nature as if an act had been passed, prior to the execution of the contract, specially authorizing the city to enter into it."

Now, if the legislature had passed an act, prior to the execution of the contract with Griffin, Beaudry, and Lazard, specially authorizing the city to enter into said contract with said parties, such an act would have been valid; for, as already shown, the constitutional inhibition against the creation of private corporations by special legislation does not include grants of franchises to individuals.

My views in regard to that clause of the contract of July 22, 1868, now under consideration, wherein the city agreed that it would not reduce water rates below those charged at the date of the contract, may be summarized thus: The city of Los Angeles, by virtue of the acts of April 4, 1850, and March 11, 1850, hereinbefore mentioned, which constituted the original charter of said city, was authorized to make said agreement; and, further, if such original authority did not exist, the agreement was validated by the ratifying act of April 2, 1870. These views render unnecessary the determination of the question of estoppel urged by complainants in their last brief.

2. The next defense to the suit is that there is no proof that the rates fixed by the ordinance of 1897 are less than the rates that were charged by the assignors of the water company at the date of the contract, July 22, 1868. The evidence adduced on this point consists of a report, made in 1870, of a joint committee of the city and water company, appointed for the purpose of fixing water rates, which report states, in substance, among other things, that said committee had

established water rates, taking as a guide the rates charged in 1868, and a similar report made in the year 1874, which reports were accepted and approved by the mayor and council of the city of Los Angeles. Defendants insist that the statements in said reports that the committee had taken as a guide the rates charged in July, 1868, are hearsay declarations of a committee of the council, not binding upon the city; citing 1 Dill. Mun. Corp. (4th Ed.) § 237, note on pages 321, 322. I have examined the cases below mentioned, which are among those cited by Judge Dillon in the note referred to, and find that, so far from sustaining, they antagonize, defendants' contention. The rule, as I gather it from these cases, is this: A corporation, municipal as well as private, is bound by the declarations of its officers, where such declarations accompany, and are explanatory of, an act done by the officer in the scope of his authority. *Glidden v. Town of Unity*, 33 N. H. 571; *Lasalle Co. v. Simmons*, 10 Ill. 516; *Railroad Co. v. Ingles*, 15 B. Mon. 637; *Gray v. Rollingsford*, 58 N. H. 253; *Bridge Co. v. Betsworth*, 30 Conn. 380; *Grimes v. Keene*, 52 N. H. 330.

The following extract is from *Glidden v. Town of Unity*, supra:

"In all American courts, towns and other corporations are now to be considered as subject to the same presumptions and implications arising from their corporate acts or the acts of their agents, within the scope of their authority, without either vote, deed, or writing, as in the case of natural persons. Vide authorities collected in 2 Kent, Comm. 290, and Ang. & A. Corp. 212. They may be bound by the express promise of their agents or officers, acting within the scope of their authority, or such promise may be implied against the corporation from the acts of its agents within their authority, as in the case of natural persons. *Smith v. First Cong. Meeting House*, 8 Pick. 178; *Bellows v. Bank*, 2 Mason, 31, Fed. Cas. No. 1,279.

In *Lasalle Co. v. Simmons*, supra, the court says:

"The declarations of the commissioners respecting the payment of the money were not competent evidence against the county. They were not made by them while officially representing the county in this transaction. The declarations of an agent, while engaged in the business of his principal, respecting a particular matter then depending, are a part of the *res gestæ* of the transaction, and binding on the principal; but those made out of the course of the agency, when the agent is not acting for the principal in the particular transaction concerning which they are made, are mere hearsay, and not admissible in evidence against the principal. 1 Greenl. Ev. §§ 113, 114; Story, Ag. §§ 134, 135."

In *Railroad Co. v. Ingles*, supra, the court said:

"The doctrine is well settled that, where the acts of the agent will bind the principal, there his representations and statements respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*. Wherever what the agent did is admissible in evidence, then whatever he said on the subject while doing it is also evidence against the principal. The court therefore did not err in admitting this testimony."

The committees above mentioned were in the performance of the duty expressly enjoined upon them by the city, and the statements in their reports that they had followed the rates charged in July, 1868, were explanatory of the rates they established, and therefore said statements are clearly within the rule enunciated by the foregoing authorities. The same remark applies to the actions of the council and mayor in accepting and approving said reports.

Defendants further suggest that it does not appear from said statements whether the time referred to in July, 1868, was prior or subsequent to the 22d day of that month, the date of the execution of the contract. This suggestion, I think, is without force. The statement is that the committee established rates, etc., "taking as a guide, as near as can be, the charges and rates for domestic purposes charged in July, 1868." The obvious meaning of this statement is that the charges and rates therein referred to prevailed, not merely on a particular day in July, but during said month. I hold that the reports above mentioned, and the actions of the city council and mayor thereon, show that the rates fixed in said report of 1870 were the rates charged by the assignors of the water company July 22, 1868.

3. The next defense relied on is that complainants are not entitled to a decree annulling the ordinance of 1897 for the reason that complainants have violated, and are still violating, a material provision of said contract, by taking from the Los Angeles river more than 10 inches of water, measured under a 4-inch pressure; citing Pom. Eq. Jur. §§ 1341, 1407. Defendants admit that all the water taken from the river prior to October 20, 1896, was taken with the consent of the city, as provided in the contract, and it does not appear that a greater quantity was being taken when this suit was commenced, March 4, 1897, than was taken in October, 1896; but defendants claim that said consent was withdrawn on the date above mentioned, October 20, 1896. If it be conceded, as claimed by defendants (which, however, I do not decide), that the provision of the contract limiting the quantity of water to be taken from the river without the previous consent of the city is sufficiently certain for enforcement, or, more specifically, that said quantity is 10 inches, measured under a 4-inch pressure, still the consent of the city to the taking of a greater quantity, once given, cannot be withdrawn during the life of the contract, for the reason that large expenditures have been made by complainants in reliance upon such consent. *Rhodes v. Otis*, 33 Ala. 600; *Woodbury v. Parshley*, 7 N. H. 237; *Lacy v. Arnett*, 33 Pa. St. 169; *Russell v. Hubbard*, 59 Ill. 337; *Beall v. Mill Co.*, 45 Ga. 33; *Veghte v. Power Co.*, 19 N. J. Eq. 153; *Railroad Co. v. Battle*, 66 N. C. 546. The rule enunciated in the foregoing citations has also been recognized and applied in California. *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268; *Grimshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84; *Smith v. Green*, 109 Cal. 228, 41 Pac. 1022. From the syllabus of the case last cited I quote as follows:

"As a general rule, one who rests his claim to an easement on a verbal contract alone, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce; yet where a parcel license to take half the waters of a stream has been executed, and investments have been made upon the faith of it, the license is irrevocable."

4. Defendants further contend that complainants have so acquiesced in the action of the council in the fixing of water rates as to estop them from maintaining the present suit, and also have been guilty of such laches in not sooner seeking an injunction

against the infringement of their rights as is fatal to the relief they now seek. This contention, in my opinion, is not well taken. So far from the action of the city council having been acquiesced in by the complainants, it has been the subject of repeated protests. But, even if the complainants had not protested, their acquiescence in ordinances establishing rates prior to the year 1896 would not be acquiescence in the ordinance of that year, for the obvious reason that the last-named ordinance made a greater reduction of rates than any previous ordinance. Without reference, however, to the facts that the ordinances of 1896 and 1897 made greater reductions than had been made in previous ordinances, it may be stated broadly that acquiescence in an ordinance passed one year cannot be acquiescence in an ordinance passed the succeeding year. The ordinances passed consecutively through a series of years, beginning, for instance, with 1880, and extending down to 1889, were not one continuous act infringing complainants' rights, but each ordinance was a separate and distinct infringement, and therefore acquiescence in one does not estop the complainants from assailing another.

5. Defendants further contend that if the limitation in the contract of July 22, 1868, upon the power of the city to fix water rates, be valid, the ordinance of 1897 is void upon its face, and does not throw any cloud upon complainants' rights under said contract, nor expose their property to forfeiture, and therefore complainants have adequate remedies at law, by actions for collections of water rates; citing *Water Works v. Bartlett*, 16 Fed. 615; *Alpers v. City and County of San Francisco*, 32 Fed. 503; and *Murphy v. East Portland*, 42 Fed. 308. This contention is erroneous, in its assumption that the ordinance referred to is void upon its face, and, besides, is fully answered by the decision on demurrer in the case of *Santa Ana Water Co. v. Town of San Buenaventura*, supra. That case, so far as concerns the question of equitable jurisdiction, is in all essential respects similar to the case at bar. This is not true, however, of any of the three cases cited by defendants in this connection. Moreover, two of said cases (*Alpers v. City and County of San Francisco*, supra, and *Murphy v. East Portland*, supra), so far from supporting, are, in one respect, against, defendants' contention. They hold, it is true, that the judiciary will not restrain the passage by a municipal corporation of a proposed ordinance upon a matter within the legislative discretion of such corporation; but they at the same time expressly recognize the competency of the courts, after the passage of such an ordinance, to annul or arrest its enforcement if it be unconstitutional. The case mainly relied on by defendants, however, is that of *Water Works v. Bartlett*, supra, in which the court held that the proposed ordinance, whose adoption was sought to be restrained, if void at all, was void on its face, and that, because everybody is presumed to know the law, no injury could result therefrom. The very essence of the rule there enunciated by Judge Sawyer is that the facts which nullify the ordinance must appear from its inspection; the theory being that since the facts appear

upon the face of the ordinance, and everybody is presumed to know the law applicable to such facts, the ordinance is a proclamation of its own nullity, and therefore cannot, in contemplation of law, be productive of harm. Thus, it will be seen that the rule is extremely technical; and Judge Sawyer himself, while enforcing it, as he in effect says, under the constraint of precedents, freely criticises its severity. In order to justify the application of such a rule, every requirement of it should be fully met. The reason why the ordinance in *Water Works v. Bartlett*, supra, if void at all, would have been void upon its face, was that the alleged contractual rights which it attempted to divest were granted by an act of the legislature of California (that of April 22, 1858), which act, without pleading or proof, was within the court's knowledge. In the case at bar, however, the ordinance, upon its face, is valid; and its invalidity appears only when considered in connection with the contract of July 22, 1868, and evidence showing what the water rates were at that date. While the court takes judicial notice of the ratifying act of April 2, 1870, still, since the provisions of the contract of July 22, 1868, are not embodied in said act, I am not sure that said provisions are matters of judicial knowledge, although such seems to be the ruling of the court (one of the justices dissenting) in *Brady v. Page*, 59 Cal. 52. Conceding, however, that the court will take judicial notice of all the provisions of said contract, still the one in question simply provides that water rates shall not be reduced below the rates then charged without indicating what those rates were; and therefore the invalidity of the ordinance appears, not upon its face, but only in connection with extraneous evidence of what the rates were in July, 1868, and for this reason complainants have adduced that evidence in the present case.

Defendants, in one of their briefs filed on demurrer, discussing the branch of the case now under consideration, say:

"The position of complainants' counsel seems to be that, merely because they can contemplate the possibility that they are intended to be included within the provisions of the ordinances which are attacked here, they can obtain the declaration of this court that the acts of the council are void, irrespective of the question whether anything is ever done to infringe their rights of property or not. In other words, they claim that they are entitled to have the theoretical question of law, concerning the validity of their contract and the invalidity of the ordinance in question, determined by this court merely for their own satisfaction, and without showing that any irreparable damage will ensue if the contract is valid, and the ordinances are void. If the contract is void, and the ordinances are valid, the complainants have no equity; and if, on the other hand, the contract is valid, and the ordinances are void, then no damage can result to complainants, in contemplation of law, as the city is not doing or attempting to do anything that will in any way interfere with the property of complainants."

These comments do not correctly present the situation as disclosed by the pleadings and proofs. Under the circumstances of this case, the ordinance itself is an infringement of complainants' property rights, because it hinders them in the collection of that compensation, to which they are entitled under the contract of 1868; and it is idle to say that relief cannot be had in equity

because the power and duty of the city ended with the passage of the ordinance, and no effort is now being made by the city for its enforcement. The ordinance, by reason of the severe pains and penalties which apparently fortify it, is daily, hourly, and momentarily enforcing itself. The defendants must either submit to the terms of the ordinance, or incur unusually onerous expenditures. It is reasonably certain that if, with the ordinance standing, they were to undertake the collection of rates in excess of those prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance, succeed in collecting without an action a higher rate than the ordinance prescribes, it is equally certain that they would thereby bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of works. Surely these injuries are irreparable, and actions at law, so far from being adequate to the exigencies of the situation, are, as complainants, in their brief, forcibly put it, mere mockeries of a remedy.

Defendants further suggest that the equitable relief prayed for by the complainants ought not to be granted for the reason that a decree annulling the ordinance of 1897 could not become final until affirmed on appeal by a court of last resort, and that before this could take place the year for which the ordinance was passed will have expired. This suggestion, in my opinion, is without force. If the views, which I have already expressed are correct, complainants' rights under the contract of July 22, 1868, cannot be adequately protected in any other way than by an annulment of said ordinance; and the possibility or probability that the enforcement of a decree to that effect may be postponed by an appeal until the ordinance expires of its own limitation affords no reason for a denial by this court of the relief, to which it finds the complainants entitled. In *San Diego Water Co. v. City of San Diego*, 118 Cal. 556, 50 Pac. 633, which was a suit to annul a city ordinance, the trial in the lower court was had after the expiration of the year covered by the ordinance; and, although the decision of the supreme court in bank was not rendered until more than six years thereafter, and specially adverts to the date of the trial in the lower court, the case was sent back for a new trial.

My conclusions are that the contract of July 22, 1868, between the city of Los Angeles and the assignors of the water company, in so far as said contract provides that the city shall not reduce water rates below those charged at said date, is valid, and that the ordinance of 1897, which was passed pursuant to constitutional and legislative requirements of the state of California, does reduce water rates below the minimum so prescribed, thereby impairing the obligation of said contract, and should be annulled. A decree conformable to this opinion will be entered.

SPEER v. BOARD OF COUNTY COM'RS OF KEARNEY COUNTY, KAN.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1898.)

No. 1,003.

1. COUNTIES—ORGANIZATION—POWERS OF TEMPORARY BOARD OF COMMISSIONERS.

Under Gen. St. Kan. 1889, par. 1577 et seq., providing for the organization of new counties, and authorizing the governor to appoint temporary officers, on whose qualification "the county shall be deemed to be duly organized," a temporary board of commissioners so appointed has power to audit claims for legitimate county expenses, and to issue warrants therefor.

2. JUDGMENT—CONFORMITY TO ISSUES.

A general judgment for defendant, which does not clearly show that it rests solely on a plea that the action was prematurely brought, cannot be sustained by the sufficiency of that plea and of the proof under it, where the plea in abatement is joined with pleas in bar in the same action.

3. APPEAL AND ERROR—REVIEW—QUESTION NOT PRESENTED TO TRIAL COURT.

In an action on county warrants, a plea in abatement on the ground that the warrants were not presented to the county treasurer for payment before suit brought, which was not presented to the trial court for decision, will not be considered by an appellate court, where it does not appear that the failure to present the warrants was prejudicial to the county.

4. COUNTY WARRANTS—VALIDITY—EVIDENCE OF OVERISSUE.

A contention that county warrants in suit are void because issued after the limit in amount authorized by statute had been passed is not supported by proof that the warrants in suit were issued in the order of the numbers they bear, and that warrants bearing lower numbers than any in suit were issued to an aggregate amount, which still left a margin within which others might legally be issued.

5. TRIAL—DIRECTION OF VERDICT—PROVINCE OF COURT.

It is only when the evidence upon an issue is free from conflict, or so clear and convincing that all reasonable men who exercise an honest judgment upon it are compelled to reach the same conclusion, that the court is justified in withdrawing the question from the jury.

6. COUNTIES—TEMPORARY COMMISSIONERS—EMPLOYMENT OF COUNSEL.

A temporary board of commissioners, appointed under the laws of Kansas on the organization of a new county, has power to employ attorneys to protect the interests of the county, and advise its officers, until the election of a county attorney.

7. COUNTY WARRANTS—PRESUMPTION OF VALIDITY—EVIDENCE TO IMPEACH.

Warrants issued by a board of county commissioners having authority to allow claims against the county, in payment of claims regularly allowed, are prima facie evidence of the just indebtedness of the county; and where a warrant in suit purported to be issued in payment for the services of an attorney previously employed by the board, and was in itself reasonable in amount, the fact that other warrants, aggregating a large amount, were also issued on the same day to the same person, does not authorize the court to withdraw from the jury the question of the validity of the warrant in question, and direct a verdict on the assumption of its invalidity.

8. SAME—SUPPORT OF POOR—POWER OF COMMISSIONERS.

Under the statutes of Kansas requiring counties to support the poor, and the boards of commissioners to levy taxes for the purpose (Gen. St. 1889, pars. 4030, 4061), neither the fact that no levy for the purpose had been made in a county newly organized, nor that the immediate care of poor persons devolved on city or township officers, will invalidate war-

rants issued by the board in payment of indebtedness incurred in supporting the poor.

9. SAME—DEFENSES—IRREGULARITY IN ISSUANCE.

Gen. St. Kan. 1889, pars. 1659, 1661, make it unlawful for a county board to allow claims (with certain exceptions) except at a regular meeting, and that violation of the requirement by commissioners shall be a misdemeanor, punishable by fine. *Held*, that where warrants, regular on their face, were issued in payment of claims, the county could not defend against them in the hands of a purchaser on the ground merely that they were irregularly issued, in that the claims were allowed at a special meeting of the board.

10. MUNICIPAL CORPORATIONS—EVIDENCES OF DEBT—ESTOPPEL TO QUESTION REGULARITY.

A municipal corporation which, by the regularity of the execution of evidences of its debts, which is apparent upon their face, induces persons to buy them, is thereby estopped from denying their validity or effect on the ground that, in their execution or in the preliminary proceedings which warranted their execution, its officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have complied, but which they negligently disregarded.

11. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATUTES.

Decisions of state courts as to their statutes, which affect the validity of contracts between citizens of different states which were made, or under which rights were acquired, before there was a judicial construction of the statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States.

12. SAME—EFFECT OF INVALIDITY OF STATUTE.

The question as to what effect the invalidity of a legislative act creating a township has upon the validity of warrants issued for indebtedness incurred by such township, in the hands of purchasers who are citizens of another state, is one upon which a federal court is not concluded by a state decision, rendered after the warrants were purchased.

13. MUNICIPAL CORPORATIONS—ESTOPPEL TO DENY CORPORATE EXISTENCE.

Where, by a legislative act, an unorganized county was attached to another county, and by existing statutes it thereby became a township of the latter county, and under such statutes was organized and assumed to act as such, without question by the state or its inhabitants until it was organized as a county, warrants issued after the county was organized, based on obligations incurred by the township, cannot be avoided in the hands of third persons to whom they were sold, on the ground that the act by which the unorganized county was attached to the older county was unconstitutional.

14. SAME—DE FACTO CORPORATIONS.

In such case the township was not organized under color of the unconstitutional act, but by virtue of the general statutes, and its acts were those of a de facto township.

15. SAME—ACTING UNDER UNCONSTITUTIONAL STATUTE.

The acts of a de facto corporation under an unconstitutional law, before its invalidity is challenged in or declared by the judicial department of the government, cannot be avoided as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity by any ex post facto declaration or decision that the law under which it acted was void.

In Error to the Circuit Court of the United States for the District of Kansas.

Frederic D. Fuller and F. P. Lindsay (George H. Whitcomb, on brief), for plaintiff in error.

Samuel R. Peters (M. G. Kelso and John C. Nicholson, on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. The questions presented by this case relate to the validity of certain county warrants issued by the board of county commissioners of Kearney county, in the state of Kansas, in the year 1888. These questions are raised by exceptions to instructions given to the jury to the effect that the plaintiff in error, H. C. Speer, was not entitled to recover upon the warrants on the evidence in the record at the close of the trial. Speer was a bona fide purchaser of the warrants in the open market. Counsel for the county present many propositions in support of the instructions of the court. Some of them challenge the validity of all the warrants. Others attack specific warrants only. Some were disregarded or overruled, while others were sustained by the court below. We can state them most clearly, and dispose of them most satisfactorily and speedily, by considering them seriatim.

The first proposition of the counsel for the county is common to all the warrants, and it was overruled by the court below. It is that the board of county commissioners had no power to issue these warrants, because it was a temporary board, appointed by the governor of Kansas under the act of the legislature of that state relating to the organization of new counties. Gen. St. Kan. 1889, pars. 1577-1594. That question, however, has been considered and decided against the county by this court in *Board v. McMaster*, 32 U. S. App. 367, 370, 15 C. C. A. 353, 355, and 68 Fed. 177, 179; and, after a careful review of the arguments on the subject, we are constrained to adhere to the views there expressed.

The statutes of Kansas provide that:

"The board of county commissioners of each county shall have power, at any meeting: * * * Second, to examine and settle all accounts of the receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county; and when so settled, they may issue county orders therefor, as provided by law." Gen. St. Kan. 1889, par. 1630.

The act relating to the organization of new counties empowers the governor, upon a proper memorial and upon adequate returns showing the population and the value of the property in the county, to appoint three persons, citizens of said unorganized county, to act as commissioners, provides that, "from and after the qualification of the county officers appointed under this act, the said county shall be deemed to be duly organized," and authorizes these commissioners to divide the county into townships, to prepare a polling list of the legal voters in each township, to give notice of an election for the choice of township and county officers and of the permanent county seat of the county, and to canvass the votes at the election. Gen. St. 1889, pars. 1577, 1582, 1584, 1587.

It is manifest from these provisions that duties were imposed upon, and powers were vested in, these commissioners, whose discharge and exercise required them to incur indebtedness on behalf of

the new county; and as, from the nature of the case, such a county could not have funds on hand with which to discharge such a debt, the inference is natural and logical that it was the purpose of the legislature to empower the commissioners, not only to incur debts, but to allow such claims and to issue such county warrants as were requisite to enable them to discharge the duties imposed upon them. When, in addition to this consideration, the express provision of the act that, upon the qualification of the temporary county officers, the county shall be deemed duly organized, is noticed, this inference becomes irresistible, and there is no logical escape from the conclusion that the temporary board of county commissioners was invested with the same powers as those given to the permanent board to incur debts, to allow claims, and to issue county warrants for legitimate county expenses.

Another proposition urged to support the instruction of the court to return a verdict for the county is that the action upon all these warrants was premature, because they were not presented to any county treasurer of the county for payment before the action was commenced. The fact is that they were presented during the year 1888, after the appointment and qualification of the temporary county commissioners, and before the election of any permanent officers of the county, to one W. P. Loucks, who was acting as county treasurer, and who indorsed upon them the fact and the dates of presentation, together with the words: "Not paid for want of funds. W. P. Loucks, County Treasurer." Conceding, but not deciding, that an action upon a county warrant, before it is presented to the county treasurer for payment, is prematurely brought (Dill. Mun. Corp. § 501; Daniel, Neg. Inst. §§ 430, 908; City of Central v. Wilcoxon, 3 Colo. 566; Varner v. Inhabitants of Nobleborough, 2 Greenl. 121; Benson v. Inhabitants of Carmel, 8 Greenl. 112; Pease v. Inhabitants of Cornish, 19 Me. 191; Dalrymple v. Whitingham, 26 Vt. 346), and that Loucks was not the county treasurer of this county when these warrants were presented to him (Atchison, T. & S. F. R. Co. v. Board of Com'rs of Kearney Co. [Kan. Sup.] 48 Pac. 583, 585), there are two reasons why the judgment against the plaintiff cannot be sustained upon this ground. The first is that the only instruction which this defense would warrant was an instruction that the jury should find that the action was prematurely brought, because payment had not been demanded of the county treasurer, and the only judgment which this defense would justify was a judgment for the defendant, without prejudice to a subsequent action on the same warrants, while the instruction given was that the plaintiff could not recover, and the judgment rendered was a general judgment for the defendant on the merits. The defendant had joined several pleas in bar with this plea in abatement in its answer; and the general instruction and judgment for the defendant, without specifying upon which defense it was based, renders all the issues presented in the case *res adjudicata*, and constitutes a bar to all future actions upon these warrants. A general judgment for the defendant, which does not clearly show that it rests solely upon a plea that the action was prematurely brought, cannot be sustained by the sufficiency of that plea and of the proof to sustain it, where the plea in abatement is joined with pleas in bar in the

same action. *House v. Mullen*, 22 Wall. 42, 46; *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 9 Fed. Cas. 592, 599 (No. 4,989), 3 Sawy. 634; *Sheldon v. Edwards*, 35 N. Y. 279, 287, 288; *U. S. v. Pine River Logging & Improvement Co.*, 49 U. S. App. 24, 35, 24 C. C. A. 101, 107, and 78 Fed. 319, 325. The second reason why the judgment cannot be sustained on this ground is that this objection was not presented to the court below for decision, and was not considered either by the court or by counsel on either side at the trial. It is plain that the objection has little, if any, merit, and that it could easily have been removed if it had been seasonably called to the attention of the plaintiff. He could have dismissed this action, made his demand, and brought another. Perhaps he could have proved that a demand had been made of the county treasurer after the permanent officers of the county had been elected. No statute of the state has been called to our attention which makes a presentation or a demand of payment of these warrants an indispensable prerequisite to the maintenance of an action upon them. If a demand of their payment was necessary, that necessity grew out of the fact that, under the general rules of law, the drawer of a draft, check, or order is not liable to suit upon it until after its presentation to the drawee for payment; and if, at any time before this action was commenced, the holder of these warrants formally or informally asked the county treasurer to pay them, and he refused, such a request undoubtedly removed the objection. *Pease v. Inhabitants of Cornish*, 19 Me. 191, 193. In *Kelley v. Mayor, etc.*, 4 Hill, 263, 266, it was held that if it affirmatively appeared that the municipality had not suffered, and could not suffer, any loss from want of presentment or of notice of nonpayment of such a warrant, neither was necessary. It is hardly possible that the county of Kearney can have suffered any loss from the failure to present and demand the payment of these warrants. It is very probable that it could have found and paid them, if it had been anxious to do so. A defendant cannot be permitted to present for the first time in an appellate court an objection to the plaintiff's recovery so easily removed, which he passed in silence at the trial.

It is contended that the warrants are void, and that the plaintiff was not entitled to recover upon them, because they were issued in violation of the limitation prescribed by paragraphs 1886 and 1887, Gen. St. Kan. 1889. Paragraph 1886 provides that the board of county commissioners shall not levy upon the taxable property of the county for current expenses of the county for any one year in excess of 1 per cent. upon a valuation of \$5,000,000 and under; and paragraph 1887 forbids a board of county commissioners or county clerk to issue county warrants or orders in any one year to a greater amount than the amount of the county tax levied in the same year to defray county charges and expenses, less the amount levied for delinquencies. The proclamation of the governor appointing the temporary county commissioners, which was made on March 27, 1887, declared the value of the taxable property in the county to be \$1,079,081, exclusive of railroad property, and the value of the taxable property of railroads credited to this county was \$266,959.20. This made

the entire taxable property of the county at that time \$1,346,040.20. The amount of warrants issuable under the limitation in paragraph 1887 was, upon this basis, \$13,460.40. On August 1, 1888, the state board of equalization reduced the valuation of the taxable property of this county, exclusive of railroad property, to \$934,160.20, but left the valuation of the railroad property \$266,959.20. This made the value of the taxable property of the county \$1,201,119.40, and the limit of the amount of issuable warrants \$12,011.19. All the warrants in suit were issued in the year 1888. They all bear numbers higher than 34, and there is evidence that they were issued in the order of their numbers. There is, however, no evidence in this record which shows to what amount warrants had been issued when any of those here in question were emitted by the county, except the fact that warrants to the amount of \$10,625.75 had been issued before warrant number 34 was issued. This fact alone was clearly insufficient to prove that any of the plaintiff's warrants were issued after the limitation of the statute had been reached. On the most favorable basis for the county, the board of county commissioners was authorized to issue warrants to the amount of \$12,011.19, while the utmost amount proved to have been issued before these in suit was \$10,625.75; and these warrants come supported by the presumption that the officials who issued them did not violate, but faithfully obeyed, the law.

Another claim of the county is that these warrants were all fraudulently issued, without any consideration. There is evidence in this record which tends strongly to support this position. The temporary board of county commissioners of this county issued warrants to the amount of \$137,543.02; it issued warrants to the amount of \$21,181.60 for attorneys' fees; it issued warrants to the amount of \$4,275.27 to one of its members; and it did all this in less than eight months. If the court below had been trying the facts in this case, and had reached the conclusion that these warrants were fraudulently issued, perhaps we should not have disturbed the result. The evidence may be sufficient to warrant that conclusion. But that is not the question before this court, nor was it the question before the court below. This was not a trial by the judge, but by the jury; and it was the province of the jury to determine every question of fact concerning which the evidence was conflicting,—every question of fact the answer to which was uncertain. It is only when the evidence is free from conflict, or so clear and convincing that all reasonable men who exercise an honest judgment upon it are compelled to reach the same conclusion, that the court is justified in withdrawing the question from the jury. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 451, 3 C. C. A. 433, 438, and 53 Fed. 65, 70; *Drake v. Stewart*, 40 U. S. App. 173, 178, 22 C. C. A. 104, 107, and 76 Fed. 140, 143; *Railway Co. v. Hall*, 87 Fed. 170. Now, while the testimony in this record may be sufficient to warrant a verdict that some of the warrants issued by this temporary board must have been fraudulently issued without adequate consideration, it is not so free from conflict, nor is it so clear and convincing, that it can truthfully be said that reasonable men might not honestly draw the conclusion from it that some, if not all, of the warrants in suit, were

honestly issued for a sufficient consideration. Take, for example, the first warrant regarding which the court instructed the jury to find for the defendant. It reads:

"No. 93.

County Clerk's Office.

\$245.00.

"Lakin, Kansas, July 3, 1888.

"Treasurer Kearney County, Kansas: Pay to L. J. Webb or bearer the sum of two hundred and forty-five and x/100 dollars, for services for counsel for Kearney county, out of any money in the treasury not otherwise appropriated. By order of the board of county commissioners.

"J. H. Waterman, Clerk.

W. J. Price, Chairman."

Indorsed: "Presented for payment, July 3rd, A. D. 1888, but not paid for want of funds.

W. P. Loucks, County Treasurer.

"Registered No. 86.

"[Seal County Clerk, Kearney County, Kansas.]"

This order was introduced in evidence. It was supported by a resolution of the board adopted April 3, 1888, that "F. P. Lindsay, of Lakin, Kansas, and Webb, Campbell & Spencer, of Topeka, Kansas, be, and they are hereby, employed to represent this board, and to protect the interests of Kearney county until a county attorney is elected," by the fact that the claim of Webb for these services was allowed by the board, and by the fact, which was drawn from him on his cross-examination, that the temporary county clerk had testified in another action that L. J. Webb rendered services for Kearney county as an attorney at law between April 3, 1888, and July 2, 1888, and that this warrant was issued to him on account of his retainer. It is true that this evidence was met by the testimony of the same witness that Webb had rendered no services to the county prior to July 2, 1888; that five warrants were issued to him on July 3, 1888; and that the aggregate amount of the warrants issued to him was \$12,163.94, while the sum total of all the warrants which the board issued was \$137,543.02. We do not doubt that the employment by this board of attorneys to render legal services which were worth \$12,163.94, if such services were ever rendered, was an indefensible and wanton abuse of its power. But it is no less certain that the board had authority to employ attorneys to give legal advice, and to render such services as the county and its officers required to enable them to enforce the rights and protect the interests of the former, and to enable the latter to discharge the duties imposed upon them in a just and legal manner. There was no county attorney, and the only way the county officers could obtain needed legal advice and services was through the employment of attorneys. Board of Com'rs v. McMaster, 32 U. S. App. 367, 370, 15 C. O. A. 353, 355, and 68 Fed. 177, 180; Commissioners v. Brewer, 9 Kan. 307, 317; Huffman v. Commissioners, 23 Kan. 197, 198. Whether or not this particular warrant for \$245 was honestly issued, in payment of the fair value of such services, or was fraudulently issued, without an adequate consideration, was a question fairly presented by this evidence; but we are unable to say that the evidence was so conclusive against its validity that the court could rightfully withdraw this issue from the jury. The warrant itself was prima facie proof of the validity of the claim it evidenced. The board was empowered to hear and determine claims against the county, and to issue warrants therefor. These warrants evidence the decision and judgment of the board

that the county is justly indebted to the holders thereof in the amounts stated therein. They are not conclusive evidence of the indebtedness they admit. The county may defeat them by proof that they were without consideration, that they were fraudulently issued to the damage of the county, or that the incurrence of the debts and the allowance of the claims they evidence were beyond the jurisdiction of the board. But the presumption is that the action of the board was right and just, and the burden of establishing these defenses is upon the county. Until one of them is established, the warrants are prima facie evidence of just debts of the county, upon which the holder is entitled to judgment in any court of competent jurisdiction. *Wall v. County of Monroe*, 103 U. S. 74, 77; *Thompson v. Searcy Co.*, 12 U. S. App. 618, 627, 6 C. C. A. 674, 679, and 57 Fed. 1030, 1036; *Board of Com'rs v. Sherwood*, 27 U. S. App. 458, 464, 11 C. C. A. 507, 511, and 64 Fed. 103, 107; *Commissioners v. Keller*, 6 Kan. 511, 523. The answer to the question whether one of these defenses had been established at the close of the evidence in this case, after the resolution of employment, the evidence that this warrant was issued on account of the retainer of Webb, and the prima facie proof of indebtedness which the warrant made, was too doubtful to justify the court below in substituting its finding for that of the jury. A careful consideration of all the evidence relative to each of the other warrants in issue has led us to the same conclusion. The question of the fraudulent issue and the want of consideration of each of these warrants was a question for the jury, and not for the court.

Some of these warrants were issued for supplies for the poor, and it is insisted that it was beyond the power of the board to incur or allow any obligation of this kind. But the statutes of Kansas provide that every county shall relieve and support all poor and indigent persons lawfully settled therein whenever they stand in need (Gen. St. 1889, par. 4030), and that the board of county commissioners may levy taxes for their support (Id. pars. 4030, 4061; *Railroad Co. v. Albright*, 33 Kan. 211, 213, 6 Pac. 276; *Fields v. Russell*, 38 Kan. 720, 722, 17 Pac. 476). The suggestions that no levy of taxes for the support of the poor had been made when these warrants were issued, and that the mayor and council of every incorporated city and the township trustee of each civil township are made overseers of the poor in their respective townships (Gen. St. 1889, pars. 4027, 4028), and are given the oversight and care of all poor persons so long as they remain a county charge (Id. pars. 4033, 4036), are without merit. It was just because no levy had been made and collected, and because none could be made and collected, when the debts evidenced by these warrants were incurred, that the power was vested in the board to issue warrants in anticipation of the revenue, in order to provide for the current expenses of the county. It is not material here whether or not there were any township trustees or city officers who were overseers of the poor in this county when these debts were contracted. If there were none, it was the duty, and therefore it was within the power, of this board of commissioners, to relieve and support all poor and indigent persons within their county; and, if there were such, this board was required by statute to pay any lawful obligations which they incurred

for the support of the suffering poor. Paragraphs 4048 and 4046. In either event the board had plenary power to incur obligations and to issue warrants for the support of the poor of its county, and it was the very body upon which the statutes had imposed that duty.

Another position of counsel for the county is that there could be no recovery upon some of these warrants, because the claims upon which they rested were not allowed at regular, but were allowed at adjourned or special, sessions of the board. This contention rests upon the following provisions of the General Statutes of Kansas of 1889:

"(1859) Unlawful to Allow Claims. § 39a. It shall be unlawful for any board of county commissioners to allow any claim or account against the county at any special or adjourned meeting of the board, except for election expenses and jury fees; and all other claims or accounts against the county shall be allowed only at the regular meetings of the board in January, April, July and October of each year."

"(1661) Penalty. § 39c. Any county commissioner violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, be fined in a sum not exceeding five hundred dollars, or by imprisonment in the county jail for the term not exceeding one year, or by both such fine and imprisonment."

It is conceded that a purchaser of these warrants does not secure the immunity from defenses accorded to the purchaser of commercial paper under the law merchant. He takes them subject to the defenses that the allowance of the debts and the issue of the warrants were not within the scope of the authority of the board, that they were without consideration, and that they were fraudulently created. In short, he takes them subject to all defenses which challenge the merits of the claims. Nevertheless, the warrants themselves are *prima facie* evidence that the debts are just, and that such defenses do not exist. It was within the power of this board, and it was its duty, to determine the validity of the claims on which these warrants rested, to allow or disallow them, and, if allowed, to issue warrants for their payment. The statute prescribed the time and the manner in which the board should exercise this power and discharge this duty. It did exercise the power and issue the warrants, which were regular on their face, and were apparently *prima facie* proof of the validity of the debts which they admitted. The statute does not require that these warrants shall be issued or dated on the same day upon which the claims which they evidence are allowed, and they contain no notice or warning, by date or otherwise, that the board which issued them, and which was authorized to issue them, exercised its power at any other time or in any other manner than those prescribed by the law. The plaintiff, a citizen of the state of Illinois, is a holder of the warrants. The presumption is that he found them in the open market, and bought and paid for them in reliance upon the legal presumption, which certainly accompanied them, that the county board had exercised its power at a lawful time and in a legal manner. Can the county defeat the warrants now, or deprive them of their force as *prima facie* evidence of its debts, in the hands of this bona fide purchaser, by proof of the bare fact that its board of commissioners carelessly or willfully exercised this power on the wrong day, without any evidence of the fact that the claims which they represent were in

fact unfounded or unjust? The right answer to this question does not appear to be doubtful. The statute which fixes the times when the board may allow claims visits the penalty for its violation upon its violators, the members of the board, and not upon the purchasers of their warrants; and it is not the province of the court to extend the punishment to the innocent. End. Interp. St. § 458. It contains no provision that the allowances made in violation of it or that the warrants issued upon them shall be void. Moreover, in their business transactions, municipal and quasi municipal corporations are governed by the same rules that govern private individuals and corporations. *Illinois Trust & Sav. Bank v. City of Arkansas City*, 40 U. S. App. 257, 277, 294, 22 C. C. A. 171, 182, 193, and 76 Fed. 271, 282, 293. But neither individuals nor corporations can be permitted to deny, to the damage of others, the truth of statements and representations by which they have purposely or carelessly induced such others to change their situation. There were lawful times and a legal way in which this board of county commissioners could have allowed these claims, and could have issued the warrants upon them. The warrants were representations of the county that they had been issued, and that the claims which they represented had been allowed at those times and in that manner. The plaintiff had the right to put his faith in these representations, and, now that he has invested his money in reliance upon them, it is too late for the county to deny them to his prejudice. A corporation which, by the regularity of the execution of evidences of its debts, which is apparent upon their face, induces lenders or borrowers to loan money upon or to buy them, is thereby estopped from denying their validity or effect on the ground that, in their execution or in the preliminary proceedings which warranted their execution, its officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure with which they might have complied, but which they carelessly or negligently disregarded. *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 10 U. S. App. 98, 188, 191, 2 C. C. A. 174, 239, 241, 51 Fed. 309, 326, 328; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 86, 82 Fed. 124, 137; *Board of Com'rs v. Sherwood*, 27 U. S. App. 458, 466, 11 C. C. A. 507, 510, and 64 Fed. 103, 108; *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272. The county cannot defeat these warrants because they were issued at adjourned or special sessions of the board.

One of the warrants in suit was issued on account of Kearney township scrip, and it is contended that the board of county commissioners had no power to issue warrants for this scrip, because the law under which Kearney township was organized was unconstitutional. Sections 1 and 2 of article 9 of the constitution of Kansas contain these provisions:

"The legislature shall provide for organizing new counties, locating county seats, and changing county lines."

"The legislature shall provide for such county and township officers as may be necessary."

In *State v. Board of Com'rs of Pawnee Co.*, 12 Kan. 426, 438, the supreme court of that state said:

"The whole power of organizing new counties belongs in this state to the legislature. It may provide for their organization by general law, and through the intervention of the governor, or of any other officer, agent, commissioner, or person it may choose; or it may directly organize a new county itself by special act."

The legislature of Kansas provided by general laws for the organization of municipal townships within the counties of that state, and authorized the election or appointment of township officers who were vested with the power to have the care and management of all the property of their township, to superintend the various interests thereof, to care for the poor, to maintain roads, to levy taxes, to incur debts, to allow and disallow claims against the township, and to issue and pay warrants for necessary township purposes. Gen. St. 1889, c. 110. It provided by general laws:

"That so long as any one of the unorganized counties of the state shall be attached to an organized county for judicial purposes, it shall constitute and form one of the municipal townships thereof, and as such shall be entitled to township officers, and all things pertaining to the rights and privileges of a township, and be subject to the same regulations and liabilities as other townships of such county, and its electors shall be deemed legal electors of the county to which it is attached, and the officers of the county to which it is attached shall have the same powers and perform the same duties, in reference to such attached county, as they have over the municipal townships of their own county; * * * that all such school districts within such unorganized county shall be separately described and numbered by the commissioners of such organized county, who shall appoint a deputy school superintendent for this purpose, and also a deputy county surveyor" (paragraph 1610); and "that whenever any unorganized county is attached for judicial purposes to any organized county, it shall be the duty of the county commissioners of the county to which it is attached to order a special election in said unorganized county for the election of township officers; * * * until such election is held, and township officers are elected and qualified, it shall be the duty of the board of county commissioners of such organized county to appoint all necessary township officers for such unorganized county, who shall hold their office until the officers elected at such special election shall have qualified, and the officers elected at such special election shall hold their office till the regular township election" (paragraph 1607).

Under the system of government in Kansas, the essential characteristics of unorganized counties were names and territorial boundaries only, while organized counties had population, courts, and county officers, in addition to their names and territory. By an act approved March 5, 1887, the legislature of Kansas created Kearney county, and defined its boundaries (chapter 81, Laws 1887), and by another act approved on the same day it provided that "the counties of Stanton and Kearney are hereby attached to the county of Hamilton" (chapter 132, Id.). But the latter act was entitled "An act to attach the counties of Haskell and Kearney to Finney county," and was obnoxious to section 16, art. 2, of the constitution of Kansas, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." Nevertheless, the legislative department of the state of Kansas by the enactment of this law, and the executive department by its approval, treated it as valid. It was published and spread upon the statute books of the state. The board of county commissioners of Hamilton county acknowledged its validity, and under it organized Kearney county as Kearney township, on

April 25, 1887, pursuant to the provisions of the general laws of the state found in paragraphs 1607 and 1610, *supra*; and from that time until the organization of Kearney county, on April 3, 1888, the township organization existed and acted. During this period of township government, the trustee of the township issued orders on its treasurer for claims against the township allowed by its acting board, pursuant to paragraphs 7085 and 7093, Gen. St. 1889; and after the organization of Kearney county the board of county commissioners allowed these township orders as just claims against the county, and issued for them the warrant in question, which was subsequently purchased by the plaintiff. He brought this action upon it. This case was tried on March 17, 1897. After all these things had been done, and on April 10, 1897, the supreme court of Kansas decided, in an action brought by another party against this county, upon a similar warrant, that the act attaching Kearney county to Hamilton county was unconstitutional and void, and that no recovery could be had on such a warrant, because neither Kearney township nor its officers ever had any existence either *de facto*, or *de jure*. *Atchison, T. & S. F. R. Co. v. Board of Com'rs of Kearney Co.*, 48 Pac. 583.

In this state of the case, counsel for the county appeal to the rule, so often announced and enforced in this court, that "the national courts uniformly follow the construction of the constitution and statutes of a state given by its highest judicial tribunal, in all cases that involve no question of general or commercial law, and no question of right under the constitution and laws of the nation." *Madden v. County of Lancaster*, 27 U. S. App. 528, 536, 12 C. C. A. 566, 570, and 65 Fed. 188, 192. There are, however, two reasons why the decision of the supreme court of Kansas to which we have adverted is not controlling in the case at bar. The first is that it was not rendered until after the rights of the plaintiff were vested under a law which stood unchallenged and without adverse judicial construction when he purchased his warrant. The plaintiff was a citizen of Illinois. He bought this warrant, and thereby entered into a contract relation with the defendant, a citizen of the state of Kansas, before the statute in question had been declared to be void. By this action he acquired the right, under the constitution and laws of the United States, to have his contract interpreted and his rights enforced in a court of the United States, and a fortiori the right to the independent judgment of that court upon the legal questions his case presents. This case falls within one of the recognized exceptions to the general rule which the defendant invokes. That exception is that decisions of the state courts which affect the validity of contracts between citizens of different states which were made, or under which rights were acquired, before there was judicial construction of the constitution or statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States. *Burgess v. Seligman*, 107 U. S. 20, 27, 2 Sup. Ct. 10; *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67-72, 11 Sup. Ct. 215; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36-47, 22 C. C. A. 334, 339, and 76 Fed. 296, 301; *Jones v. Hotel Co.*, 30 C. C. A. 108, 86 Fed. 370, 373. In *Burgess v. Seligman*, the supreme court declined to follow a decision of the highest judicial tri-

bunal of Missouri in respect to the interpretation of a statute of that state when the latter decision had been made after the transaction in controversy had arisen. Mr. Justice Bradley, speaking for the unanimous court, said:

"We do not consider ourselves bound to follow the decision of the state court in this case. When the transaction in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But, where the law has not been thus settled, it is the right and the duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded, as they are, on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obliterate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail."

In *Louisville Trust Co. v. City of Cincinnati*, supra, the United States circuit court of appeals for the Sixth circuit, in treating of this subject, said:

"A well-grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends, by the highest court of the state whose statute is involved. In such a case, if a court of the United States obtains jurisdiction of a question touching the validity, effect, or obligation of such a contract, it will, while 'leaning to an agreement with the state court,' exercise an independent judgment as to the validity and meaning of such contract, although the meaning and validity of state statutes may be an element in the case, and will not be bound to follow opinions

of the state court construing such statute if such decisions were rendered after the rights involved in the controversy originated."

Another reason why the decision of the supreme court of Kansas does not rule this case is that the vital question here is not whether or not the act attaching Kearney county to Hamilton county was constitutional, but it is whether or not the unconstitutionality of that act, if conceded, constitutes any legal defense to an action by an innocent third party upon this warrant; and that is a question of general jurisprudence, which it would be a dereliction of duty for a federal court to decline to consider and determine for itself. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 36 U. S. App. 152, 156, 17 C. C. A. 62, 65, and 70 Fed. 201, 203, and cases there cited. For these reasons, we have deemed it incumbent upon us to consider and determine the merits of this question; and after its consideration, which we have made with great deference to the opinion of the supreme court of Kansas, we are constrained to say that we have been unable to reach the result which that court has attained. We proceed to state briefly the reasons upon which we rest our conclusion.

The county of Kearney has been the same quasi municipal, political, and corporate entity ever since it was created, in March, 1887. It has during all this time had the same name, the same boundaries, and the same territory. Its inhabitants have undoubtedly changed, but the municipal entity of which they formed a part while they were citizens within its territory has not. It has been said that the particles which compose the human body decay and are replaced by others several times during the average duration of human life; but during all this time each man remains the same identical person, and his rights, duties, and liabilities do not vary with the changing components of his physical organization. In the same way, the inhabitants of a municipal or political subdivision of a state, one by one, die or remove from its territory, and are replaced by others; but the municipal corporation remains unchanged, and its rights and liabilities are not affected by the departure of one and the advent of a succeeding generation of men. The same old commonwealth of Massachusetts exists to-day which was inspired by the life and words, and mourned the loss, of old Samuel Adams, though perhaps no man now survives who lived within its borders during his life. This county of Kearney, then, has been the same quasi municipal body from March, 1887, to the present moment. During about one year of its existence it adopted the name and acted under the title of the township of Kearney. But the township had the same boundaries, the same territory, and the same people as the county of Kearney during its entire existence. During the time while this township of Kearney existed, the legislature of Kansas, which had the power to make counties and townships, the governor of Kansas, who had authority to approve or veto the acts of the legislature, the officers and inhabitants of Hamilton county, and the inhabitants of Kearney county, all supposed that this county of Kearney was the township of Kearney. While the record does not disclose the several acts of the officers and inhabitants of this county during this period, it is conceded on all hands that they acted as a township for nearly 12 months, and it

may have been, and probably is, true, that a township trustee, a township clerk, and a township treasurer were first appointed by the commissioners of Hamilton county, and then elected, under paragraph 1607; that school districts were separately described and numbered; that the schools were supported under the superintendence of the commissioners of Hamilton county, under paragraph 1610; that justices of the peace of the township were chosen, under paragraph 7066; that road overseers were elected, and roads and bridges were repaired and improved, under paragraphs 7070 and 7133; and that the poor of the county of Kearney were supported and cared for by the trustee of Kearney township, under paragraphs 4027, 4046, and 4048 of the General Statutes of Kansas of 1889, for more than 11 months. It may be conceded that if the state or any taxpayer of the county of Kearney had challenged the acts of this township, or of its officers, by a writ of quo warranto, or by an application for an injunction, before public interests were affected and private rights had vested under them, they might have been prevented. But neither the citizen nor the state questioned the lawful existence of this township, or the legality of the acts of its officers, until the life of the former was legally terminated by the organization of the county, and the acts of the latter had all been completed, and the rights of third parties had vested under them. Undoubtedly, the trustee of this township supported the poor, the township board and the road overseers improved and repaired the roads and bridges, and the trustee drew orders on the township treasurer to pay for these repairs and improvements, the children of the inhabitants were taught, on the theory that this was a township; its justices of the peace solemnized marriages, took and certified the acknowledgments of deeds, and decided lawsuits, and its township board audited and allowed accounts, and the trustee issued warrants for them, which strangers purchased, while no one complained,—no one sounded a note of warning. Are all these acts void because every one was mistaken in supposing that Kearney county was attached to Hamilton county? Are the couples married by the justices of this township still single? Are the deeds whose acknowledgments they certified, and the judgments they rendered, void? Are the just claims of those who supported the poor, and repaired the roads and bridges for this county, at the request of these township officers, their allowance by the township board, and the warrants issued for them, all void? And may this county retain the benefits and improvements it has thus obtained, and yet deprive those who furnished them, or those who subsequently purchased its warrants, of all right to a return of the money which they invested in them? We think not. In our opinion, there is an established rule of jurisprudence which prevents results so unjust and deplorable. That principle is that the acts of ordinary municipal bodies into which the people have organized themselves under color of law depend far more upon general acquiescence than upon the legality of their action or the existence of every condition precedent prescribed by the statutes under which they organize and act. It is that general acquiescence by the inhabitants of the political subdivision so organized, and by the departments and officers of the state having official relations with it,

gives to the acts and contracts of a municipal or quasi municipal corporation de facto all the force and validity of the acts of a corporation de jure. The interests of the public which depend upon such municipalities, the rights and the relations of private citizens which become vested and fixed in reliance upon their existence, the intolerable injustice and confusion which must result from an ex post facto avoidance of their acts, commend the justice, and demand the enforcement, of the rule that "when a municipal body has assumed, under color of authority, and exercised, for any considerable period of time, with the consent of the state, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence." *National Life Ins. Co. v. Board of Education of City of Huron*, 27 U. S. App. 244, 259, 10 C. C. A. 637, 647, and 62 Fed. 778, 787; *Ashley v. Board*, 16 U. S. App. 656, 671, 8 C. C. A. 455, 461, and 60 Fed. 55, 61; *People v. Maynard*, 15 Mich. 463, 470; *School Dist. No. 25 v. State*, 29 Kan. 42, 49, 50; *City of St. Louis v. Shields*, 62 Mo. 247, 252; *State v. Carroll*, 38 Conn. 449, 471; *State v. Rich*, 20 Mo. 393, 396; *Clement v. Everest*, 29 Mich. 19, 23; *Donough v. Hollister*, 82 Mich. 309, 46 N. W. 782, 783; *Carleton v. People*, 10 Mich. 250; *Clark v. Com.*, 29 Pa. St. 129; *Com. v. McCombs*, 56 Pa. St. 436.

An attempt is made to escape from the effect of this rule on the ground that there can be no de facto corporation under an unconstitutional law; that there can be no such thing as a corporation in fact where the only legal right of such a corporation to exist rests on a law that is clearly void. The effort must, in our opinion, be unavailing in this case—First, because this township was not organized under color of the unconstitutional law, but under color of the general laws of Kansas relating to township organizations; and, second, because the proposition is unsound that there can be no de facto corporation or de facto officer under an unconstitutional law.

If, as in *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121, the corporate body whose acts are in question, and the offices filled by its officers, were unknown to the constitution of the state of Kansas, and if they constituted an anomaly in its system of government,—if under its constitution and laws there could not be a township or township officers under any circumstances, as under the constitution of Tennessee there could not be a board of county commissioners,—in that case the effort of counsel for the county might succeed. But, as we have seen, the legislature of Kansas had authority to create counties and townships when and as it directed. It had provided by general laws when the people of any political subdivision might organize themselves into, and exercise the privileges and franchises of, civil townships. All these laws were constitutional and valid, and it was under these, and not under the void law which enacted the attachment of Kearney county to Hamilton county, that this township was organized, and that its officers were chosen and acted. The law which attempted to attach Kearney county to Hamilton county made no provision for township organization, or for township officers. It cannot therefore be successfully maintained that there was no valid

law authorizing the creation of townships and the choice of township officers, and that for this reason there could be no de facto township and no de facto township officers. There were such laws, and in compliance with them, and under color of them, every step in the organization and operation of this township was taken. The only mistake made was that the citizens and officers supposed that a condition precedent to their action had been complied with, which had not been fulfilled.

In *School Dist. No. 25 v. State*, 29 Kan. 42, 49, 50, this very question was decided by the supreme court of that state. An unconstitutional law had been passed which purported to detach certain territory from the county of Stafford, and to attach it to the county of Barton. Thereupon, upon the supposition that this law was valid, the county superintendent of Barton county and the inhabitants of a portion of this territory organized a school district, elected officers, and voted for an issue of the bonds of the district to build a school house under the general laws of the state. When an action was brought on the bonds, the trial court held that while the attaching act was void, and the superintendent of Barton county had no authority to organize the school district, yet it was a school district de facto, and its bonds were binding obligations on the de jure district which succeeded. Answering the position urged upon us in the case at bar that there could be no de facto corporation because the attaching act was void, the supreme court said:

"The plaintiff in error (defendant below) claims that school district No. 58 could not have been a de facto organization or school district, because, as it claims, there was no law in existence under which it could have been organized, or could have a legal and valid existence. This, we think, is a mistake. It was organized under the general laws of the state authorizing the creation and organization of school districts (Laws 1876, c. 122, art. 3; Comp. Laws 1879, p. 824 et seq.); and every act that was done or performed with reference to the organization of this school district was done and performed under valid and existing laws. The school district was not organized under the act changing the boundaries of Stafford and Barton counties, for that act made no provision for the organization or creation of school districts. That act said nothing with reference to school districts. But the school district was really and in fact organized and created under said chapter 122 of article 3 of the Laws of 1876, and the bonds were voted and issued under valid and existing laws, and the school-fund commissioners purchased the same under valid and existing laws."

Moreover, we are unable to yield our assent to the broad proposition that there can be no de facto corporation under an unconstitutional law. Such a law passes the scrutiny and receives the approval of the attorney general, of the lawyers who compose the judiciary committees of the state legislative bodies, of the legislature, and of the governor before it reaches the statute book. When it is spread upon that book, it comes to the people of a state with the presumption of validity. Courts declare its invalidity with hesitation and after long deliberation and much consideration, even when its violation of the organic law is clear, and never when it is doubtful. Until the judiciary has declared it void, men act and contract, and they ought to act and contract, on the presumption that it is valid; and where, before such a declaration is made, their acts and contracts

have affected public interests or private rights, they must be treated as valid and lawful. The acts of a de facto corporation or officer under an unconstitutional law before its invalidity is challenged in or declared by the judicial department of the government cannot be avoided, as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity, by any ex post facto declaration or decision that the law under which they acted was void. This proposition is not without the support of eminent authority. Indeed, we believe it is founded in reason, and sustained by the great current of the decisions of the courts that have considered it.

In *Ashley v. Board*, 16 U. S. App. 656, 666, 671, 8 C. C. A. 455, 461, and 60 Fed. 55, 61, the United States circuit court of appeals for the Sixth circuit held, in a learned and exhaustive opinion, that if a county was organized under an unconstitutional law, and if county bonds were issued and sold by county officers appointed or elected under such a law while they were recognized and treated as such by the inhabitants of the county and by the officials of the state, the invalidity of the law and of the organization would constitute no defense to an action to enforce the collection of the bonds.

In *People v. Maynard*, 15 Mich. 463, the supreme court of that state refused to inquire, even on a writ of quo warranto, whether a county organization under a law which was claimed to be unconstitutional was invalid, and said:

"In public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on, year after year, raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin; and no ex post facto inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can be no longer open to question."

In *State v. City of Des Moines*, 65 N. W. 818, 822, 824, the supreme court of Iowa refused to oust a de facto corporation organized under an unconstitutional law on the ground of acquiescence, although a direct proceeding by quo warranto was brought for the purpose. It declared that color of law was semblance of legal right, and that a corporation organized under an unconstitutional law was organized under color of law.

In *State v. Rich*, 20 Mo. 393, Rich and another were indicted in the circuit court of Stone county, and a motion was made to quash the indictment on the ground that the law establishing the county of Stone was unconstitutional, so that there was no de jure county and no de jure court. The circuit attorney admitted the unconstitutionality of the law, and the court granted the motion, and dismissed the defendant. The supreme court of Missouri reversed the judgment, and declared that "all such inquiries must be excluded whenever they come up collaterally, and the county, its courts and officers, must be treated as things existing in fact, the lawfulness of which cannot be questioned, unless in a direct proceeding for that purpose." To the same effect is *City of St. Louis v. Shields*, 62 Mo. 247, 252.

The same rule is applicable to corporations de facto and officers

de facto; and Chief Justice Butler, in the clearest, most analytical, and most satisfactory discussion of this subject which we have found in the books, declares, in *State v. Carroll*, 38 Conn. 449, 471, that "an officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: * * * Fourth. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." He cites six cases in which it was held that an officer acting under an unconstitutional law was acting under color of law, and was an officer de facto. They are *Taylor v. Skrine*, 3 Brev. 516; *Cocke v. Halsey*, 16 Pet. 71; *People v. White*, 24 Wend. 520; *Carleton v. People*, 10 Mich. 250; *Clark v. Com.*, 29 Pa. St. 129; and *Com. v. McCombs*, 56 Pa. St. 436, in which Judge Strong (afterwards Mr. Justice Strong, of the supreme court) said: "An act of assembly, even if it be unconstitutional, is sufficient to give color of title, and an officer acting under it is an officer de facto." To the position sometimes urged that a law of doubtful constitutionality may give color of law and of title to those who act under it, but that one that is manifestly repugnant to the constitution and void cannot, Chief Justice Butler makes this admirable answer:

"The inference to be drawn from these assumptions necessarily is that a manifestly unconstitutional law is without any force whatever, and that whether manifestly unconstitutional or not, and whether to have the appearance and force of law or not, are questions for the private judgment of the citizen. If these assumptions were true, they would dispose of this case, but they are of novel impression, and fundamentally erroneous. Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and, if thought unconstitutional, resisted, but must be received and obeyed, as to all intents and purposes law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society. It has never been questioned by any jurist to my knowledge. It was never questioned even by Mr. Calhoun and his disciples that an unconstitutional law of congress, manifestly and palpably unconstitutional, had the color and semblance of authority, and was obligatory upon the citizens of a state, as citizens of the United States, until it was nullified by an act of the state legislature, which they claimed might be done on the ground that the general government was the creature of a compact between the states, and its laws might therefore be so nullified by action of the state legislatures. Certainly, they never asserted that a legislative enactment of a state, having all the forms of law, had not the force of law to all intents and purposes as against the citizens of the state, however repugnant to the state constitution, until set aside by the courts. The doctrine that a law of doubtful constitutionality may be presumed to be constitutional until judicially decided otherwise, and that a law manifestly unconstitutional cannot be so presumed, has no existence as applicable to the citizen."

The conclusion we have reached is that the warrant issued for the scrip of Kearney township cannot be defeated on the ground that the law attaching Kearney county to Hamilton county was unconstitutional: (1) Because the validity of the organization of Kearney township cannot be questioned collaterally in this action; (2) because Kearney township was a de facto township, organized under color of

general laws of Kansas relating to townships, and not under the unconstitutional law which attached Kearney county to Hamilton county; and (3) because, even if it were organized under the unconstitutional law, that law, until it was challenged in or declared void by the judicial department of the government, was sufficient to confer color of legality upon the township; and it was still a de facto organization, whose acts and contracts are valid so far as they involve the interests of the public and of third persons who have relied upon them.

We have now disposed of all the questions presented by this record save one, and that is of minor importance. The trial court peremptorily instructed the jury that they could allow only \$12 on a warrant for \$788.88 issued to W. J. Price for services as a commissioner. There is nothing in the record to show that the services of this commissioner were not worth more than \$12, and nothing by which the amount he is entitled to receive can be accurately determined. No provision of statute has been found which limits his compensation to the amount allowed, and our conclusion is that this instruction was unwarranted. The result of the whole matter is that the judgment below must be reversed, and the cause must be remanded to the court below, with directions to grant a new trial. It is so ordered.

MAURY'S TRUSTEE et al. v. FITZWATER et al.

(Circuit Court, D. West Virginia. August 6, 1898.)

1. VOID JUDGMENT—REVIVAL AGAINST HEIRS OF DECEASED PARTY—UNAUTHORIZED APPEARANCE BY ATTORNEY.

A man was made a party defendant by an amended declaration in ejectment, and an appearance by attorney was at the same time entered for him, though he was in fact dead. The case was afterwards revived against his heirs by consent of the attorney, who also waived process, and appeared for them, though without authority to appear for either the deceased or the heirs, neither of whom had any knowledge of the action. *Held*, that a judgment against the heirs was void.

2. SAME—PETITION TO VACATE—LACHES.

A court will not refuse to entertain a petition to vacate a void judgment because not filed until 11 years after the rendition of the judgment, where it was rendered against the petitioners as heirs, and they had no knowledge of its existence for several years.

3. REVIVAL—AUTHORITY OF ATTORNEY TO BIND HEIRS OF DECEASED DEFENDANT.

Where a defendant in ejectment has appeared by a duly-authorized attorney, on his death his heirs will be bound by the action of such attorney in consenting to a revival, waiving process, and entering appearance in their behalf.

This was a hearing on a petition to vacate a judgment entered herein in 1886 against the petitioners as heirs of Sela White and Andrew Claycomb.

Mollahon & McClintock, for petitioners.

James F. Brown and Eugene Massie, for defendants.

JACKSON, District Judge. The only question presented to the consideration of the court at this time arises upon the petition of Thomas J. White and others, filed in this cause some 11 years after the case had been tried at the bar of this court, to set aside a judgment rendered in it against the petitioners. The declaration of the plaintiffs in this cause was served upon Benjamin Fitzwater and others, and filed in the clerk's office of this court at July rules, 1884. At the time neither Sela White nor Andrew Claycomb were made parties defendant to these proceedings. At the November rules, 1884, an amended declaration was filed making additional parties defendants, among them the defendant Claycomb, but at this time neither White nor his heirs nor devisees were made parties. At the November term, 1884, an amended declaration was filed in court making Sela White a defendant with Andrew Claycomb, as joint owner, at which time J. M. McWhorter appeared as counsel for the defendants White and Claycomb to plead to the plaintiffs' declaration as amended. At the time this order was made in court it appears from the evidence that Sela White was dead. At the spring term, 1886, McWhorter, as counsel for Sela White and Andrew Claycomb, suggested the death of both of the defendants White and Claycomb, and waived process against the heirs of the deceased defendants, and agreed to appear and plead for them at the next term of the court. At the fall term, 1886, which was the next order, the case was revived, upon the motion of McWhorter, by an order of the court, against the heirs of Claycomb and White. In December, 1886, a trial was had, and judgment rendered in said action against part of the defendants, including petitioners, for a large boundary of land mentioned in the plaintiffs' declaration. The defendants, replying to this petition, claimed that one John E. Stewart was employed and authorized by Claycomb to employ counsel to represent him, and that, Claycomb having a joint interest with White in the lands, his action bound White, although it does not appear from the evidence in this case that White ever knew of the employment of McWhorter as counsel to represent him.

From the view I take of this case, I do not think there is sufficient evidence to establish the relation of attorney and client between McWhorter and White in his lifetime, or his heirs after his decease, and therefore every step taken by McWhorter in representing the interests of White or his heirs was absolutely without authority. The judgment of the court, as against a man at a time when he was dead of course amounts to nothing, even if he had been properly impleaded in the cause of action; but it is to be borne in mind that there was an effort to amend the declaration in ejectment in a very unusual way. The amendment sought to be made, in the way it was done, could only be done by the consent of the defendants, after they had cognizance of the pendency of the action.

After a suit is once instituted against a party who is properly before the court on process duly served, and the party dies before judgment is obtained against him, the judgment obtained after his death is void. The only mode and manner in which the suit could be

further prosecuted would be to revive it against his heirs upon a scire facias sued out for that purpose. This was not done in this case, and inasmuch as there was no party representing the heirs of White who could consent to revive the suit against him, and there being no steps taken to sue out necessary legal processes to revive, it follows that any judgment taken, either against White, after he is dead, or against his heirs, who are not properly before the court, must be held to be void in law, and would not bind the parties sought to be impleaded. It is contended, however, that in this case, from the long lapse of time, the court should presume an acquiescence by the heirs of White. In the judgment of the court in this case, the court would not be authorized to act upon a presumption of this character unless an unusual delay occurred after the parties had notice of the judgment in the case.

It clearly appears that White in his lifetime knew nothing about the pendency of this action, nor did his heirs after his death have notice until long after the rendition of the judgment. The delay that occurred after the heirs became informed of their interests in the property was not unreasonable. There was not such a delay as amounts to laches.

As to the petitioner Sarah C. Johnson, who derived her interest in the property from Claycomb, there can be no question, in my mind, that McWhorter was counsel for Claycomb, and represented his interests in the land in controversy; and he having, as the attorney of Claycomb, made him a party to the suit in his lifetime, his heirs must be bound by the action of McWhorter, as Claycomb himself would be. For this reason I am of the opinion that the petition of Sarah C. Johnson must be dismissed. It is to be regretted that a judgment of the court of the age of the one under consideration should have to be disturbed after a period of 11 years has transpired; but when it appears that parties have been deprived of their legal rights by the judgment of a court, before they were impleaded, it is far better that the parties should be restored to their rights, although the rights of other parties have in the meantime intervened.

For the reasons assigned I am of the opinion that the judgment in the case as to the petitioners should be set aside, and a further trial directed, as between the plaintiffs and these petitioners, at the bar of this court.

MATZ et al. v. CHICAGO & A. R. CO.

(Circuit Court, W. D. Missouri, W. D. June 13, 1898.)

1. CODE PLEADING—NEGLIGENCE—JOINDER OF CAUSES OF ACTION.

To allege three distinct acts of negligence in one count, either one of which would give a cause of action *prima facie*,—one based on a city ordinance, one on a state statute, and the other on negligence at common law,—is bad pleading under the Missouri Code; and a motion to compel plaintiffs to elect on which cause of action they will rely is well taken.

2. SAME—ALLEGATIONS OF NEGLIGENCE.

Negligence must be distinctly alleged; and, in an action for death at a railroad crossing, it is insufficient merely to aver that no watchman or

gates were maintained "to warn children or the public in general of the approach of cars and engines," without further averring that the company was negligent therein.

8. SAME—ARGUMENTATIVE ALLEGATIONS.

In a petition to recover for death at a crossing, after setting out an ordinance limiting the speed of trains, an averment that "it became the duty" of defendant's employes not to move any cars within the city limits at a greater speed than six miles an hour is an allegation of a legal conclusion, and may be stricken out on motion.

This was an action at law by Peter Matz and others against the Chicago & Alton Railroad Company to recover damages for the killing of plaintiffs' child at a street crossing. The case was heard on motions to compel plaintiffs to elect on which cause of action they will rely, and to strike out certain parts of the petition.

Scarritt, Griffith, Vaughan & Jones, for plaintiffs.
Wash. Adams, for defendant.

PHILIPS, District Judge. The defendant has filed a motion herein to compel the plaintiffs to elect upon which of the several causes of action they intend to rely at the trial. The petition is based upon the negligence of defendant's servants in charge of one of its trains in killing plaintiffs' child at a point where it is alleged the railroad intersected a public street in Kansas City, Mo. It is to be kept in mind in the consideration of cases like this that the cause of action is not so much that a person has been killed by the railroad as it is the imputed negligence of the railroad, through its servants and agents, which occasions the injury or death. An injury may result to a person by a collision of a railroad train without any cause of action arising thereon to the party injured or his legal representatives; and a petition which should state in a case like this nothing more than that "A." was run over and killed by a locomotive engine and train of cars of the defendant railroad company would not state any cause of action, for the reason that the action is predicated of the negligent conduct and acts of the railroad company. *Railway Co. v. Wyler*, 158 U. S. 285 et seq., 15 Sup. Ct. 877.

There is but one count in the last-amended petition in this case. It is alleged in one part of the petition that there was at the time of the injury an ordinance in force, adopted by Kansas City, a municipality, which prohibited conductors, engineers, firemen, brakemen, or other persons from moving, causing or allowing to be moved, any locomotive, tender, or cars within the city limits at a greater rate of speed than six miles per hour; and it is alleged that at the time in question the said servants and agents of the defendant railroad company ran a locomotive engine and cars, which did the injury, at a greater rate of speed than six miles an hour, and were therefore violating a penal statute of the city at the time of the injury, whereby a cause of action arises to these plaintiffs. It is next alleged that the servants and agents of the defendant company were guilty of negligence in running upon the deceased without giving him any notice or warning of the approach of the train, and without slowing up or slackening the

speed thereof. From this it might well be inferred that the injury resulted from the failure of the defendant company to give the statutory warning by sounding the whistle at 80 rods from a public crossing, and for failing to either keep up said signal of warning, or by ringing the bell until the crossing was passed. This is another statutory cause of action. Further on, it is alleged that the said servants and agents of the defendant company were guilty of negligence, on approaching the deceased, standing on the railroad crossing, in not discovering his presence, which they might have done with the exercise of ordinary care, in time to have prevented injury by checking the train. This is a common-law ground of recovery, predicated upon common-law negligence. The petition, then, after reciting these several negligences, concludes as follows:

"That by reason of said negligence [which negligence is not stated] of the defendant, acting by and through its agents, servants, etc., in charge of and running said locomotive and train of cars, and by reason of the negligence of the defendant's said servants, agents, etc. [which is but a repetition of the preceding paragraph], the said locomotive and cars were by them moved and run upon and against said William Matz [the deceased] at the time and place aforesaid, and thereby injured," etc.

It is thus made apparent that the plaintiffs have attempted to state three distinct acts of negligence, either one of which would give a cause of action, *prima facie*,—one based upon the ordinance of the city, another upon the state statute, and the other from negligence at common law. The state court of appeals, sitting in this district, has decided, in *Harris v. Railway Co.*, 51 Mo. App. 125, that this is bad pleading, for the reason that it conjoins in one and the same count several causes of action, in violation of the code pleading. And I am persuaded after consideration that the rule thus established by the state court of appeals is a correct one. The defendant is entitled to know, before it proceeds to trial, upon which cause of action it is to join issue, and upon what distinct ground the plaintiffs propose to give battle. It is also important that both the court and the jury should be advised as to what distinctive issue is in the trial of a cause; and the verdict of the jury should be so responsive to the issue that it could be known at once upon what particular negligent act the jury based their verdict. A verdict on this petition would be a general verdict; and, if for the plaintiffs, it would be impossible to determine from the verdict upon which imputed negligence the jury reached their conclusion. A plaintiff ought to know in advance his case, and what the negligence was that caused the injury. It is observable that the petition does not allege in its conclusion that the injury or death of the party resulted from all the causes of negligence combined, co-acting to produce a common result. But it alleges "that by reason of said negligence"; but which of them, or whether all combined, is not stated. Such pleading makes a chance medley, instead of a plain and concise statement of the facts constituting the cause of action, required by the Code. The motion to elect is therefore well taken.

The defendant moves to strike out certain statements made in the petition. The first is the allegation "that, at the time herein re-

ferred to, no watchman was stationed or gates or bars maintained, at the said crossing of defendant's tracks, on said Agnes avenue, to warn children or the public in general of the approach of cars and engines thereto." It is not alleged that the placing of such gates or watchman was required by any ordinance or statute, nor is it alleged that defendant was guilty of negligence in failing to do so.

The motion to strike out is also aimed at the following allegation in the petition, following immediately after setting out the ordinance of the city aforesaid:

"That, at the times herein referred to, it became and was the duty of the defendant's conductors, engineers, agents," etc., "in charge of and while running, conducting," etc., "defendant's locomotives and cars, not to move or cause to be moved any locomotive or car within the city limits at the place aforesaid at a greater rate of speed than six miles an hour."

This averment is quite unnecessary. It is nothing more than a conclusion of law drawn from the antecedent allegation of negligence resulting from the violation of the city ordinance. It is therefore bad, as not a statement of fact constituting the cause of action, and is argumentative in stating the law of the case, which comes within the province of the court. The motion to strike out these statements in the petition is therefore sustained.

YAGER'S ADM'R v. THE RECEIVERS.¹

(Circuit Court, E. D. Virginia. January, 1882.)

1. MASTER AND SERVANT—ASSUMPTION OF RISKS BY SERVANT.

A workman employed by railroad receivers as a bridge builder assumes all the ordinary risks incident to that employment, including the risk of the falling of a bridge at the critical time of adjusting its bearings after taking out the false work.

2. SAME—FELLOW SERVANTS.

A workman engaging with railroad receivers as a bridge builder assumes the risk of all accidents incident to such work from the temporary oversight or mismanagement of a foreman who is proved to be a skillful bridge builder, and who is in charge of the work, but who also labors thereon as a mechanic.

The petition is filed in this case, as a branch of it, the property of the defendant company (the Atlantic, Mississippi & Ohio Railroad Company) being in the custody of the court, in charge of receivers who were in charge at the time of the accident which gave rise to the proceeding.

The petition claims damages to the amount of \$10,000, for the killing of plaintiff's intestate, J. M. Yager, about the 1st day of July, 1878, by the falling of parts of a bridge of this railroad while in process of erection across a part of the Appomattox river, at Petersburg, Va., on which intestate was at

¹ This case has been heretofore reported in 4 Hughes, 192, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

the time at work, as employé of the receivers. The intestate was carried down by the bridge, and fatally crushed. The falling of the bridge is supposed to have been caused by its having got a few inches out of plumb while the builders were adjusting it to its bearings, and putting in end braces, just after having removed the false work or scaffolding which had supported the upper chords. There are two petitions of the plaintiff in the case. The original petition charges negligence upon the receivers in having failed to supply the requisite timber for building the bridge; thereby compelling a resort for timber to the false work supporting the upper chords, whereby the structure was rendered liable to fall, and for negligence in having put in supervision of the work a person or persons ignorant of the business, and negligent of the duties incident to it, "who, instead of suspending operations on finding that proper material was exhausted, not only used what was unsuitable for the purpose, but even went so far as to resort to the false work or scaffolding, the removal of which rendered the bridge dangerously insecure," the more so as the structure had not been secured in its proper position by the proper bolts, braces, and fastenings. The original petition was filed May 3, 1879. The answer of the receivers to it was filed January 27, 1880. Depositions were taken by plaintiff in April, 1880, by defendants in January, 1881, and were closed by plaintiff in May, 1881. Plaintiff's counsel asked leave to file an amended petition on the 16th December, 1881; and this motion was on that day heard, at which time also the case was heard in chief, with a saving to the defendants of the right, if the filing of the amended petition should be allowed, to answer that petition, and to take testimony responsive to the pleadings in their amended form if their counsel should so desire. The amended petition, repeating the charges of the original one, charges, further, that W. S. Hanna was the person in charge of the said work by whose order the intestate was on the bridge when it fell and killed him; that Hanna was manager of such work; that, in attempting to swing this bridge to its bearings, the sides fell some inches out of perpendicular, causing a tendency to careen and fall, which fact was perfectly obvious to, and was observed by, said Hanna; that the accident which then occurred could have been averted by props placed against the sides of the bridge or ropes, and guys fastened to the top; that Hanna failed to adopt these precautions and all others, and precipitated the catastrophe by sending men to the top of the bridge; that this top weight was further increased by the men who were there, attempting, on Hanna's orders, to haul up to the top heavy planks to complete the work in which they were engaged, and that the structure fell because of this overweight on the top. The plaintiff therefore charges that the said Hanna was culpably negligent in the discharge of his duties in and about the said work, and that the receivers are liable in damages for his negligence.

The evidence wholly fails to sustain the charges of the original petition in respect to a scarcity of timber. The weight of proof is in favor of the conclusion that there was abundant timber of suitable quality, and to spare. The weight of proof is also to the effect that the false work of the bridge had been removed at the time of the accident, in due course of construction, because it was no longer needed; that there were six lateral braces in place between the top chords of the bridge; that there were seven iron rods in place between the top and bottom chords, and properly tightened up; that between the bottom chords, which were of iron and heavy, the old bridge work was still intact, so that lateral braces could not be placed there; and that there was nothing in these respects so out of usual condition at such a stage in the erection of such a structure as to have caused the accident. The opinion of Hanna and of one or more witnesses who were at work on the bridge when it fell was that the falling of the two chords of the bridge by which the intestate Yager lost his life, occurring, as it did, while temporary end or knee braces were about being put into one of the end bents, was caused by the bridge having got three or four inches out of plumb, and by there being at the time, besides the weight of the chords and braces, the weight also of two men on top of the bridge, hauling up a two-inch plank for use as one of the temporary knee braces; rendering the structure

top heavy. The evidence is that the manner pursued in adjusting this bridge to its place after removing the false work was the same as had been pursued by the foreman, Hanna, in the construction of 12 or 13 bridges which he had previously built on this same plan; that there was not time after the bridge got out of plumb for the use of props, ropes, or guys for steadying it; that at the time of the accident it seemed plumb to the eye; that, as soon as it began to fall, alarm was given to all of the workmen to get out of the way, who all did make their escape except Yager, who seemed to be deaf or absent-minded; that on a previous occasion, at Lynchburg, of such an alarm, Yager had acted in a similar way; and that, if Yager had had presence of mind to obey the alarm when given, he might have escaped. The evidence as to Yager is that he had been for some time a regular hand with Hanna in bridge building, and was an employé of the authorities of this railroad. The evidence as to Hanna is that he was 58 years old at the time of the accident; that he was a bridge builder by occupation and profession, and had been so for 30 years; that he had principal charge of the bridge force of the Atlantic, Mississippi & Ohio road from Big Spring in Norfolk, a distance of 275 miles, as foreman; that he had been such foreman for 15 years; that he had been constantly employed during the time in building and repairing bridges; that he had built 13 bridges on the same plan as that at Petersburg, which was the fourteenth; and that the accident there was the first that had ever happened in his experience. I think it was stated in argument that Hanna has died since giving his deposition.

HUGHES, District Judge. The first question arising in this case is upon the pleadings, and is whether the plaintiff should be allowed to file his amended petition. If the petition makes a new case different from that made by the original petition, it cannot be admitted, for the reason, among others, that it is not brought within the 12 months allowed by statute to such claims; the general rule being that actions for tort die with the parties to them. If the plaintiff has any right to damages for negligence on the part of the receivers or their agents, it is not from general habits or acts of negligence, but can only be from some particular act properly charged in the pleadings, and proved in the evidence as the especial cause of his intestate's injury. These receivers and their agents might be guilty of acts, even of habitual and wanton negligence, resulting, some of them, in injury to other persons; but this plaintiff could recover nothing except from some particular act of negligence specifically charged in his complaint, and proved to have affected his intestate personally. Even in respect to the construction of this particular bridge, the receivers, through their foreman, might be proved to have negligently and defectively constructed other parts of the bridge from which other persons received, or might have received, injury; yet, if the plaintiff should not charge and show that his intestate was injured by or in consequence of the defective construction of the particular part from which he actually received injury, he could not recover. One man cannot recover damages for acts which injure or are capable of injuring other men, but from which he himself receives no injury, nor for injuries to himself not charged in his complaint. This is elementary law.

A plaintiff, to make a sufficient case, must charge and prove a particular act, or particular acts of negligence, and injury received therefrom. Now, the original petition in this case charges that

the premature removal of timbers in the false work of this bridge, by order of ignorant and incompetent persons put in charge of the work by the receivers, was the cause of the accident, while the amended petition charges that the accident was caused by the bridge getting out of plumb from the neglect of the foreman to use props, ropes, and guys, and from too much weight being put and allowed upon the top of the bridge. As the act of negligence charged in the original petition is disproved by the evidence, the case rests wholly upon the charge made in the amended petition. I am strongly of opinion that the charge in this last is of a different act of negligence from that made in the first petition; that the case set out is a new one, different from the first; and that the petition comes too late, because coming more than 12 months after the death of the intestate. The only alternative view to that just stated which occurs to me as even plausible would be to consider the falling of the bridge, however happening, as the act of negligence which constitutes the gravamen of the suit, and that the amended petition simply repeats the charge of that act, giving another explanation of the manner in which it occurred. As I am unwilling to base my decision in this case upon a technicality, I will adopt that view of the subject, and treat the case as presented by the amended bill.

Conceding at present, for the sake of the argument, that there was negligence on the part of Hanna, the foreman bridge builder in charge of the bridge of these receivers at Petersburg, the case belongs to that familiar class of cases, often difficult to treat, of an injury to one fellow servant from the alleged negligence of another. No principle of law is more firmly settled than the general principle that every person who voluntarily enters upon a particular employment for hire impliedly takes upon himself all the risks ordinarily incident to it, and especially that voluntary employes for hire in any work impliedly assume that risk of accident resulting in the due course of that work from the negligence of fellow servants. The principle is plain enough, and the reason of law obvious enough. But there are several classes of exceptions to the rule, and there is often difficulty in determining whether a particular case falls within the exception, or should be governed by the rule itself. It is not worth while to show by citation of law, for it must be conceded, that Yager, as a bridge builder, assumed the risks ordinarily incident to that trade; and the further question in this case is whether he did not also assume the risk of such negligence and oversight as might be committed by his foreman and co-employé in the execution of this job.

In the case of *Hough v. Railway Co.*, 100 U. S. 213, referred to in the briefs of counsel, and relied upon by each, the United States supreme court, acquiescing fully in the general rule, was at pains to discriminate the case then before it from the class of cases falling within the general principle. The accident there happened from a defective cow catcher or pilot attached to a locomotive engine, by which the engine was thrown off the railroad track, and the engineer scalded to death. The engineer had complained to the master machinist and the foreman of the company about the defect, and had been promised

a number of times that the defect should be remedied; but this had never been done, and the accident was the result. In that case the defense invoked the general rule which excuses the master from liability to one servant for the negligence of a fellow servant, and also the more special rule of law (quite well settled as to cases proper for its application) that when an employé knows of a defect in a piece of machinery, and afterwards goes to work with knowledge of the continuance of the defect, he thereby waives his right to claim damages from the consequences. But the court overruled the defense on both points. As to the first one, it held that agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule respecting co-employés, to be regarded as fellow servants of those who are engaged in operating the machinery, but are employed in a distinct and independent department of duty from that of the operator of the machinery, and are charged with the master's duty rather than that of the fellow servant. As to the second point, the court ruled that, when a master has expressly promised to repair a defect, the servant subsequently using the machine can recover for an injury caused thereby happening at such a period of time after the promise as it would be reasonable to allow for its performance, and within any period which would not preclude all reasonable expectation that the promise might be kept. This case of *Hough v. Railway Co.* shows but one example of an exception to the general rule under consideration. It is a case of accident from the use of defective machinery. It is not a case of accident in bridge building. In that case the general rule as to the nonresponsibility of a master to one employé for the negligence of another was set out with much care, as follows (page 217):

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his judgment or inclination may suggest."

This general rule, thus carefully enunciated by Mr. Justice Harlan, is the one which must be held to determine the case at bar, unless it can be brought within some exception equally clear and well settled, because it must be assumed that Hanna and Yager were co-employés, one as foreman, and the other as journeyman, in an employment in which they had been working with each other for some time, and in which they had had full opportunity for becoming acquainted with each other's "habits, conduct, and capacity." I am not able to gather from the argument of counsel for the plaintiff what particular class of exceptions to the general rule of nonliability it is within which they suppose the present case to fall. It is not, as the case of *Hough v. Railway Co.* was, one of defective machinery known to have been out of repair by intestate and foreman, and which the intestate had a number of times complained of ineffectually. The court was dealing with such a case, and detached expressions appropriate to such a case cannot logically be applied to the present case. The court was showing

that that case was, by reason of its own particular facts, an exception to the general rule, and was at pains to set out the especial grounds on which it discriminated that case from those governed by the general law. Certainly, the case of a locomotive engine being thrown from a railroad track by a defective cow catcher, which the proper officers of the company had frequently promised, but had neglected, to put in repair, is a very different one in all its elements from that of the falling of the parts of a new bridge while in the course of erection from circumstances arising at the moment, equally unforeseen and unexpected by the foreman and the intestate journeyman.

Nor is the case of *Flike v. Railway Co.*, 53 N. Y. 549, cited by plaintiff's counsel, at all in point. There the injury occurred from a freight train, on which the plaintiff's intestate was fireman to the locomotive, having run into a portion of another freight train running ahead of it, which had broken loose and become separated from the forward train, and could not be controlled in consequence of there having been an insufficient number, and not the usual number, of brakemen on the forward train. They were heavy freight trains, running at intervals of five minutes apart. It was the business of the head conductor stationed at Albany to make up the trains, and to provide them with brakemen and other train operatives. The court held that this stationary head conductor was to be regarded as representing the company in respect to some of the duties belonging to him; and, as to these, was not, in his relation to the fireman of a train, such a co-employé as was contemplated by the general rule of a master's nonliability. It held that the hiring of a brakeman, and assigning him to duty, and providing a train with a sufficient number of brakemen, was part of the company's duties, in relation to which the head conductor stood in the place of the company, and that, though he had other duties in respect to which he stood in the relation of co-employé to the intestate fireman, yet that his acts could not be divided up, and a part of them be regarded as those of the company, and a part those of its employés; saying, "As well might the company be relieved if the train was started without an engineer, or without brakes, or with a defective engine." The court, in this case, was divided four to three; and the exception to the general rule, which this precedent has not very firmly established, consists in a general agent of a company discharging general duties, from stationary headquarters, being distinguished from the class of employés contemplated by the general rule. Certainly, that case is wholly different from the one at bar, both in its facts and the principles involved. Hanna was an employé of the receivers of this railroad, a foreman engaged at manual labor in a special class of work along with other workmen. He was depended upon to take charge on the spot in person of every job of bridge building or repairing that was required on a long section of the railroad. But he did this in detail. He had no stationary headquarters. His service was not limited to giving orders from a central point to workmen at a distance, but he was personally present in executing each job, laboring with his own hands as a mechanic along with the rest of his gang in its execution. He was so actually

engaged when the accident under present consideration happened, and therefore I am of opinion that he was a co-employé of Yager in every particular and every sense, so carefully defined by Mr. Justice Harlan in *Hough v. Railway Co.*, 100 U. S. 217, in the language I have quoted at length.

But I am not convinced by anything appearing in the evidence that there was in the falling of the bridge at Petersburg, on July 1, 1878, culpable negligence on the part of Hanna or any other co-employé of the plaintiff's intestate, Yager. Counsel for plaintiff assumes in argument that Hanna saw that the bridge was out of plumb a greater or less time before the accident occurred, and that he then increased the danger of falling from that cause by sending two men on top of the bridge, and ordering them to pull up heavy timbers after them, thus rendering it top heavy. Such is not my reading of the evidence. Hanna testifies that, judging by the eye, the bridge looked plumb, and that, believing it plumb, he went on to put in the cross-pieces in the end bent, as he had done before in building other bridges like this, and as he did in building this bridge itself shortly afterwards. He nowhere says that he saw that it was out of plumb before the structure began to fall. He testifies that, if he had known or apprehended such a thing, there were several ways in which he could have guarded against the accident; but it seems not to have occurred to him to resort in advance to these expedients, because such an accident had never before happened in his experience of 15 years. It is true that, in accounting for the accident after it had happened, he ascribed it to the fact that the structure had got a few inches out of plumb, and was overloaded at the top; but, in so doing, he does not state as a fact, or even imply, that he had seen that the structure was out of plumb before it began to fall. This accident may have been one of the many that periodically happen whose real cause cannot be predicated with certainty. It occurred in one of the long days of a hot summer, and the men engaged may have been partially unnerved and relaxed with the heat of the weather. Few men ever prove such a character for care and skill and experience as is proved for Hanna as a bridge builder; and I am unwilling to ascribe culpable negligence to him in the falling of this bridge at Petersburg.

The petition must be dismissed, but without costs. It must be dismissed—First, because the deceased man, Yager, in engaging with these receivers for wages, as a bridge builder, took upon himself all the ordinary risks incident to that employment, including the risk of the falling of this bridge at the critical time of adjusting it to its bearings, after the taking out of the false work, during the putting in of the upper braces of the end bent; second, because, in engaging in this occupation, he took upon himself the risk of all accidents incident to such work from the temporary oversight or mismanagement of his co-workman Hanna, the experienced and skillful foreman bridge builder, who was laboring with him, and directing this job; and, third, because the evidence does not show that the falling of this bridge was caused by any fault of the receivers, or by the culpable negligence of their foreman bridge builder, Hanna.

SABRE v. MOTT.

(Circuit Court, D. Vermont. July 30, 1898.)

1. ASSAULT AND BATTERY—JUSTIFICATION.

One has no right to take a paper from the person of another by force or threats, even if he has a right to the possession thereof.

2. SAME—DAMAGES.

Five hundred dollars damages to one who was assaulted by being seized by the collar at the throat, and threatened with the fist, whereby he was afflicted with nervous prostration, is not an excessive award.

This was an action for assault and battery brought by George W. Sabre against Henry Mott. Heard on motion to set aside the verdict as excessive and for error.

Felix W. McGettrick, for plaintiff.

Hiram M. Mott and James L. Martin, for defendant.

WHEELER, District Judge. The plaintiff, the defendant, and one Langlois were together to carry out a contract signed by the plaintiff, by which a mortgage held by him was to be foreclosed at the expense of the defendant, and he was to quitclaim the premises on payment of the sum due, and which the defendant had assigned to Langlois, who had on the day before brought the contract, and paid the sum due, to the plaintiff, who had kept the contract without objection from Langlois, and had it with him in his pocket, but he had not delivered the deed because not assured that the expenses of the foreclosure had been paid. When this was alluded to, the defendant demanded the contract or a receipt for the money, both of which the plaintiff refused; whereupon the defendant seized the plaintiff by the collar at his throat, and pushed him violently against the wall of the room. This suit is brought for this assault. The plaintiff testified that the defendant said that he should never leave the room till he gave up the contract or signed his name, and swung his fist close to the plaintiff's face while holding him, and that this brought on previous nervous prostration again, and caused him much suffering and disability. The defendant denied the threats and swinging of his fist, but not the seizing of the plaintiff by the collar at his throat. Neither of them, nor any one, testified to any attempt by the defendant to take the contract from the plaintiff, and all agreed that he did not give it up nor sign anything.

Counsel for the defendant urged that he, because of his interest in the contract and duty to see it fulfilled, had a right to retake it from the plaintiff, and to use what force would be necessary for that purpose, and that the question whether he used more force than that should be submitted to the jury; but the jury were directed that, as the defendant admitted the assault, the claim to the contract afforded no justification, in any view of the evidence, and that the plaintiff was entitled to a verdict for something, and the question of damages, actual and exemplary, only was submitted. A verdict for \$500 was rendered, and the cause has now been heard on a motion to set it aside for error in this ruling, and as excessive.

The contract to convey belonged to Langlois. He had a right to rely upon the plaintiff's performance of it, without keeping it himself, and when he let the plaintiff take it the plaintiff's possession of it would seem to be rightful. The defendant had no interest in it except to have it carried out with Langlois, and he does not seem to have had any right to disturb the possession acquired from Langlois. But, if he had such a right, the paper had been in the plaintiff's peaceable possession for a day, and the right was in dispute, and he could not lawfully use force to assert it. 2 Am. & Eng. Enc. Law (2d Ed.) 983; *Bowman v. Brown*, 55 Vt. 184. And, if he had a right to use force to take the property, it could only be for that purpose, and he would have no right to use force upon the person of the plaintiff to compel him to deliver the property. This was held in *Hodgeden v. Hubbard*, 18 Vt. 504, relied upon in behalf of the defendant here. And, as to the right of an owner to retake personal property, Blackstone said: "If, therefore, he can so contrive as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding." But the right should never be exerted "where such exertion must occasion strife and bodily contention, or endanger the peace of society." 3 Bl. Comm. 4. No authority has been cited or noticed to the contrary of this. So, no right to the contract, however absolute, would justify taking it by force from the plaintiff's person, and much less would it justify any assault upon his person to compel delivery of it; and there was no question about the ownership of the paper, or the amount of force necessary to retake it, to submit to the jury, upon the evidence, as decisive for the defendant of the justification set up. The damages were wholly within the judgment and discretion of the jury, and those found are not sufficiently large to show that they were moved by passion or prejudice, or anything besides the fair exercise of their best judgment and discretion in the performance of their duty. Motion overruled.

Ex parte BALLINGER et al.¹

(District Court, D. Virginia. April 2, 1882.)

PIRACY—JURISDICTION OF FEDERAL COURTS.

Rev. St. § 5370, making robbery, etc., on a vessel within tide waters piracy, punishable in the federal courts, is limited by section 5328 to acts committed outside the territorial jurisdiction of the state courts; and hence a robbery committed on a ferryboat while passing on the Potomac river, between Washington, D. C., and Alexandria, Va., is not cognizable in the federal court in Virginia.

This was a proceeding by writ of habeas corpus. The applicants for the writ had been committed to jail in Alexandria, Va., by United

¹ This case has been heretofore reported in 5 Hughes, 387, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

States Commissioner Fowler, on a charge of piracy. The acts of alleged piracy were committed on board a ferryboat which was then on its way from Washington, D. C., to Alexandria, Va., and consisted in forcibly seizing and throwing overboard certain newspapers which were intended for circulation in Alexandria.

Westel Willoughby and L. L. Lewis, Dist. Atty., for the United States.

Charles E. Stuart, F. L. Smith, S. G. Brent, and Edmund Burke, for the accused.

HUGHES, District Judge. The prisoners are in jail on a charge of piracy, alleged to have been committed on one of the ferryboats plying between Washington and Alexandria, on the Potomac river, on tide water. The offense charged is the taking with violence certain property from a passenger on the steamer. The arrest is based upon section 5370 of the Revised Statutes of the United States, which makes robbery or murder in or upon a vessel on tide waters piracy, and fixes upon such a crime the penalty of death. The prisoners are committed to jail here to await indictment in the District of Columbia.

Piracy was originally an offense known only to the admiralty and international law. Murder, robbery, or depredation, committed in a general spirit of hostility to mankind, on the high seas, was called "piracy." It was cognizable only by the admiralty court. But as pirates often invested havens, bays, rivers, and inlets, and committed like offenses there, it became necessary for the nation whose jurisdiction was thus infested and violated to declare similar acts, though committed on waters other than the high seas, to be piracy, and to make it cognizable by the local criminal courts. In this way rose the statutory crime of piracy. The constitution of the United States gives to congress power to establish admiralty courts, and to prescribe their jurisdiction. Congress has exercised this power only to the extent of conferring upon the admiralty courts jurisdiction in civil causes arising upon contract and tort. But it has given the admiralty courts no criminal jurisdiction, for the reason that the constitution guarantees a jury trial in criminal prosecutions, and juries are unknown to the admiralty law. Congress has vested criminal jurisdiction in the circuit and district courts of the United States, sitting as courts of common law. It has conferred upon those courts the cognizance of crimes committed on American vessels on the high seas, and of crimes committed on vessels within the havens, bays, and rivers affected by the tides; statutory piracy being among the crimes of which cognizance is thus given to the federal courts. But by the crimes act of 1790 this jurisdiction over certain crimes committed within the tide-water inlets, bays, rivers, etc., was conferred by a section which limited it to such crimes as are committed "out of the jurisdiction of any particular state." The criminal jurisdiction of the states is exercised by local courts, whose powers do not extend beyond the body of the counties, respectively. But the body of the county has always been held to embrace all waters that lie within the fauces terræ; that is to say, within lines supposed to be drawn from one utmost point of land to an

other utmost point. Over such waters, of course, the jurisdiction of the courts of the counties (that is to say, the jurisdiction of the states) extends. And therefore congress, in giving jurisdiction to the national courts over certain crimes committed in bays, rivers, inlets, etc., affected by tides, as has been stated, in order to avoid a conflict of jurisdiction, and also for the reason that it was unnecessary to provide for the trial of crimes already cognizable by competent courts, gave jurisdiction to the federal courts over such of these crimes only as should be committed in waters outside of the jurisdiction of the states, outside the fauces terræ, outside the bodies of counties. So, likewise, in the crimes act of 1820 the section which relates to piracy, and from which the present section 5370 is taken, contains the following clause, viz.: "Provided that nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offenses when committed within the body of a county," etc. In construing this statute, the United States supreme court, in the Case of Jackalow, 1 Black, 484, held that the special verdict which was found was insufficient to warrant a judgment to be rendered upon it, because it failed to show whether or not the offense was committed outside of the jurisdiction of New York, beyond the forks of the land of the adjacent county. See, also, *U. S. v. Beavans*, 3 Wheat. 336. And Mr. Bishop, the best writer on Criminal Law, remarks that, "within the counties, the dominion of the state and the common-law jurisdiction of their courts are practically almost as exclusive as if congress had no constitutional authority in exceptional localities there." This proviso, requiring that the piracy shall be committed in water outside the state jurisdiction, to be cognizable by United States courts, was dropped in transferring the section from the act of 1820 into the present Revised Statutes, where it stands as section 5370; and that section, so unqualified in its tenor, is well calculated to mislead the examining and committing officers of the United States, as it did in this case. But section 5370 is nevertheless qualified by a provision of law equivalent to the proviso which the codifier dropped. Section 5370 stands in a title of the Revised Statutes dealing with crimes, and is to be construed in connection with section 5328, standing in the beginning of that title, which declares that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Now, I take it to be unquestionable that the crime of robbery, such as is set forth in the papers before me, is cognizable by the proper court of the District of Columbia for trying common-law offenses. And therefore that court, having jurisdiction to try this offense of robbery, would have such jurisdiction "taken away" and "impaired," if a court of the United States should try this national offense of piracy. The offense for which these prisoners are held was not committed out of the jurisdiction of the District of Columbia. Indeed, there are two local jurisdictions for certain purposes over the Potomac river, between Alexandria and Washington,—that of Virginia as well as that of the District; and to try the offense of piracy in a national court would be to take away and impair two local jurisdictions, and doubly violate the inhibition of section

5328. The proceeding under which the prisoners are held having been without jurisdiction, their imprisonment is without law, and they must be discharged. I will sign an order of discharge.

PECK, STOW & WILCOX CO. v. FRAY et al.

(Circuit Court, D. Connecticut. July 22, 1898.)

1. PATENTS—PRELIMINARY INJUNCTION.

Where a patent had been in active life for 14 years, and large numbers of the patented article had been made and sold under it, without any question of its validity, *held*, that a preliminary injunction would be granted against an infringer.

2. SAME—PAWL AND RATCHET.

The Ellrich patent, No. 293,957, for an improved pawl and ratchet, *held* valid and infringed, on motion for preliminary injunction.

Wm. Edgar Simonds, for complainant.

A. M. Wooster, for defendants.

SHIPMAN, Circuit Judge. This is a motion for an injunction pendente lite to restrain the infringement by the defendants of claims 2 and 3 of letters patent No. 293,957, dated February 19, 1894, to Robert E. Ellrich, for an improved pawl and ratchet.

The invention is described in the specification as follows:

"My invention relates to improvements in ratchets having two pawls; and it consists in the construction of the pawls, and the means for operating them hereinafter set forth, and more particularly pointed out in the claims. Each of the pawls has three flat faces, one of which comes against the ratchet; and a flat bar operates on one of the other faces to hold the pawl against the ratchet, and on the other to hold the pawl away from the ratchet. The bar operates on both pawls, and a spring holds the bar against them. The ratchet teeth have bearing surfaces on both sides for the pawls to operate against. When one of the pawls engages the ratchet, motion is allowed in one direction; and when it is raised, and the other pawl engages the ratchet, motion is allowed in the opposite direction. When both pawls engage the ratchet, motion is allowed in neither direction."

The bar bears against the pawls at all times; and, when a pawl is engaged with the ratchet, the bar will bear upon one of its faces, and hold a face against the ratchet; but, when the pawl is thrown up and disengaged from the ratchet, the bar will bear upon another face, and hold the pawl away from the ratchet. "Both pawls operate in the same manner, and when the bar, D, is holding one in engagement, it serves to hold the other out, or vice versa, or it may hold both pawls in or out of engagement at the same time." The patentee also said in the specification: "The device for operating the pawls may be somewhat varied without departing from the spirit of my invention, as, for example, two springs may be used in place of one spring and the bar."

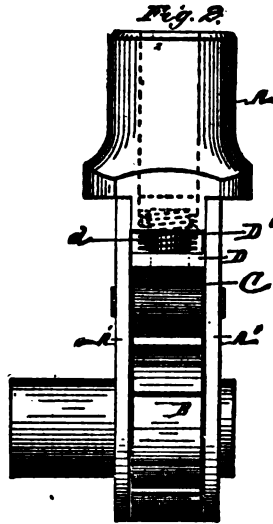
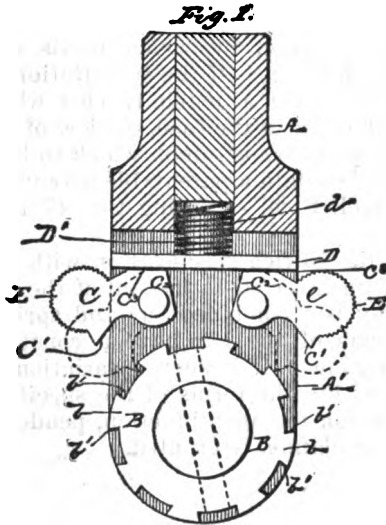
Claim 1 describes the invention too broadly.

Claims 2 and 3 are as follows:

"(2) The combination, with the ratchet, and either pawl having a means for engaging the ratchet and two flat faces, of a bar, as D, adapted to bear

upon one of the faces to hold the pawl against the ratchet, and upon the other face to hold it away from the ratchet, as set forth.

"(3) The combination of a ratchet wheel, B, having teeth, b, both sides of which are adapted to be engaged by the pawls, with two pawls, each of which has two flat faces, and means for throwing them into or out of engagement with the ratchet, separately or together, and a bar, D, having a spring, d, behind it, for holding the pawls in any position in which they are placed, by bearing on one or the other of the flat faces, as herein set forth."



No litigation or adjudication has ever been had upon this patent. It has been in active life for 14 years; and from March 3, 1891, when the complainant and present owner became a licensee, to February 1, 1898, the complainant sold 116,632 bit braces made under it; and its validity, until the acts of the defendant, was acquiesced in or conceded by the trade and the public. The defendants recently began to make and to sell, but not to a large extent, a bit brace which has two elements, viz. the ratchet and pawls, as described in claims 2 and 3, and instead of the bar and spring has a long spring shaped like an inverted U, the resilient sides or arms of which bear against the pawls. The defenses against the motion are that this brace does not infringe the two claims of the Ellrich patent, if the means by which the pawls are to be thrown into or out of engagement with the ratchet are limited to the described means, but, if the means are not thus limited, that the patent is invalid by reason of its close relation to the prior art. Pawls and ratchets have long been used as a part of small hand tools like bit braces, so that, by a change of the engagement of a pawl with the ratchet teeth, the shaft which carries the tool chuck can be rotated in a different, or perhaps opposite, direction from the one in which it was previously moving. Ten forms which antedate the Ellrich patent are shown in the defendants' affidavits. The new thing which

Ellrich did, and which is described in claim 3 more perfectly than elsewhere, was to combine a single ratchet wheel having two-faced teeth with two pawls which could engage separately or simultaneously with the single wheel. The pawls must have flat faces, and the described means of engagement must be a flat-faced bar, and a spring or their equivalent, acting automatically. Inasmuch as he has a single ratchet wheel, he departed from the ratchet hand drill shown in the patent to I. N. and R. N. Cherry, No. 240,575, dated April 26, 1881, which has two ratchet wheels side by side and a pawl for each. This device had the defendants' U-shaped spring, by which pawls and ratchet were made to engage with each other. If the substitution of a single ratchet with the two-faced teeth for a double ratchet wheel was an inventive act,—and there is thus far in the case, in view of the history of the patented device, no adequate reason upon which to base an adverse conclusion,—claims 2 and 3 contain a patentable invention. *Consolidated Brake Shoe Co. v. Detroit Steel & Spring Co.*, 47 Fed. 894.

The defendants' device is that of the Ellrich specification with the long spring of Cherry in the form of an inverted U, instead of the bar and spring of Ellrich. The U spring is a combined bar and spring. By reason of the curvature, the arms of the bar have a constant resilient action, or the action of a spring. It is such a variation of the bar, D, and its spring, as to be within the terms of the specification and of claims 2 and 3. The motion for an injunction, *pendente lite*, against the infringement of those claims, is granted.

BALLOU v. EDWARD A. POTTER & CO.

(Circuit Court, D. Rhode Island. July 22, 1898.)

No. 2,549.

1. PATENTS—INFRINGEMENT SUITS—DEMURRER FOR WANT OF PATENTABILITY.

A patent will not be declared void for want of invention on demurrer to the bill, unless it seems clear that under no possible state of proofs could invention be shown.

2. SAME—MANUFACTURE OF SAFETY PINS.

The Ballou patent, No. 380,380, for an improvement in the manufacture of safety pins, is not so manifestly lacking in invention as to warrant the court in adjudging it void on demurrer to the bill.

This was a suit in equity by Barton A. Ballou against Edward A. Potter & Co., for alleged infringement of letters patent No. 380,380, issued April 3, 1888, to complainant, for an improvement in the manufacture of safety pins. The cause was heard on demurrer to the bill.

Warren R. Perce, for complainant.

Wilmarth Thurston and Charles A. Wilson, for respondent.

BROWN, District Judge. The defendant demurs to the bill, assigning the following causes:

"(2) That the letters patent issued to Barton A. Ballou, for improvement in the manufacture of safety pins, No. 380,380, dated April 3, 1888, infringement of which is charged in said bill of complaint, is wholly void upon its face for want of patentable novelty and invention.

"(3) That said letters patent does not upon its face disclose any patentable novelty or invention over and above what was, long before the alleged invention of the said Ballou, within the common and general knowledge of the public, of which the court will take judicial notice, and that for this reason said letters patent is wholly void upon its face.

"(4) That said letters patent is for a process of manufacture, and is upon its face for a process which involves nothing but mechanical operation or function of certain machines, apparatus, or devices, and is therefore upon its face for a process which is not patentable under the law, and is wholly unwarranted by law, and void upon its face."

The claim is as follows:

"The improved process of manufacturing safety pins herein described, consisting in forming the central portion of the wire blank into a body portion, a, by a die and plunger, swaging one end of the wire to give it a longitudinal groove, reducing, elongating, tempering, and pointing the opposite end of the wire by cold-swaging dies, and bending the ends so as to make them engageable with each other, substantially as specified."

The defendant argues, first, that, each of the operations being old and well known, there is no invention in performing all of the operations upon one and the same piece of wire for the reason that there is no co-relation or co-operation between the several operations. The complainant contends that, as a matter of fact, there is such co-operation. I do not think that the court would be justified in finding that under no possible state of proofs can invention be shown in this case. *Patent Button Co. v. Consolidated Fastner Co.*, 84 Fed. 189.

Secondly, the defendant contends "that, even if said patent discloses any invention, it does not disclose anything which is patentable as a process." The case of *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, does not seem conclusive on this point. The patent is not for the mere function of a machine, but for a process which possibly may be regarded as a compound process, whereby there is given to a wire blank certain related properties of elasticity and temper, as well as a certain shape. *Blakesley Novelty Co. v. Connecticut Webb Co.*, 78 Fed. 480. In that case it was said by Judge Townsend, of a compound process:

"In such a case I understand that there may be invention, if there is such change in the method or arrangement of operation as involves invention, and produces a new and useful result."

Conceding that each of the operations was old, the question is whether, by any possible state of proof, the complainant can show that his combination or series of operations is new, and produces a new result constituting an invention. See *Cochrane v. Deener*, 94 U. S. 780, cited in *Locomotive Works v. Medart*. While I am of the opinion that the question of patentability is doubtful, and that there is much force in the suggestion that there is merely aggregation rather than a true combination, it seems to me that upon each cause of demurrer there arises a question of invention which may possibly turn upon evidence, and that, in view of the rule that a demurrer for want of invention should be sustained only in very clear cases, and that

doubts should be resolved against the defendant, the question of the validity of the patent should be reserved for final hearing. Demurrer overruled. Question of costs reserved.

COMPUTING SCALE CO. v. KEYSTONE STORE-SERVICE CO.

(Circuit Court, W. D. Pennsylvania. June 7, 1898.)

1. PATENTS—CONSTRUCTION OF CLAIMS.

When a claim, read in its common, ordinary meaning, is explicit and clear,—when there is no apparent uncertainty,—there is no room for construction, or for expert evidence as to the meaning of the claim.

2. SAME—WEIGHING AND PRICE SCALE.

The Pitrat patent, No. 385,005, for a weighing and price scale, construed, and held not infringed as to claim 12.

3. SAME—COMPUTING SCALE.

The Culmer patent, No. 486,663, for a computing scale, construed, and held not infringed as to claim 1.

Church & Church, for complainant.

John R. Bennett and H. H. Bliss, for respondent.

BUFFINGTON, District Judge. By this bill the Computing Scale Company charges the Keystone Store-Service Company with the infringement of claim 12 of patent No. 385,005, issued June 26, 1888, to J. E. Pitrat, for a weighing and price scale, and of claim 1 of patent No. 486,663, issued November 22, 1892, to J. W. Culmer, for a computing scale. Bearing in mind the statutory requirement that the patentee "shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery" (Rev. St. § 4888), we turn to the patent of Pitrat to ascertain from such patent itself what invention was made and claimed. If we are able to ascertain those facts from that instrument, we have no need to go further; for when a claim, read in its common, ordinary meaning, is explicit and clear,—when there is no apparent uncertainty,—there is no room for construction. *Rich v. Close*, 4 Fish. Pat. Cas. 279, Fed. Cas. No. 11,757; *United States Glass Co. v. Atlas Glass Co.*, 88 Fed. 493.

The patent refers to combination weighing and price scales, which in themselves were not new in the art, and Pitrat's invention was for improvements. Without going into the details of Pitrat's suggested improvements or a description of scales of that general type, it is sufficient to say that Pitrat showed two specific forms, alike in general features, but differing in details. In both the indicating beams were pivoted on a frame adapted to shift its position with reference to the body of the scales. The medium of interrelation was a connecting rod, which, with the scale proper, retained a stationary position. Consequently the movement of the scale-beam frame changed the leverage point of the platform weight upon the scale beam, and so necessitated a change in position of the weight or weights upon such scale beams to secure an equipoise. This scale-

beam shifting was required by the fact that, in price and weight scales, we have the two units of calculation, viz. price and weight. By an ingenious system of gradations on different portions of the scale beam and the use of an additional poise,—things not original with Pitrat,—means are afforded of figuring the net amount of diverse weights at diverse prices. Computation at the lowest desired price per pound was impossible in one form of device suggested by Pitrat. The position of the pivotal supports upon which the scale beam balanced was such that the head block could not reach the center of the beam. To overcome this mechanical objection, Pitrat suggested another form of construction. In it the pivotal support was bow shaped, the open side being towards the head block. "The pivotal support, O," says the specification, "is bow shaped, thereby allowing the head block to reach the center of the beam or come in line with the pivotal supports, which permits computation to be made at the lowest desired rate per pound,—a thing not attainable by the construction first described." It will be noted that the foregoing extract contains the only reference in the patent to alignment, and that the alignment there spoken of is not a fixed and unchangeable one, but one resulting from a change in the relative position of parts. An examination shows that in the twelfth claim we find that which in apt words embodies the invention disclosed as above stated in the specification. That claim is for "the combination with the price beam, having its left branch slotted, of the head block, having the rod, e, pivotally connected therewith, and mounted in said slot, whereby the pivotal supports of the beam and rod, e, may be brought into alignment, as and for the purpose described."

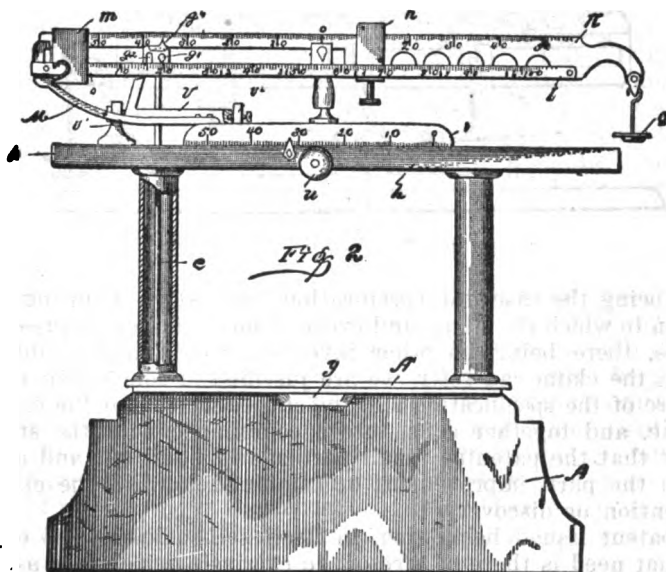
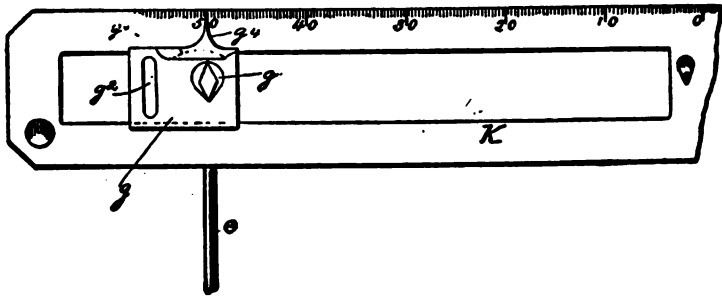
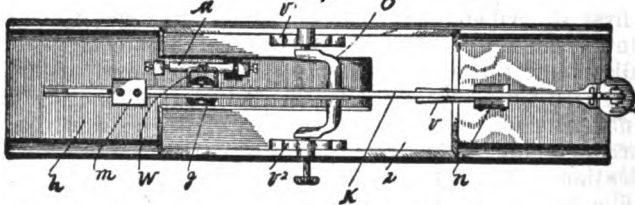
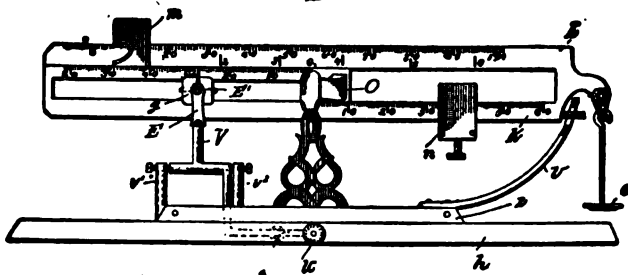


Fig. 6*Fig. 14**Fig. 15*

Such being the case, the specification particularly pointing out an invention to which the claim, and every element thereof, is presumably referable, there being no other invention particularly pointed out to which the claim can refer, we are justified in concluding that the disclosure of the specification and the subject-matter of the claim are the same, and together constitute a compliance with the statutory mandate that the patentee "shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery."

The patent issued being then in itself self-sufficient and explanatory, what need is there of a resort to extrinsic evidence to ascertain

its meaning? In a late case, that of *United States Glass Co. v. Atlas Glass Co.*, 88 Fed. 493, this court had occasion to say what we regard as especially pertinent to this patent. In substance we there said, if the meaning is clear, construction is not to be resorted to to create doubt, and then a liberal construction given to the doubt, which results in presenting to a patentee, not what he claimed, but what he failed to claim. Such liberality is not construction, but reconstruction; for a court discharges its duty and exhausts its power when it ascertains and declares what was claimed, and it as clearly transcends its power when it reconstructs a claim to cover what a patentee did not, but might have, claimed, had he been gifted with prescience.

At variance, we think, with these safe and wholesome canons of interpretation, an effort is here made to say that this reasonable, just, and statutory ascertainment of the meaning of the claim from the four corners of the patent itself should not be followed, and that the true meaning of the claim is found in the testimony of expert witnesses called by the complainant. Assuming a resort to that source pertinent, we think their views should not prevail. It is claimed the alignment of the twelfth claim means, not a transverse alignment into which the aligning elements are brought, and which, therefore, may or may not exist, but the horizontal alignment which the three pivotal points of head block, beam, and forward poise drop bear to each other. An analysis of this position exhibits the following: There is no mention in the claim of a third point in connection with alignment. The alignment therein referred to is of two points only, viz. the pivotal supports of the beam and that of the rod, E. Moreover, the claim contemplates a device wherein these two points may be brought into alignment. This language primarily means, and clearly implies, that they may be out of alignment, but that the construction is such that they may be brought, i. e. shifted, "into alignment, as and for the purpose described." What this alignment, "as and for the purpose described," was, had been explicitly set forth before in the specification, namely, "allowing the head block to reach the center of the beam or come in line with the pivotal supports, which permits computation to be made at the lowest desired rate per pound,—a thing not attainable by the construction first described." The claim is not alone for a price beam having its left branch slotted, and of a head block having the rod, E, pivotally connected therewith and mounted in said slot, but it is of those elements so constructed that "the pivotal supports of the beam and rod, E, may be brought into alignment, as and for the purpose described." The insertion of these words meant something, and they must be given due weight. The construction we adopt accords them meaning; that of the complainant ignores their presence, and makes nonessential what the patentee and the office have deemed material and essential. To us it is clear that the construction which we thus reach from the four corners of the writing is the natural, logical, and true one, and awards to the patentee all he disclosed and claimed in that regard. It is

conceded the respondent's device does not infringe the claim when thus construed.

We now turn to the Culmer patent, the first claim of which is alleged to be infringed. In a scale of complainant's type of make, combining both a weighing and computing beam, it is obvious that the arc described by the weighing beam is fixed, while that described by the computing beam varies, as that beam is moved forward or backward within the link. These beams having but a single connection with the platform, it is manifest that, to avoid binding or friction, compensation must be made for this arc-variation. This the patentee secured by placing a joint or flexible connection between the two beams. In the play allowed by this connection the difficulty was overcome. Two styles of joint were shown, the specific form of which it is not necessary to detail. The patentee contemplated their use in a combination scale, such as complainant makes; that is, where the beam was mounted on a carriage adapted to be moved longitudinally on the frame of the scales. In that regard the specification says:

"As my invention consists, essentially, of the above-described flexible connection for the beams, the computing beam, and the mounting of such beam upon a carriage longitudinally movable on a cap in relation to the weighing beam, it is obvious that these parts and combinations of parts may, if desirable, be added to the ordinary scale now in use."

Upon this device was granted the claim in issue, viz.:

"The combination, with the computing beam and the weight beam, of a rod connecting said beams, having a flexible joint between such connections, whereby said rod will adapt itself to the variations in the vibrations of the said beams in the efficient working of the scale, substantially as described."

In this claim there are three elements, viz. the computing beam, the weight beam, and rod connecting the two. This rod has the limitation of a flexible joint of such functional power that the rod will adapt itself to the variations in the vibrations of the two beams.

Assuming this device was novel and patentable, does the respondent's device infringe? We think not. The device in question was certainly not of a broad, general type. It covers simply the combination disclosed, or one embodying substantial equivalents of its elements. Without describing the entire apparatus, we find in respondent's device that the computing beam occupies a fixed position relative to the platform. Now, inasmuch as there must be a change in point of application of the weight resultant force to the computing scale, it is manifest this connection must be secured by a shifting of the connecting medium or rod. But, inasmuch as the connection between the weight beam and the platform is necessarily fixed, it follows that in this type of scales the computing beam and the weight beam cannot be bound by a connecting rod, and the connected two to the platform by a single rod. The shifting capacity of the weight connecting and conveying medium between the scale beam and the platform of respondent's device is incompatible and nonassimilating with the necessarily nonshifting weight transmitting medium between

the weight beam and the platform. It therefore follows that, to transmit its weight units, the platform must have two separate, individual connections,—one with the weight scale, of a fixed relativity to both; the other with the computing beam, but of shifting or changeable relativity thereto. An analysis of the operation of this scale, it is submitted, shows that in this type the weight units emanate from the platform in two separate, defined, individual paths, respectively, and in such separate paths adjust themselves to the arc of the beam at the end of their path, and this without reflex action on the other path, while in the Culmer device the weight units emanate from the platform by a single path, which, by the intercommunicating flexible joint, is the necessary resultant from the reflexed effects of the varying divergence of the arcs of the connected intercommunicating scale and weight beams. The incipient division of the weight by means of the two separate rods, and the absence of a connecting rod with a flexible joint between the scale and the weight beam, show to our mind a different construction—one involving different principles and means—from Culmer.

While the end sought for in both mechanisms may be the same, yet the means employed are essentially and functionally different. We are therefore of opinion infringement has not been shown, and the bill must be dismissed.

BRIDGEPORT MFG. CO. v. WILLIAM SCHOLLHORN CO. et al.

(Circuit Court, D. Connecticut. June 17, 1898.)

PATENTS—LIMITATION OF CLAIMS—PRIOR ART.

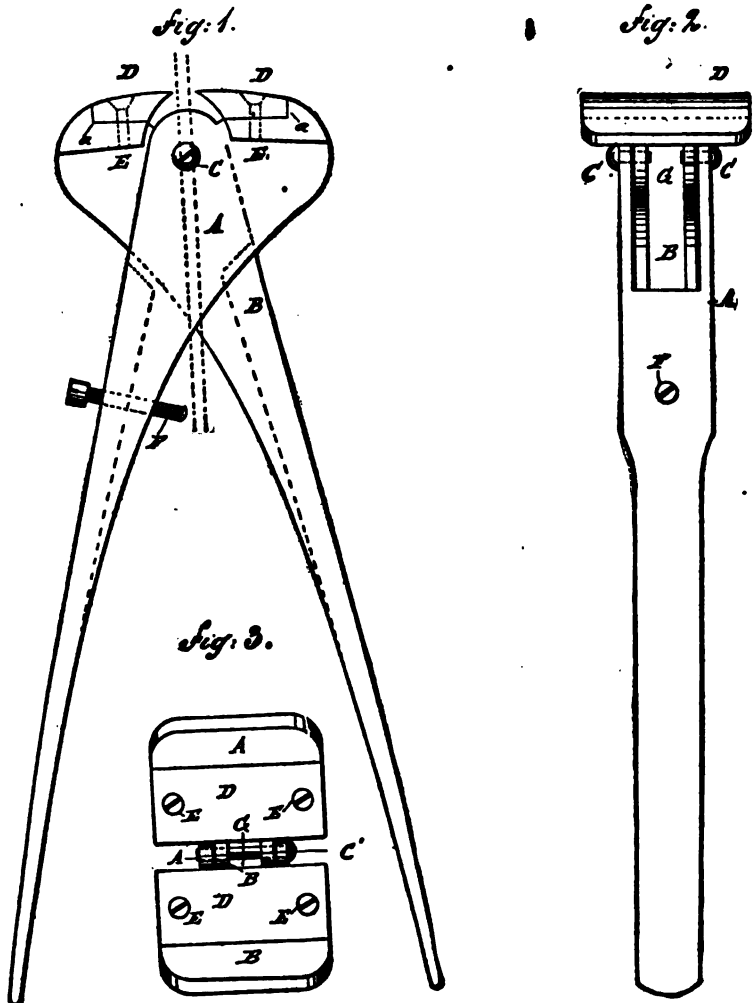
The Broadbrooks patent, No. 329,133, for an improvement in nippers, if valid at all, must, in view of the prior art, be narrowly construed; and it is not infringed by a flat-nosed plier, which is not a cutting nipper, and in which the pivotal portions of the levers are parallel with their sides, and not at right angles to the jaw.

This was a suit in equity by the Bridgeport Manufacturing Company against the William Schollhorn Company, John J. Henderson, and Frank J. Schollhorn for alleged infringement of a patent for an improvement in nippers.

Schrieter, Van Iderstine & Mathews, for complainant.
Robinson & Fisher and John K. Beach, for defendants.

TOWNSEND, District Judge. The defendant corporation herein was complainant, and the complainant corporation herein was defendant, in Schollhorn v. Manufacturing Co., 84 Fed. 674, in which complainant's patent, No. 427,220, to Bernard, was held to be valid, and infringed by defendant, and an injunction was granted. In that case, patent No. 329,133, granted to Broadbrooks in 1885, was set up by defendant as an anticipation of complainant's patent, and was purchased by defendant, which has filed this bill, alleging infringement of said patent. It does not appear that complainant has manufactured, or intends to manufacture, under the patent in suit. The only

proof of its utility during the 12 years of its life is the sale of 400 tools manufactured thereunder between 1894 and 1897, and prior to its purchase by complainant. The defendant's tool has been on the market since 1890, and it manufactures from 100 dozen to 125 dozen thereof per week, and it never had any notice of claim of infringement until after said purchase by complainant. The patentee of the patent in suit testifies that he would never have known that anybody was infringing, except for the correspondence with the present complainant. The defenses are noninfringement, in view of the limitations stated in the claim, and shown by the file wrapper and by the prior art, and invalidity on various grounds. It will be necessary to consider only the defense of noninfringement.



The single claim, as finally allowed, was as follows:

"The herein-described nippers, consisting of two levers pivoted together, and each provided in their jaw ends with coincident slots or recesses forming side bars, the bars of one lever being lapped between and close to the inner sides of those of the other lever, all arranged substantially as described, whereby a passage is provided through the nippers at right angles to the jaws, and in line approximately midway between the sides thereof, as set forth."

The patent is for a specific construction of an article of manufacture. The prior art showed such a cutting nipper outside, or at the side, of the nipping jaws, and the pivoted recessed levers, as shown in the drawings of the patent in suit, and lapped levers, as covered by the claim. The construction covered by the claim practically amounts to the same thing as the old familiar hand nipper, with a hole bored through it; and such a hole, extending through a vice, was shown in the prior art. The earlier Lewis patent sufficiently illustrates the position of the patent in suit. That the Lewis patent covers every essential feature of the patented nipper appears from a comparison of the specifications, and from the admissions of complainant's expert. Lewis describes the two jaw levers having their upper ends forked as in Broadbooks'. Broadbooks says:

"The two jaw levers, A and B, have their upper ends forked, the prongs of the lever, B, being passed between the prongs of lever, A, and the prongs are then pivoted together by means of two rivets, C,—one in each pair of prongs,—or by a single rivet, C', passed through all four prongs, as shown in Fig. 3."

This is the Lewis construction, and by means of it in each tool "an opening or recess is formed between the sides of the levers at the pivot or pivots, thus permitting of passing a rivet or wire between the [cutting] edges of the blades, and between the sides of the levers." If the complainant be limited to a narrow construction, the defendants do not infringe; for their flat-nosed plier is not a cutting nipper, and the passage between the pivotal portions of the levers is parallel with the sides of the levers, and not at right angles to the jaw. If complainant be permitted the expanded construction contended for, its patent is void, in view of the prior art. Let the bill be dismissed.

NEWTON ST. RY. CO. V. AMERICAN STREET-CAR ADVERTISING CO.

(Circuit Court of Appeals, First Circuit. July 19, 1898.)

No. 230.

PATENTS—CONSTRUCTION AND INFRINGEMENT—ADVERTISING RACK FOR STREET CARS.

The Randall patent, No. 380,696, for an advertising rack for street cars, if disclosing any invention whatever, must be very narrowly construed, and is not infringed by a structure which is not a complete article in itself, adapted to be readily attached to the car. 82 Fed. 732, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the American Street-Car Advertising Company against the Newton Street-Railway Company and others for alleged infringement of letters patent No. 380,696, for an advertising rack for use in street cars.

In the specifications of his patent the patentee thus describes his invention:

"It has been the custom to place advertising cards in street cars at the corners formed by the roof and sides of the car. These cards have heretofore been simply tacked to the roof and side of the car, or held in place at each of said corners by means of two longitudinal strips,—one fastened to the framework of the roof, and the other to the framework of the side. My invention consists in an article styled an 'advertising rack,' constructed and applied at either of said corners, as hereinafter set forth, into which the cards may be conveniently placed, and from which they may be readily removed; the rack being an article complete in itself, adapted to be readily attached to the car at the place specified, where it will exhibit the cards therein in an attractive manner."

Fig. 1

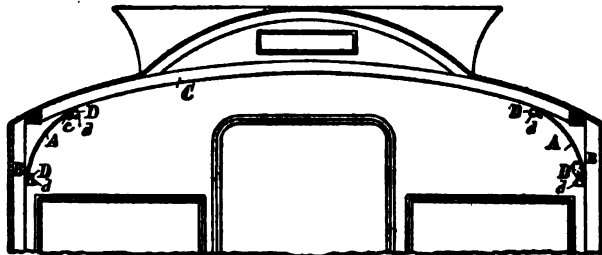


Fig. 2

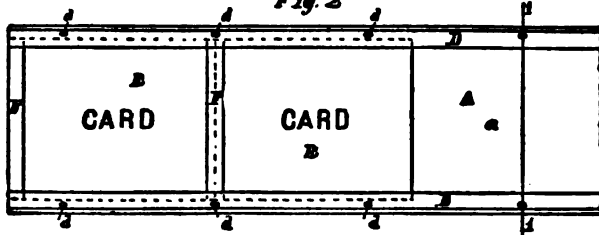


Fig. 3

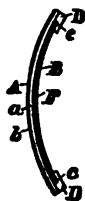


Fig. 4

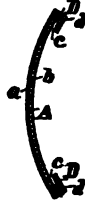


Fig. 5



While his application was pending in the patent office, the patentee, in endeavoring to distinguish the Akarman advertising device, which had been cited by the examiner as an anticipation, says:

"The Akarman device, before being fastened in place in car or elsewhere, is of several separate pieces, and does not form a rack to hold the cards until so fastened, while applicant's rack is complete and in condition to receive the cards when not fastened to the car."

The first claim of the patent, which alone was relied on and alleged to be infringed, is as follows:

"(1) An advertising rack adapted for use in a street car, consisting of the body, A, having a continuous concave face, and longitudinal moldings along the edges thereof, having grooves, c, adjacent to and in substantially the same plane as the concave face of the body, in combination with screws or equivalent devices for connecting the rack to the car, engaging with the moldings outside the grooves therein, substantially as and for the purpose set forth."

Frederick P. Fish and Charles G. Coe (George W. Morse and John C. Lane, on the brief), for appellant.

Causten Browne and William Quinby, for appellee.

Before COLT, Circuit Judge, and WEBB and BROWN, District Judges.

PER CURIAM. While we entertain doubts whether the complainant's device involves invention or patentability, yet, admitting that both were found in it, the patent must be held so close and narrow that it is not infringed by a structure that cannot be described, in the language of the patent, as "an article complete in itself, adapted to be readily attached to the car at the place specified," or, in the language impressed upon the patent office, a rack "complete and in condition to receive the cards when not fastened to the car." We are clear, therefore, that the respondent's structure does not infringe.

The decree of the circuit court against this appellant, the Newton Street-Railway Company, is reversed, and the case is remanded to that court, with directions to dismiss the bill, with costs; the appellant to recover the costs of this court.

THE VICTORIAN.

(District Court, D. Washington, N. D. July 22, 1898.)

SEAMEN'S WAGES—DESERTION—EVIDENCE FROM LOG.

By the act of February 18, 1895, the act of August 19, 1890, was so revised and amended as to exempt vessels in the coastwise trade (except between ports in the Atlantic and ports on the Pacific) and vessels engaged in trade between the United States and Canada from the requirements of the act of 1872 as to keeping official log books. Hence the wages of deserting seamen may be adjudged forfeited without any proof that they were ever noted in the log book as deserters.

This was a libel in rem by Lawrence Goldspring and Michael Moore against the steamship *Victorian* to recover seamen's wages.

P. P. Carroll, for libelants.

S. H. Piles, for claimant.

HANFORD, District Judge. The libelants, after signing articles for a voyage from Seattle, via. Victoria, to Alaska and return, entered into the service of the vessel, but left her on the third day at Victoria, and were there arrested on a criminal charge, and detained until after the vessel had proceeded on her voyage, when they were released for want of evidence to sustain the accusation against them. The claimant denies any liability, and insists that the libelants forfeited their wages by desertion. The official log book has not been introduced in evidence, and there is no proof that any entry was made therein of desertion, or any other offense committed by the libelants, and it is insisted that they cannot be treated as deserters by the court in this proceeding without proof that they were duly logged as deserters at the time, as provided by section 4597, Rev. St. U. S. I would sustain the contention of the libelants' proctor, and refuse to consider evidence of desertion, in the exercise of the discretion authorized by section 4597, if that statute were applicable in this case. The provisions of sections 4290-4292, 4596, and 4597, requiring official log books to be kept, and records of offenses to be made therein, are all part of a general and comprehensive statute prescribing the manner of shipping crews for American merchant vessels, and relating to the discipline and discharge of seamen, enacted in the year 1872. 17 Stat. 262. This statute, however, is limited by an act of congress approved June 9, 1874 (18 Stat. 64), which provides that none of the provisions of the act of 1872 "shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage." By the second section of the act of June 19, 1886 (1 Supp. Rev. St. U. S. [2d Ed.] 493), it is provided "that shipping commissioners may ship and discharge crews for any vessel engaged in the coastwise trade, or the trade between the United States and the dominion of Canada, or Newfoundland, or the West Indies, or the republic of Mexico, at the request of the master or owner of such vessel"; and by the act of August 19, 1890 (1 Supp. Rev. St. U. S. [2d Ed.] 780), the provisions of sections 4596 and 4597 are extended, and made applicable to vessels in the coastwise trade and the trade between the United States and the dominion of Canada, or Newfoundland, or the West Indies, or Mexico, where the crews of such vessels have been shipped by a shipping commissioner, as authorized by the act of 1886. And finally, by the act of February 18, 1895 (28 Stat. 667), the act of August 19, 1890, was so revised and amended as to cut out entirely sections 4596 and 4597, and to exempt vessels engaged in the coastwise trade

(except between ports on the Atlantic and ports on the Pacific coast) and vessels engaged in trade between ports of the United States and the dominion of Canada from the requirements of the act of 1872 as to keeping official log books. There is, therefore, no statute in force requiring the production of an official log book containing evidence of desertion of any of the crew from the steamship *Victorian* while on a voyage from Puget Sound to British Columbia or Alaska, and there is no rule applicable to this case contrary to the general admiralty law which deprives a deserter of all right to sue for and recover wages for his unperformed contract. *The Yosemite*, 18 Fed. 383. The evidence is clear and convincing that both of the libelants did willfully desert the vessel at Victoria. A decree of dismissal will be entered.

SCHMIDT et al. v. KEYSER et al.

KEYSER et al. v. SCHMIDT et al.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1898.)

No. 655.

SHIPPING—DEMURRAGE CESSOR CLAUSE—CONSTRUCTION OF CHARTER PARTY.

A charter provided for demurrage, but a "cessor clause" therein provided that "the charterer's responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled or provided for in the bill of lading." The charter also provided that bills of lading should be signed as presented without prejudice to the charter party, but any difference of freight was to be settled on signing the bills of lading. *Held*, that the signing of bills of lading did not operate to release the charterers from liability for demurrage accruing prior to the signing of the bills, from their failure to fulfill the conditions of the charter.

Appeal from the District Court of the United States for the Northern District of Florida.

This was an appeal in a libel in admiralty to recover demurrage. A full statement of the facts in the case will be found in *Wood v. Keyser*, 84 Fed. 688, and *Steamship Co. v. Keyser*, Id. 693.

Ben. C. Tunison, for Schmidt & Hansen.

John C. Avery, for Keyser & Co.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge, as the organ of the court, said:

The issues in this case are the same as those in *Wood v. Keyser* (No. 654) 84 Fed. 688, 87 Fed. 1007, and *Steamship Co. v. Keyser* (No. 653) 84 Fed. 693, 87 Fed. 1005, recently decided by this court, except that in this cause reliance is placed on the "cessor clause" to wholly relieve the charterers from liability. The provisions of the charter party must be construed together. By articles 8, 9, and 10 of the

charter party it is clear that provision was made for demurrage. Article 6 provided that bills of lading should be signed as presented without prejudice to the charter party; but any difference of freight was to be settled on signing the bills of lading. Article 10, the "cessor clause," reads as follows: "The charterer's responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled or provided for by bills of lading." The bills of lading stated that all the conditions of the charter had been complied with. It seems plain that, under such bills of lading, no demurrage could be claimed by the consignees or their transferees; and if it be true, as contended, that the signing of the bills of lading operated the release of the charterers from all prior liability, then the shipowners have no recourse. But it is clear that the signing of the bills of lading did not release the charterers. Under the plain terms of the clause relied on, they were to be released on one of two conditions, viz. a full compliance with all the conditions of the charter party, or by making provision in the bills of lading for the shipowners' security. The charterers complied with neither condition.

We notice that Lord Esher, M. R., in *Clink v. Radford* [1891] 1 Q. B. Div. 625, said that the main rule to be derived from the cases interpreting the "cessor clause" is that the court will construe it as inapplicable to the particular breach complained of if, by construing it otherwise, the shipowners would be left unprotected in respect to that particular breach, unless the clause is expressed in terms which prohibit such a conclusion. In *Christoffersen v. Hansen*, L. R. 7 Q. B. 509, where the charter party provided that all liability on the part of the charterer should "cease as soon as he shipped the cargo," it was held that the clause applied only to liability accruing after the loading, and did not release the charterer from liability accruing before the completion of the loading. The decree appealed from is affirmed.

TRACY et al. v. MOREL et al.

(Circuit Court, D. Nebraska. August 4, 1896.)

1. REMOVAL OF CAUSES—TIME OF APPLICATION.

When a party not served enters a voluntary appearance, with a stipulation that he shall have a certain time to plead, an application for removal made within that time is made in time, although not within the statutory time for answering.

2. SAME—DIVERSE CITIZENSHIP.

It must affirmatively appear that the citizenship of all the defendants is diverse from that of all the plaintiffs; and, in an action in Nebraska by a citizen of Nebraska and a citizen of Tennessee, an allegation that one of the defendants is not a citizen of Nebraska, "but that his residence and citizenship are unknown," is insufficient.

3. SAME.

A cause is not removable on the ground that it is a controversy between citizens of a state and foreign citizens, when one of the defendants is a citizen of a state, although of a different state from that of plaintiff.

4. SAME—SEPARABLE CONTROVERSY.

An alien has no right to the removal of a cause on the ground of a separable controversy.

Barnes & Tyler, for plaintiffs.

Lohr, Gardner & Lohr, for defendants.

MUNGER, District Judge. This action was commenced in the district court for Dakota county on the 8th day of September, 1896, against Leon Grezaud, Benoit Grezaud, Joseph Beauvernois, Francis Jeandet, M. P. Ohlman, John Kellner, and John M. Severson, to quiet the title of plaintiffs to certain real estate therein described. Plaintiffs, in their petition, allege title in themselves through several mesne conveyances from the United States; that said lands were by the county treasurer of Dakota county sold for taxes due thereon, and a tax deed issued therefor; that said tax title is void because of certain irregularities in the proceedings leading up to the sale; that defendants "claim to have some interest in and to the said premises, but whatever interest, if any, the said defendants have in and to the said lands, is derived through and by virtue of the void tax deed heretofore mentioned"; that said real estate is unoccupied. The prayer of plaintiffs' petition is that the title of plaintiffs in and to the lands mentioned be quieted, confirmed, and adjudged to be in plaintiffs, and that the tax deed be decreed void; that the pretended rights, title, claims, and interests of the said defendants, and each of them, in and to said premises, be cut off, annulled, and held for naught. On the 12th of October, 1896, the defendant John M. Severson filed a general demurrer to plaintiffs' petition. The usual affidavit required by the Nebraska Code for service by publication upon the other defendants was filed, and notice was published; the answer day therein being May 31, 1897. On May 31, 1897, there was a stipulation filed that the defendant Leon Grezaud has died, leaving surviving him Fannie Grezaud, his widow, and Mme. Charles Emil Luc, and Jeanne Grezaud, children. Said stipulation provided for the entering by said heirs of their voluntary appearance in said case, and that the time to plead should be extended 60 days. July 28, 1897, the defendants Fannie Grezaud,

Mme. Charles Emil Luc, Jeanne Grezaud, Benoit Grezaud, Joseph Beauvernois, and Francis Jeandet filed their petition and bond for a removal of the case into this court. In the petition for removal it is stated that M. M. Tracy, one of the plaintiffs, is, and was at the commencement of the action, a citizen of the state of Tennessee; that John J. Tracy is, and was at the commencement of the action, a citizen of the state of Nebraska; that the defendants petitioning for the removal are, and were at the time of the bringing the action, aliens, residents of the republic of France; the defendant M. E. Ohlman a citizen of the state of South Dakota; defendant John M. Severson a citizen of the state of Nebraska; and that the defendant John Kellner "is not a citizen of Nebraska, and does not reside in said state, but that his residence and citizenship are unknown." The present hearing is on plaintiffs' motion to remand. The only ground stated in the motion is that the application for removal was not made in time; that, the answer day fixed in the published notice of service being May 31st, the petition for removal, filed July 28th, was after the time for removal had expired.

Upon the question as to whether or not an extension of time to plead extends the time for removal, the authorities are not in harmony. This court, however, has held, following the decision of Judge Phillips in the case of Spangler v. Railroad Co., 42 Fed. 305, that the application for removal must be made at or before the time fixed by the statutes of the state to answer, and that an extension of time to answer, by stipulation of parties or order of court, does not have the effect to extend the time within which the application for a removal must be made; yet, as to a portion of the defendants (the representatives of Leon Grezaud, deceased), no process of any character was ever issued to bring them into court. Their appearance to the action was a voluntary one, pursuant to the stipulation of parties, of date June 9, 1897, that they were to become parties to the action, and have 60 days in which to plead. As to them, it is clear the application for removal was had in time. It is, however, the duty of the court to remand the cause, at any stage in the proceedings, whenever it appears that the case is not one in which the court has jurisdiction. This court has no jurisdiction of the action on the ground of diverse citizenship, for it does not appear from the record that it is a controversy between citizens of different states. It is shown that the parties plaintiff are citizens, respectively, of the states of Tennessee and Nebraska; that one of the defendants (John M. Severson) is a citizen of the state of Nebraska. This does not present a case of diverse citizenship, as it must appear that all the parties plaintiff are citizens of different states from any of the necessary parties defendant. But it is alleged in the petition for removal that the defendant Severson has no interest in the subject-matter of the action, but was made a party for the purpose of preventing a removal of the action into this court. Whether such fact can at this time be investigated for the purpose of determining the question of jurisdiction, we will not consider, as it does not appear that the citizenship of defendant John Kellner is diverse to that of each plaintiff. The allegation is "that John Kellner, another defendant in this suit, is not a

citizen of Nebraska, and does not reside in said state, but that his residence and citizenship are unknown." It must affirmatively appear, to give the court jurisdiction, that his citizenship is of a state other than Tennessee or Nebraska. The allegation that the citizenship is unknown is insufficient. *Salt Co. v. Brigel*, 14 C. C. A. 577, 67 Fed. 625, 31 U. S. App. 665.

Nor can jurisdiction be sustained on the ground that it is a controversy between "citizens of a state and foreign citizens or subjects." The law in this respect is stated in *Black, Dill. Rem. Causes*, § 34, as follows:

"It is therefore necessary that all the parties on one side of the case should be citizens of a state or states, and all the parties on the other side aliens. * * * When a plaintiff, citizen of the state where the suit is brought, sues two defendants, one of whom is a citizen of another state, and the other an alien, * * * the cause is not removable, because it does not come within any of the provisions of the statute. It is *casus omissus*. It cannot be said to be a controversy 'between citizens of different states,' because one of the parties is not a citizen; and it cannot be described as a controversy 'between citizens of a state and foreign citizens or subjects,' because one of the defendants is not a foreigner."

The same rule is stated in *Hervey v. Railway Co.*, 7 Biss. 103, Fed. Cas. No. 6,434, and *King v. Cornell*, 106 U. S. 395, 1 Sup. Ct. 312.

It is further urged that the action is removable on the ground of a separable controversy. A complete answer to this proposition is that the statute does not give the right of removal to an alien on the ground of a separable controversy. *King v. Cornell*, *supra*; *Merchants' Cotton-Press Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367.

Perceiving no grounds on which the jurisdiction of this court can be sustained, the cause is remanded to the state court.

POSTAL TEL. CABLE CO. v. SOUTHERN RY. CO.

SOUTHERN RY. CO. v. POSTAL TEL. CABLE CO.

(Circuit Court, W. D. North Carolina. July 20, 1898.)

1. REMOVAL OF CAUSES—EFFECT OF FILING PETITION AND BOND.

On the filing of a petition in the state court stating the essential facts for removal, accompanied by a proper bond, the cause is *ipso facto* removed, and the state court can take no further action.

2. SAME—JURISDICTIONAL AMOUNT.

The question whether an amount is involved sufficient to support the jurisdiction of the federal court must be determined by the federal court alone, and not by the state court.

3. SAME.

In a proceeding to condemn a right of way, where defendant in his petition for removal averred that the matter in controversy far exceeded \$2,000 in value, and the plaintiff claimed that it was of merely nominal value, *held*, that the court would be governed, as in other cases, by the amount of the claim made, in the absence of any reason to believe that it had no bona fide existence, and was only made to secure the jurisdiction.

A. L. Brooks and J. R. McIntosh, for plaintiff.
Stiles & Holladay and F. H. Busbee, for defendant.

SIMONTON, Circuit Judge. These two cases came up together under these circumstances: The Postal Telegraph Cable Company entered proceedings in the superior court of Guilford county, in the state of North Carolina, seeking to condemn the right to erect its poles and stretch its wires over and along the right of way of the Southern Railway in North Carolina. The petition, among other things, alleged the intention of the Postal Telegraph Cable Company to erect its poles and stretch its wires very near the outer limits of the right of way of the railway company, so as in no wise to interfere with its use of its track, and if, in any case, it should hereafter appear that any of the said poles were obstructing such use, that the telegraph company would remove them at its own expense, on reasonable notice. Upon the institution of these proceedings the Southern Railway Company filed its petition for removal of the case into this court, relying upon two distinctly stated facts,—the diversity of citizenship between it and the telegraph company, and that the matter in dispute exceeded \$2,000, besides interest and costs. The petition was accompanied by a bond with surety. Application having been made to the state court immediately upon the filing the petition and bond, an order of removal was refused upon the ground solely that the matter in dispute was not of a value exceeding \$2,000. The next day after this refusal the Southern Railway filed a transcript of the record in this court. On the same day the Postal Telegraph Cable Company moved before the state court for leave to amend its proceedings for the purpose of making new parties. This motion was refused because made in the absence of, and without notice to, the defendant's attorney. Because of this, and the fear of other motions, the Southern Railway Company filed its bill, setting forth the facts stated above, and praying that the Postal Telegraph Cable Company be enjoined from seeking to proceed any farther in the state court, inasmuch as the cause had been removed into this court. This is the second cause mentioned in the title above set forth. It comes up on the return to the rule issued on filing the bill requiring cause to be shown why an injunction should not issue as prayed for. The return, after disclaiming all knowledge that the cause had been removed into this court, and disavowing all want of respect thereof, rests upon the position that this court cannot entertain the case, as the value of the matter in dispute is less than \$2,000. As precisely the same question is made in the removal case, and as the two cases are closely connected with each other, it was determined to hear argument, with the understanding that the conclusion reached would dispose of both cases.

The controlling question in this matter, then, is, is the proceeding in the superior court of Guilford county a proper case for removal into this court? It is not questioned that that proceeding is a suit. Nor can there be any doubt on this point. *Kohl v. U. S.*, 91 U. S. 367; *Searl v. School Dist.*, 124 U. S. 199, 8 Sup. Ct. 460; *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533. It is a suit between citizens of different states; the Postal Telegraph Cable Company being a corporation of the state of New York, and the Southern Railway Company being a corporation of the state of Vir-

ginia. The petition for removal, with proper bond, was filed before the time for answering had expired. This petition averred the two jurisdictional facts: (1) The diversity of citizenship; (2) that the matter in controversy exceeded the value of \$2,000, exclusive of interest and costs. Upon the truth of these facts, of both of them, depends the right of removal. *Powers v. Railway Co.*, 169 U. S. 99, 18 Sup. Ct. 264. Issue was joined upon one of these facts,—the jurisdictional amount; and the superior court, inadvertently it is sure, passed upon that issue. It could be decided nowhere but in this court. *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030; *Railway Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262; *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306. This being the case, and the petition on its face stating the two essential facts for removal, the case was ipso facto removed, and the state court could proceed no further, upon the filing of the petition and bond; that is, just so soon as they were filed. *Gordon v. Longest*, 16 Pet. 97; *Insurance Co. v. Dunn*, 19 Wall. 214; *Kern v. Huidekoper*, 103 U. S. 485; *Railroad Co. v. Koontz*, 104 U. S. 5; Act Cong. March 3, 1875 (18 Stat. 470). It is very clear, therefore, that the state court could have taken no other action in this cause from the date of the filing of the petition and bond, and that the efforts of the plaintiff in the state court to procure orders from that court were coram non jndice, and very properly refused.

The grave question made here is upon remanding this cause to the state court. It is contended that this court has no jurisdiction, because of the amount of the matter in controversy; that being less than \$2,000. It has been contended with great ability and eloquence that in the present case the Postal Telegraph Cable Company seeks to erect its poles on the right of way of the railway company, which has already been dedicated to a public use; that it is confined to the public use; that, therefore, in estimating the compensation to be paid the railway company the same rule cannot be followed which obtains in the condemnation of the property of a private person; that such private person holds his property, and can put it to any use, and compensation for taking it must be measured accordingly; the railway company holds its property for a public use only, and its compensation must be measured only by the interference with its performance of its public duty, growing out of the public use; that the petition declares an intent in no way to interfere with this public use, and so the compensation to the railway company for putting up the poles and stretching the wires must be nominal. Strong as this line of argument is, and however convincing under other circumstances, it does not apply to the question now at issue. That question is, must this case be remanded? The answer to this question depends upon the matter in controversy. What is the matter in controversy? The compensation to be allowed to the railway company for the erection of the poles and the stretching of the wires by the telegraph company. The latter alleges that this compensation should be nominal. The former alleges that it should greatly exceed \$2,000. The question is, does it exceed \$2,000? On this question the petition of the plain-

tiff in the state court and that of the defendant for removal differ, and on it the issue is joined. Says the supreme court in *Smith v. Adams*, 130 U. S. 168, 9 Sup. Ct. 569:

"By this phrase, 'matter in dispute,' as used in the statutes conferring jurisdiction on this court, is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue is one of fact, testimony is taken; and its pecuniary value may be determined, not only by the money judgment prayed, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, as by the pecuniary result to one of the parties immediately from the judgment."

See, also, *Security Co. v. Gay*, 145 U. S. 127, 12 Sup. Ct. 815; *City of Clay Center v. Farmers' Loan & Trust Co.*, 145 U. S. 224, 12 Sup. Ct. 817.

In estimating the amount of the matter in controversy, the court is governed by the claim made, provided that there is no reason to believe that the claim has no bona fide existence, and is only made to secure jurisdiction. *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501. Then this is the mode of ascertaining the amount of the matter in controversy, and it being claimed on the one side that it greatly exceeds \$2,000, and wholly denied on the other, the determination of this issue gives this court jurisdiction. The issue must be tried in accordance with the law of North Carolina in such case made and provided, and on the trial of the issue will come up the points so ably presented by counsel at bar. Let an order be entered in the equity cause continuing the restraining order until the further order of this court. Let an order be entered refusing to remand the cause removed.

WIDAMAN v. HUBBARD et al.

(Circuit Court, S. D. California. July 27, 1898.)

No. 772.

1. JURISDICTION OF FEDERAL COURT—CITIZENSHIP—ANCILLARY PROCEEDING.

A bill filed in a circuit court to enjoin the further prosecution of an action at law pending therein is ancillary to the law action, and the court has jurisdiction without regard to the citizenship of the parties.

2. INSURANCE—ASSIGNMENT OF LIFE POLICY—RIGHTS OF ASSIGNEE.

An assignment of a life policy, which purports to transfer all rights thereunder absolutely in consideration of a sum advanced to the insured and the payment of future premiums, is not wholly void for illegality, but vests the legal title to the policy in the assignee, who may, after the death of the insured, maintain an action thereon in his own name, though he will be accountable as trustee for all the proceeds above the amount of his advances, with interest.

3. SAME—ENJOINING ACTION BY ASSIGNEE.

An action on a life policy by an assignee will not be enjoined where it is admitted that he has a lien on the proceeds for advances made the insured, unless such lien is extinguished by the proceeds of another policy, also assigned to him, and that he has not as yet realized on such policy, which is in litigation in another court.

This was a bill filed by O. P. Widaman, as assignee in insolvency of George W. Meade, against Anthony G. Hubbard, to enjoin the

prosecution by the defendant of an action at law to collect a policy of insurance on the life of the deceased assignor. Heard on demurrer to the bill.

Cheney & Taylor and Anderson & Anderson, for complainant.

Page, McCutchen & Eells, E. R. Annable, and Brousseau & Montgomery, for defendants.

WELLBORN, District Judge. Complainant sues to enjoin further proceedings in an action entitled "Anthony G. Hubbard v. New York Life Insurance Company," pending on the law side of this court, and to have determined certain equitable claims to a fund of \$15,000, which said company has paid into court in said action in satisfaction of the liability therein sued on. The material allegations of the bill are these: Complainant, in November, 1896, was, by the superior court of the county of Los Angeles, state of California, appointed assignee in insolvency of one George W. Meade, whose petition in insolvency was filed in the month of October of the same year. The indebtedness of Meade's estate aggregates \$30,000, and the only property belonging to said estate is the fund above mentioned. The New York Life Insurance Company is a corporation created under the laws of the state of New York, and on April 22, 1884, for an annual premium of \$989.80, issued a tontine policy, numbered 186,405, for \$20,000, on the life of said Meade, payable to Anna Meade, April 17, 1899, or upon the death of the said George W. Meade, should he die before said date. On the 14th day of August, 1894, in consideration of the payment by said Hubbard to said company, at the request of said George W. and Anna Meade, of the quarterly premium then due on said policy of \$262.40, said policy was assigned to said Hubbard, and thereafter, on October 29, 1894, said parties entered into the following agreement:

"This article of agreement, made and entered into this 29th day of October, A. D. 1894, between George W. Meade, and his wife, Anna Meade, both of Redlands, San Bernardino county, California, parties of the first part, and Anthony G. Hubbard, of the same place, party of the second part, witnesseth: That, whereas, on the 22d day of April, in the year 1884, a policy of insurance on the life of George W. Meade, one of the parties of the first part, was issued and delivered to the said George W. Meade by the New York Life Insurance Co., of the state of New York, which policy was and is numbered 186,405; and whereas, on the 14th day of August, 1894, the said parties of the first part did assign unto the said party of the second part the said policy of insurance numbered 186,405, which assignment was made to the said party of the second part, and by the said party of the second part accepted as security for certain advances of money then made by the said party of the second part for the benefit of the said parties of the first part, and was also made and accepted, as aforesaid, to secure the said party of the second part for any further advances of money which he, the said party of the second part, may make to the said parties of the first part as the said parties of the first part and the said party of the second part may or should agree upon in the future; and whereas, the said party of the second part is now owner and holder of the mortgage upon certain real property located in the city of Redlands, county of San Bernardino, state of California, now owned by one or both of said parties of the first part, which said real property is described as follows, to wit: 'All of lots 1, 2, 3, 4, 5, and 6 of block 23, as laid down in a map entitled "Map No. 6" of a part of Redlands Heights, as recorded in the office of the recorder of said county of San Bernardino, state of Cali-

fornia, in Book 7 of Maps, at page 40,' and also all that part of Crescent avenue heretofore vacated and not occupied as a public street, lying northwest of and adjoining lot 1, aforementioned, together with 23 shares of the capital stock of the Redlands Heights Water Company; and whereas, the said mortgage so held against the said real property by the said party of the second part was given to secure the payment of a certain promissory note for \$6,000, which said promissory note, with accrued and accumulating interest, now remains due and wholly unpaid; and whereas, said Anthony G. Hubbard, said party of the second part, is now the owner and holder of the said policy of insurance on the life of the said George W. Meade: Now, therefore, this article of agreement witnesseth that the said Anthony G. Hubbard shall be and remain the owner of the said policy of insurance hereinbefore referred to, and shall hold the same for the purpose of securing him, the said party of the second part, for any advances of money which he, the said party of the second part, may make to the said party of the first part, or either of them, and it is agreed that the said Anthony G. Hubbard may, at his option, hold the said policy of insurance as collateral security for the said promissory note hereinbefore referred to, and as additional security for the payment of the same, in addition to the mortgage which he now holds against the said real property hereinbefore referred to and described. But it is distinctly understood and agreed that the holding by the said party of the second part of the policy of insurance as further and additional security in connection with the said mortgage shall in no manner be construed as extending the time of payment of the promissory note, to secure the payment of which the said mortgage was given, and is now held by the said party of the second part, the object being to allow the said party of the second part the privilege or option of considering and holding the said policy of insurance as further security for the payment of the said promissory note in the said mortgage described and hereinbefore referred to, according to the terms of the said promissory note, as the same was originally drawn and as the same now exists. In witness whereof, the said parties have hereunto subscribed their names this 29th day of October, 1894.

"[Signed]

"[Signed]

George W. Meade.
Anna Meade."

On the day after said agreement was executed, to wit, October 30, 1894, said Hubbard advanced and paid the quarterly premium on said policy for said month of October, and thereafter, on January 17, 1895, advanced and paid the quarterly premium on said policy for said month of January. The promissory note mentioned in the agreement has been discharged. On the 13th day of March, 1895, said insurance company issued another policy of insurance,—No. 665,889,—for \$15,000, on the life of said George W. Meade, payable to himself; the annual premium on said last-named policy being \$562.50. On the 21st day of March, 1895, said Hubbard and Meade entered into the following agreement:

"This agreement, made and entered into this 21st day of March, A. D. 1895, by and between A. G. Hubbard, of the city of Redlands, San Bernardino county, party of the first part, and Geo. W. Meade, of the same place, the party of the second part, witnesseth: That whereas, the party of the second part now holds a policy of insurance on his life in the New York Life Insurance Company, of the state of New York, which policy is numbered 186,406; and whereas, the said party of the second part has had issued to him another policy of insurance on his life in the same company above mentioned for the sum of fifteen thousand dollars (\$15,000.00), which said second policy of insurance is numbered 665,889; and whereas, the said party of the second part is unable to pay and keep up the payment of premiums due and to become due on each of said policies according to the terms of the same and each of the same; and whereas, further, said party of the second part desires the said party of the first part to advance to him, the said party

of the second part, the sum of three thousand six hundred ninety dollars (\$3,690.00); and whereas, it is understood that if the said party of the first part shall pay and keep up the premiums due and to become due upon each of said policies of insurance during the lifetime of the party of the second part, subject to the limitations hereinafter recited, and shall also pay unto said party of the second part the said sum of \$3,690.00, that the said party of the second part will transfer and assign unto the said party of the first part the said policy of insurance numbered 665,889, above referred to, as the property absolutely of the said party of the first part, so as to confer upon the said party of the first part, his heirs or assigns, the right absolute to receive and collect from the said New York Life Insurance Company, under the said policy numbered 665,889, upon the death of the party of the second part, the entire sum of money made by said policy last mentioned payable unto the said Geo. W. Meade, his executors, administrators, or assigns, and being, as mentioned in said policy, the sum of \$15,000.00: Now, therefore, the said party of the first part does hereby agree to pay and keep up the payments of all premiums due and to become due upon both of the policies hereinbefore mentioned during the lifetime of the party of the 2nd part. And it is also agreed that first party is to advance and pay to the said party of the second part the sum of \$3,690.00, the receipt of which is hereby acknowledged by the said party of the second part, and in consideration of the agreements hereinbefore undertaken to be performed by the said party of the first part, and also the payment unto him, the said party of the second part, the said sum of \$3,690.00, the said party of the second part does hereby assign, transfer, and set over unto the said party of the first part in absolute ownership the said policy of insurance numbered 665,889, and does hereby authorize and empower the said party of the first part, his heirs, executors, administrators, or assigns, to receive and collect the said sum of \$15,000.00, upon the happening of the event which shall entitle the holder or assignee of said policy or other person or persons thereunto entitled to demand and receive payment of said sum; and whereas, further, the said policy numbered 186,405 does, by its terms, mature and become payable on the 17th day of April, 1899: Now, therefore, it is further agreed, in consideration of the premises and matters hereinbefore recited and set forth, and in consideration of the faithful performance by the party of the first part of the things hereinbefore by him undertaken to be kept and performed, that if the said party of the second part shall survive until the said 17th day of April, 1899, that then, in that event, and upon the payment of the amount of money called for and then to become due under said policy numbered 186,405, the said party of the first part, his heirs or assigns, shall be entitled to and shall receive and be paid out of the proceeds of said policy numbered 186,405 the full sum of \$15,000 in cash, and he, the said party of the first part, is hereby authorized and empowered to demand, sue for, and collect out of the proceeds of the said policy numbered 186,405 the said sum of \$15,000, and in the event of the said party of the second part surviving until the said 17th day of April, 1899, and in the further event of the party of the first part receiving out of the proceeds of the policy numbered 186,405, upon the maturity of said policy, the said sum of \$15,000, it is agreed that the party of the first part shall assign and retransfer unto the said party of the second part the said policy numbered 665,889, and upon the reassignment of the said policy to said party of the second part by the said party of the first part the liability of the party of the first part for the payment of further premiums on said policy shall then and there cease and terminate. And whereas, first party now holds an assignment of said policy number 186,405, it is agreed that if party of the second part dies before the maturity of said policy the party of the first part will, on receipt of \$15,000 (under either of the policies herein mentioned), reassign to the legal representatives of second party the said policy number 186,405, subject, however, to provisions of contract between parties dated Oct. 29th, 1894. Witness the hands of the parties this 21st day of March, 1895, and executed this in duplicate.

"[Signed]

A. G. Hubbard;
"Geo. W. Meade."

Appended to said agreement was the following writing, to wit:

"I, Anna Meade, wife of Geo. W. Meade, hereby certify and show that I have read the foregoing agreement, and am fully conversant with the terms, force, and effect of the same, and that the same meets my approval, and I hereby relinquish and release unto the said A. G. Hubbard all interest of any kind, class, or description which I now have or could hereafter have as an heir at law of Geo. W. Meade, or other interest which I may or could have in the sum of \$15,000.00, which would be payable under the policy of insurance mentioned in said agreement as 665,889, on the death of said George W. Meade; and in anticipation of the payment of said sum on the death of said Geo. W. Meade, I hereby assign and transfer unto the said A. G. Hubbard, the party of the first part in the said agreement named, all right and interest which I now have or might hereafter have under and by virtue of said policy of insurance. Witness my hand this 21st day of March, A. D. 1895.

"[Signed] Anna Meade.

"Anna Meade,

"By Geo. W. Meade,

"Her Atty. in Fact."

George W. Meade died January 1, 1897, at the city of Los Angeles, Cal., leaving said two policies in full force and effect. Afterwards Hubbard brought the common-law action already mentioned to recover the \$15,000 due on said policy 665,889. The insurance company appeared in said action, admitting its liability for the amount named, but alleging that defendants Anna Meade, Sarah J. Turner, and Dr. Turner, her husband, and complainant, as assignee in insolvency of said George W. Meade, respectively claimed interests in said policy, and asking that it be permitted to pay said \$15,000 into said court, and that the persons above named be substituted as defendants in place of itself. On June 1, 1897, the order asked for by said company was made, and thereupon said company paid said \$15,000 into court, and the persons above named were duly brought in and substituted as defendants in said action. There is now pending in the superior court of the county of Los Angeles, Cal., an action—No. 59,344—entitled "The New York Life Insurance Company, a Corporation, Plaintiff, v. Anthony G. Hubbard, Anna Meade, Sarah J. Turner, and Margaret M. Cross, Defendants." The complaint in said action alleges the issuance of said policy No. 186,405 for \$20,000, the death of said George W. Meade, that said company is willing to pay said amount to whoever may be entitled thereto, that the parties named as defendants respectively claim adverse interests in said policy, and that said company is ready and offers to deposit said sum of \$20,000 in court, or pay the same to such person or persons as the court may direct, and prays that the persons named as defendants be required to interplead concerning their respective claims. Said company has not paid said \$20,000 into court in said action, but its attorneys have the amount in their hands ready to deposit when the company is ordered to do so by said court.

The bill in this court sets forth the conflicting claims of the various parties as follows:

"That your orator has been informed and believes, and so states, that said A. G. Hubbard claims to be the owner of both of said policies, or that he has an interest in both of said policies, or that he holds both of said policies as security for moneys advanced by him to said George W. Meade and the said

Anna Meade, or to one or both of them, but that the exact nature of the claim and contention of the said Hubbard as to his respective rights under said policies, and each of them, is unknown to your orator. That the claim of the said Hubbard as to an interest in said policy No. 665,889, or to the proceeds thereof, is hostile and antagonistic to the equitable rights of your orator to said policy and to the proceeds thereof, and your orator is advised and believes, and so states, that the said Hubbard's said claim or claims to the proceeds of said policy is without right in equity and good conscience, and that, if he is entitled to be reimbursed for any advances made to George W. Meade and Anna Meade, that it is a right to be reimbursed therefor out of the proceeds of said policy No. 186,405, and that if he has a right to be reimbursed out of the proceeds of said policy No. 665,889 it is only after he shall have failed to be reimbursed out of said policy No. 186,405. That your orator has been informed and believes, and so states, that the other defendants in this action claim to be the owners of and entitled to the proceeds of said policy No. 186,405, and claim that if the said Hubbard is entitled to be reimbursed for any advances made to George W. Meade and Anna Meade, or to one or both of them, that said reimbursement should be made in the first instance from the proceeds of said policy No. 665,889; that the exact claim or claims of the said defendants and each of them to the proceeds of said policy 186,405 is unknown to your orator, but their said claim or claims to have any advances made by the said Hubbard to George W. Meade and Anna Meade, or to either of them, paid out of the proceeds of policy No. 665,889, before the proceeds of said policy No. 186,405 is liable therefor, is hostile and antagonistic to the rights of your orator, and is without equity and right, and against good conscience. That your orator claims that he, as assignee of the estate of George W. Meade, is the equitable owner of the proceeds of said policy No. 665,889, and that said Hubbard holds the legal title thereto in trust for your orator. That said Hubbard is not entitled to any of the proceeds of the said policy No. 665,889, or, if your orator is wrongly advised or is mistaken on that point, that then your orator is advised and believes, and so states, that if he has a lien on said proceeds for any such advances, it is secondary to his lien on the proceeds of said policy No. 186,405, and should be paid out of such proceeds first. Your orator further states that he is advised and believes, and so charges, that if he is compelled to pay any such advances so made by said Hubbard out of the proceeds of said policy No. 665,889, that then, under the contract set out herein of date the 21st of March, 1896, between said Hubbard and said George W. Meade, assented to and ratified by said Anna Meade, he is entitled to have said policy No. 186,405 transferred and assigned to him, and to hold the same until he shall be reimbursed therefrom for all sums that he may have to pay said Hubbard out of the proceeds of said policy No. 665,889. Your orator is advised and believes, and so states, that though he is a party to said suit No. 741, now pending on the law side of this court, that his rights are of an equitable character, and are dependent upon the rules and principles of equity for their protection and enforcement, and that this court in said action is without jurisdiction to administer the rights and equity that your orator is entitled to in the premises, and that your orator is without a full, perfect, and clear remedy in the matters involved in this controversy, save in a court of equity. Your orator further states that he is advised and believes that the rights of all the parties interested in said two policies and that are parties to said action No. 741 and said action No. 59,344 are so intermingled and blended that they can only be adjudicated and administered in a court of equity, and in one suit."

The prayer of the bill is that the defendants be required to set forth their respective claims to said property, and that the same be determined, and that further proceedings in the common-law action be enjoined. A demurrer to the bill has been interposed, on the following grounds, to wit: First, that this court has no jurisdiction of the cause, inasmuch as the bill does not show diverse citizenship of the parties; second, that the bill does not state a case for equitable

relief. These grounds will be considered in the order in which I have stated them.

1. The bill is ancillary to the common-law action, and therefore the court has jurisdiction of the suit without regard to the citizenship of the parties. *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Johnson v. Christian*, 125 U. S. 643, 8 Sup. Ct. 989, 1135; *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136; *Broadis v. Broadis*, 86 Fed. 951.

2. The next question to be considered is whether or not the bill shows any ground for equitable relief. Plaintiff in the common-law action, A. G. Hubbard, holds, by assignment, the policy therein sued on; not, perhaps, in absolute ownership, but as collateral security for a loan to the assured of \$3,690, and for other moneys advanced in payment of premiums on said policy. If the validity of said assignment be tested by the laws of the state where it was made,—California,—then the question is covered by statutory enactment. Section 2764 of the Civil Code of said state is as follows:

"A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered."

See, also, *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Curtiss v. Insurance Co.*, 90 Cal. 245, 27 Pac. 211; *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283; *Wetmore v. City of San Francisco*, 44 Cal. 294.

Independently, however, of any statute, I am satisfied that there is no such wagering element in the assignment to Hubbard as invalidates it, and the law has been so declared by the supreme court of the United States in one of the cases cited by complainant himself, where in it is said:

"Although the agreement between the trust association and the assured was invalid as far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security, and the courts will therefore hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest." *Warnock v. Davis*, 104 U. S. 775.

See, also, *Cammack v. Lewis*, 15 Wall. 643; *Burroughs v. Assurance Co.*, 97 Mass. 359; 2 May, Ina. (3d Ed.) 393. From the last authority I quote the following:

"The right to sue, however, under these statutes, enacted in the interest of the family support, is not to be confounded with the right to appropriate and use the proceeds. The assignee may well have the right to sue in his own name, and recover the amount payable by the policy, but he recovers to hold in trust for the beneficiaries. 'The rights of the child,' say the court, in *Burroughs v. Assurance Co.*, 'cannot be set up to defeat this action. No

trustee has ever been appointed to hold and manage the interest of the wife. The assignments to the plaintiff, assented to by the insurers, transferred to him the legal title in the policies, and the right to sue thereon. *Palmer v. Merrill*, 6 Cush. 288, note; *Kingsley v. Insurance Co.*, 8 Cush. 393. If the assured had afterwards died, leaving no wife or child surviving, the assignments would have entitled the assignee to receive the whole amount of the policies to his own use. The plaintiff, having the legal title, may maintain this action at law, and, if he recovers judgment, will hold the proceeds, so far as they inure to the benefit of the child of the assured, in trust for him. The equitable rights of the child under the statute, and the extent to which they may be subject to a claim of the assignee for reimbursement of the sums paid by him for premiums and assessments or otherwise, cannot be now determined, but may be ascertained upon a bill of interpleader filed by the insurance company, or in a suit by the child against this plaintiff after he shall have recovered judgment in this action."

The rights of the assignee have been clearly stated thus:

"The use as collateral security of insurance policies upon bona fide loans vests in the pledgee the legal title, as upon an absolute assignment. Receiving such title, he may enforce the security to its full amount, holding any surplus after payment of his advances, premiums, and assessments paid for the pledgor or persons equitably entitled thereto." *Coleb. Coll. Sec.* p. 575.

If this be a correct statement of the law,—and I have no doubt but that it is,—it follows that a beneficiary cannot interfere with the progress of an action brought by the holder of the legal title, or the person vested with the right to collect, unless fraud or insolvency be charged against such trustee. Nor does the fact that in the present case the insurance company has deposited the money in court at all impair the rights of the trustee, or enlarge those of the beneficiaries. It is true that the insurance company, had it seen proper to do so, might, for its own protection, have exhibited a bill of interpleader against the different claimants (*Spring v. Insurance Co.*, 8 Wheat. 268), but it could not, by depositing the money in court, give to the equitable claimants any rights which they did not before possess, nor take from Hubbard his right to collect the fund, and apply the same, so far as necessary, to the satisfaction of his debt. On this point, counsel for Hubbard, in his brief, well says:

"Certainly, if the possessor of a residuary interest has no right to control the collection, that right cannot be extended to him by the debtor, directly or indirectly."

There is another difficulty to any relief in the present suit, and this difficulty is emphasized in complainant's brief, where he says:

"Our contention is that the bill and contract and proposal of contract between Hubbard and the Meades, set out and made exhibits to the bill, show that Hubbard held two policies on the life of Mr. Meade; that he held the said policies as security for moneys advanced and to be advanced by him to them; that the period fixed for the certain repayment of said advances was the expiration of the tontine period of the first policy assigned to him. It was estimated by the parties that the advances made and to be made, with a certain rate of interest, would amount to \$15,000 at the expiration of the tontine period; that when the tontine period arrived he was to collect the proceeds of said first policy, and repay himself the \$15,000, and then reassign the second policy, No. 685,889, for \$15,000 to Meade. We contend that this shows that the proceeds of the first policy are the primary fund out of which the payment of the advancements are to be made. The bill shows that the insurance company makes no contest as to either fund; that it has paid \$15,000, the proceeds of the second policy into this court; that it has filed

its bill of interpleader in the California state court, tendering and offering to pay the proceeds thereof into court; that the proceeds of both policies are virtually in the hands of and under the control of Hubbard, and that the only question to be litigated and settled is as to whom he shall pay them out to and how. We contend that under the contracts set out in and exhibited with the bill that he should first pay himself such sums as he has advanced to the Meades out of the primary fund that he holds as security, to wit, the proceeds of the \$20,000 policy; that the balance he should pay to Mrs. Meade or her successor in interest, Mrs. Cross, and that he should pay over the whole of the proceeds of the \$15,000 policy to plaintiff as the legal representative of Meade, and the equitable owner thereof."

Now, if it be conceded—which, however, I do not decide—that the proceeds of the \$20,000 policy were contemplated by the parties to the contracts hereinbefore mentioned as the primary fund out of which Hubbard should be paid, still complainant's argument is unsound, for the reason that Hubbard has not yet realized on that policy. Its payment is suspended, at the instance of the insurance company, by a bill of interpleader pending in the state court. If Hubbard should fail, without fault on his part, to realize on said policy, he could unquestionably, and according to complainant's own theory, resort to the \$15,000 policy, since he holds both policies as collaterals. How is it possible to make a decree in the present suit fully covering these equities, when this court has no control whatever over the \$20,000 policy or its proceeds? Taking the most favorable view of the case for complainant which the allegations of his bill will allow, Hubbard holds the policy sued on in the common-law action as collateral security for lawful advances made by him to the Meades, and it is his right and duty to forthwith collect the amount due on said policy, applying a sufficiency of the proceeds to the payment of his own debt, and holding the balance for the parties equitably entitled thereto. Should he fail to pay over such balance, said parties will then have adequate remedies against him. The demurrer will be sustained.

PREFERRED ACC. INS. CO., OF NEW YORK, v. BARKER.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 686.

JURISDICTION OF FEDERAL COURTS—AVERMENTS OF CITIZENSHIP—AMENDMENT ON APPEAL.

A petition which avers the residence of the parties only cannot be amended on appeal so as to show citizenship; but the judgment may be reversed, and the cause remanded, with instructions to dismiss the suit, unless, by proper amendment below, diverse citizenship is made to appear.¹

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action at law brought by Harriet Barker against the Preferred Accident Insurance Company, of New York, to recover on a policy of accident insurance. In the circuit court, verdict and judgment were given for plaintiff, and the defendant sued out this writ of error. The case is heard here on mo-

¹ As to "Necessity for Averment of Citizenship," see note to *Shipp v. Williams*, 10 C. C. A. 261, and supplementary note to *Mason v. Dullaghan*, 27 C. C. A. 303.

tion of counsel for the plaintiff for leave to amend the petition by inserting certain allegations in respect to the citizenship of the parties. The averments of the petition in this regard were as follows: "The petition of Harriet Barker, widow of J. W. Barker, who resides in the city of New Orleans, respectfully represents: That the Preferred Accident Insurance Company, of New York, a corporation organized under the laws of the state of New York, and domiciled in the city of New York, but here present in this district by an agent,—Franke Watson,—who is authorized to accept service of legal process, and to stand in judgment for said corporation, as required by the constitution and laws of the state of Louisiana, is legally and justly indebted," etc.

Hewes T. Gurley, for plaintiff in error.

S. Wolff, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. The motion of counsel for defendant in error for leave to amend the petition filed in the court below by inserting that the plaintiff below was at the time that this suit was instituted, and is now, a citizen of the state of Louisiana, and the defendant was at that time, and is now, a citizen of the state of New York, is denied. The amendment proposed is one of substance, and presents an issuable fact, which cannot be traversed in this court. The motion presented is a confession of error; and as, upon an inspection of the record, the jurisdiction of the circuit court does not appear, it is ordered and adjudged that the judgment of the circuit court be, and the same is, reversed, and the cause is remanded, with instructions to dismiss the suit, unless, by a proper amendment, the jurisdiction of the circuit court shall be made to appear.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. V. NORFOLK & W. R. CO.

(Circuit Court, W. D. Virginia. July 2, 1898.)

1. RAILROAD RECEIVERS—FORECLOSURE—TRANSFER TO PURCHASER—LIABILITY FOR NEGLIGENCE.

A foreclosure decree provided that the purchasers should be let into possession on the execution and delivery of deeds by the special masters making the sale, and that they should take the property subject to all liabilities incurred by the receivers, which liabilities should be determined and enforced by the court ordering the sale. The receivers in fact remained in possession for six days after delivery of the deeds, during which period a liability arose for negligent operation of the road. *Held*, that the delivery of the deeds did not, in law, effect an immediate transfer of possession, so as to make the purchasers directly responsible for such negligence, nor could the receivers be considered as operating the road as their agents, but that such liability was one arising during the receivership, which could only be enforced by the federal court under the terms of the decree.

2. JURISDICTION OF FEDERAL COURT—ENJOINING PROCEEDINGS IN STATE COURT.

Where a federal court by its decree of sale retains jurisdiction of a foreclosure proceeding so far as to determine and enforce, against the property sold, claims for liability incurred by the receivers, it may enjoin the prosecution of an action on such a claim in a state court without violating Rev. St. § 720, which inhibits granting an injunction to stay proceedings in a state court.

Sipe & Harris and E. M. Pendleton, for petitioner.
William A. Anderson and C. B. Guyer, for respondent.

PAUL, District Judge. In this cause the petitioner, the Norfolk & Western Railway Company, heretofore filed its petition praying for an injunction against Baxter Lilly, to restrain said Lilly from prosecuting an action at law instituted by him against said petitioner in the corporation court of the city of Buena Vista, Va., to recover damages for injury to his property alleged to have occurred by reason of the negligence of said railway company, by permitting a certain water course to be dammed and impeded by the embankment and roadbed of said railway company, and by not having an adequate outlet for such water course. A temporary restraining order was granted by this court, enjoining said Lilly from further proceeding with his suit in the state court. The defendant Lilly demurs to the petition on the following grounds:

"(1) That, by the terms of the decree confirming the sale, the receivership, and the possession of the receivers as the representatives of this court, terminated with the making and delivery of the deed unreservedly conveying the entire property of the Norfolk & Western Railroad Company to the Norfolk & Western Railway Company, thereby constituting the latter company the absolute owner of said property. (2) That from the instant of the delivery of said deed the title and control of the property was, as a question of law and of fact, vested absolutely in the grantee, and the jurisdiction of this court in the suit for which the sale was made finally at an end in respect to the control of the property conveyed, and as to all transactions and rights arising in respect to that property. (3) That it does not appear from the record that this court intended to extend its jurisdiction, or to retain the control and custody of the property sold and conveyed, beyond the moment of the conveyance consummated. On the contrary, the decree expressly limits the possession of the receivers, as such, until the conveyance to the purchaser, his successors or assigns, in the following explicit language: 'Until the conveyance to the purchaser, his successor or assigns, of the mortgaged premises, railroad property, and franchises sold under this decree, the receivers shall continue in possession thereof, and to discharge the duties imposed upon them by the order of their appointment, with the rights and powers thereby conferred.' (4) That the receivers had no right or power under said decree to retain possession and control of said property for a moment after the completion of the conveyance. If they did so, it was as the agents and representatives of the purchaser, and not of the court. It was merely for the convenience of the purchaser that the formal transfer of the possession was postponed till September 30, 1896. In contemplation of law, the real transfer of the possession took place instantaneously with the delivery of the deed to the purchaser. In such case, 'possession follows the title.' If it was in the power of the receivers to prolong the receivership and extend their control and custody of the property for six days, it was in their power to do this for six months, or any longer period. They could only retain the possession at all after the conveyance with the consent of the purchaser, and as his agent in law and in fact. Their possession after September 24, 1896, was the possession of the Norfolk & Western Railway Company. (5) This court did not by its decree of confirmation undertake to prolong its control and custody of the property sold beyond the consummation of the sale and transfer of the railroad property by the completion of the conveyance, and, if its decree could bear such construction, it would be, in such particular, erroneous and inoperative. (6) To place such a construction upon the decree would be to render nugatory the provisions of the constitution and laws of the United States which give to the state courts exclusive original jurisdiction of all suits between citizens of the same state, by undertaking to compel a citizen of Virginia, who has a cause of action against the Norfolk & Western Railway Company, to assert

his demand in the federal court. (7) The prayer of the petition is in contravention of the inhibition of the judiciary act of 1793 (Rev. St. U. S. § 720): 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except where such injunction may be authorized by any law relating to proceedings in bankruptcy.' The allegation of the petitioner that the demurrant has sued the wrong party—that his suit should have been brought against the receivers, and not against the petitioner—is no answer to this. If true, that would be an ample defense to the suit in the state court. But it cannot be availed of by this collateral proceeding, by invoking the writ of injunction from this court, without violating the explicit prohibition of the act of 1793. That defense, in a suit like the one enjoined, between two citizens of Virginia, can only be rightfully and properly asserted by way of direct defense to that suit in the Virginia forum. (8) The fact that this court retained jurisdiction of the case for the purpose of enforcing the terms of the decree of sale for the benefit of any claimants against the receivers does not justify the extension of that jurisdiction to a party who is asserting no claim against the receivers, who is not claiming the benefit of the lien retained under the terms of sale, but who is suing the Norfolk & Western Railway Company upon a cause of action which has arisen between these two parties after said railway company had become the actual and the only responsible owner of the property."

The petition shows the following state of facts:

In February, 1895, receivers were appointed of the Norfolk & Western Railroad Company in a foreclosure suit brought by the Fidelity Insurance, Trust & Safe-Deposit Company. A decree of sale of the railroad property was entered on the 26th day of June, 1896; and on the 16th day of September, 1896, a deed conveying the same to the Norfolk & Western Railway Company (which will hereafter be styled the "Railway Company") was executed and delivered, and the Railway Company took possession thereof at midnight on the 30th day of September, 1896. The injury of which Lilly complains, and for which he brings in the state court his suit for damages, occurred on the 29th day of September, 1896. The decree of sale contained a provision, very common in decrees of sale of railroad property, as to the payment of existing liabilities against the receivers. It is as follows:

"The purchaser shall, as part consideration for the railroad property and franchises purchased, take the same and receive the deed therefor upon the express condition that, to the extent that the assets or proceeds of assets in the receivers' hands not subject to any other lien or charge shall be insufficient, such purchaser, his successors or assigns, shall pay, satisfy, and discharge (a) any unpaid compensation which shall be allowed by the court to the receivers; (b) any indebtedness and obligations or liabilities which have been contracted or incurred by the receivers, before delivery of possession of the property sold, in the management, operation, use, or preservation thereof.
* * *

The decree further provides:

"The purchaser of such railroad property and franchise shall also take the same subject to the performance by him or his successors or assigns of all pending contracts in respect thereof theretofore lawfully made by the receivers. In the event that the purchaser of said railroad property and franchises, his successors or assigns, after demand made, shall refuse to pay any of the before-mentioned indebtedness or liabilities, the person holding the claim therefor, upon fifteen days' notice to such purchaser and his successors and assigns, may file his petition in this court to have such claim enforced against the property sold, in accordance with the usual practice of the court in relation to claims of similar character; and such purchaser and his successors and assigns shall have the right to appear and make defense to any

claim, debt, or demand so sought to be enforced, and any party shall have the right to appeal from any judgment, decree, or order made therein. For the purpose of enforcing the foregoing provisions of the decree, jurisdiction of this cause is retained by this court; and the court retains the right to retake and resell said property in case such purchaser or his successors or assigns shall fail to comply with any order of the court in respect to the payment of such prior indebtedness or liabilities within thirty days after service of a copy of such order."

The decree provides for the publication of notice in the newspapers of certain towns, calling upon the holders of any such claims as are directed to be paid to present the same for allowance or payment; those not presented within six months after first publication of such notice to be disallowed. In the decree it was further ordered:

"Upon payment of the purchase price bid by the purchaser or purchasers, or upon making such provision as the court shall approve for the payment thereof, the said special masters shall execute proper deed or deeds conveying and assigning the property purchased to such purchaser, or his successors or assigns; and upon the execution and delivery of such deed or deeds the grantees therein shall be let into possession of the premises conveyed, and the receivers shall deliver any of the premises sold which may be in their possession over to the purchaser, his successors or assigns, together with any property and net income acquired or received by the receivers since the commencement of this suit, and up to the date of such delivery of possession, in the management or operation of the mortgaged premises embraced in such conveyance, subject nevertheless to the condition that the court may retake and resell all or any of said property in case the purchaser thereof, his successors or assigns, respectively, shall fail to pay any balance of the purchase price remaining unpaid by him or them, or to comply with any order of this court with respect to the payment of the prior indebtedness, obligations, and liabilities as hereinbefore provided, within thirty days after the service of copy of such order. Until the conveyance to the purchaser, his successors or assigns, of the mortgaged premises, railroad property, and franchises sold under this decree, the receivers shall continue in possession thereof, and to discharge the duties imposed upon them by the order of their appointment, with the rights and powers thereby conferred. They will keep a correct account of the earnings and income of the premises accruing after the date of sale; and, if the same should be confirmed, the purchaser, on delivery of possession by the receivers, will, as hereinafter provided, be entitled to receive the net income and earnings accruing subsequent to the date of sale, and the proceeds of such income and earnings. The purchaser of the said railroad property and franchises, and his successors and assigns, respectively, after such delivery of the premises, shall hold, possess, and enjoy the same, and all the rights, privileges, immunities, and franchises appertaining thereto, as fully and completely as said Norfolk & Western Railroad Company now holds and enjoys the same, or held and enjoyed or was entitled to hold and enjoy the same at the time of the execution of the said mortgage, or at any time since; and the purchaser and his successors and assigns, respectively, shall thereupon be entitled to have and hold the premises so conveyed free and discharged from the lien and incumbrance of said mortgage, and from the claims of all other parties to this suit, and those claiming under them, save only as hereafter shall be adjudged to be prior in lien or superior in equity to said mortgage, and which, as hereinbefore provided, the purchaser may be required to pay in addition to the purchase price bid."

The contention of the petitioner, the Railway Company, is that the claim of Lilly is one arising under this provision of the decree of sale, to wit: "The purchaser shall, as part consideration for the railroad property and franchises purchased, * * * pay, satisfy, and discharge * * * (b) any indebtedness and obligations or liabilities which shall have been contracted or incurred by the re-

ceivers before delivery of possession of the property sold, in the management, operation, use, or preservation thereof." It is claimed that, notwithstanding the property was sold on the 16th of September, 1896, the sale confirmed, the deed of conveyance executed and delivered to the purchaser on the 24th of September, 1896, and although the injury complained of by Lilly occurred on the 29th of September, 1896, yet this is an obligation or liability incurred by the receivers, and is part of the consideration which the purchasers agreed to pay for the railroad property and franchises. The railway company insists that this liability must be ascertained and determined in this court. The ground on which this contention rests is the fact that though the deed was executed and delivered to the purchaser on the 24th of September, 1896, the receivers did not deliver possession of the property to the Railway Company until midnight on the 30th day of September, 1896. The defendant insists that the delivery of the deed of conveyance on the 24th of September, 1896, carried with it, and vested in the Norfolk & Western Railway Company, the possession and control of said railroad, and that the damage complained of having occurred subsequent to the execution and delivery of the deed to the purchaser, the Railway Company, that company is liable for the damages claimed. The defendant urges that it was clearly in contemplation of the court to limit the time in which possession and control of the property should rest in the receivers to the time of the execution and delivery of the bond; that this is shown by the following provisions in the deed of sale:

"Upon the execution and delivery of such deed or deeds, the grantee therein shall be let into the possession of the premises conveyed, and the receivers shall deliver any of the premises sold which may be in their possession over to the purchaser, his successors or assigns, together with any property and net income acquired or received by them since the commencement of this suit, and up to the date of such delivery of possession, in the management or operation of the mortgaged premises embraced in such conveyance. * * * Until the conveyance to the purchaser, his successors or assigns, of the mortgaged premises, railroad property, and franchises sold under this decree, the receivers shall continue in possession thereof, and to discharge the duties imposed upon them by the order of their appointment, with the rights and powers thereby conferred."

Taken in connection with other provisions of the decree, these extracts do not, in the opinion of the court, invest the purchaser with possession of the railroad property, in such sense as to make it responsible for acts of negligence occurring before it has assumed control and management of the property. Actual possession and control of the management of a railroad are so essentially necessary to fix responsibility for negligent conduct in its operation that these conditions cannot be met by the execution and delivery of a deed of conveyance to the purchaser of railroad property. The possession conferred by such a conveyance is not such possession as was contemplated by the decree of sale in this cause. Such a deed doubtless gives a right of possession of the railroad property to the grantee, but it was actual, controlling possession that was intended by the court should be given to the purchaser before his responsibil-

ity for its negligent management attached, and that of the receivers ended. To have invested the purchaser of an extensive railroad system with immediate possession on the execution of the deed of conveyance would have been, in the very nature of the transaction, impracticable. In making the change from the control and management of the receivers to that of the officials of the purchasing railroad company required time, method, and orderly procedure, to the end that the public service might be conserved without derangement of the mails, passenger and freight trains, and the disorganization of the management and labor necessarily employed in the various departments of the railroad business. There was not an unusual or an avoidable delay in the delivery of possession by the receivers; and, if there had been, the court is at a loss to see how a failure on the part of the receivers to promptly perform their duty could fix any responsibility on the railway company. It took possession when delivered to it by the receivers, and its responsibility for acts of negligence, of commission or omission, began then.

The contention of counsel for Lilly, that, during the interim of six days between the execution and delivery of the deed of conveyance and the delivery of possession of the railroad property, the receivers were the agents of the Railway Company, and not acting in their official capacity as receivers, cannot be maintained. There is nothing in the conduct of the parties, or in the facts of the case, to establish either an express, or an implied agency.

The claim sought to be established in the state court against the Railway Company is a liability accruing during the time the receivers were in control and possession of the railroad, and must be established in the manner prescribed by the decree. The court did not surrender its jurisdiction over this class of claims, nor did its jurisdiction end with the execution and delivery of the deed of conveyance. It specifically provided in the decree of sale what liabilities the purchaser of the railroad property should assume as part of the purchase price therefor, and how such liabilities should be ascertained. These provisions of the decree entered into, and became a part of, the contract of purchase. The Railway Company by its purchase became a party to this suit. It is bound by the terms of the decree of sale, and it has a right to have them enforced in its behalf. In enforcing the provisions of this decree, and protecting its own jurisdiction, the court does not, as contended in the second substantial ground of demurrer, violate the provision of section 720 of Revised Statutes of the United States, which inhibits the granting of an injunction to stay proceedings in a state court. The court, in granting an injunction to prevent Lilly from proceeding in the state court to establish a claim of which this court has jurisdiction, and so had when the suit in the state court was commenced, is in no wise invading the already acquired jurisdiction of the state court. This court is only endeavoring to protect its own jurisdiction, and to enforce its own decrees. Without this, its efficiency would not only be seriously impaired, but its authority, in many cases, rendered nugatory. In *Dietzsch v. Huidekoper*, 103 U. S. 494, the supreme court says:

"A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant an injunction to stay proceedings in a state court."

The doctrine here announced has been followed by numerous decisions in the federal courts. *Railroad Co. v. Scott*, 13 Fed. 793; *Jesup v. Railway Co.*, 44 Fed. 663; *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 59 Fed. 385; *Lanning v. Osborne*, 79 Fed. 657; *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.*, 82 Fed. 943.

After a careful examination of the cases cited by counsel for the defendant, the court fails to find that they contravene in any respect the doctrine sustained by the authorities just cited. The demurrer will be overruled.

CORNELL V. GREEN.

(Circuit Court, N. D. Illinois. October 8, 1897.)

1. FORECLOSURE—PARTIES.

A foreclosure bill was brought against the mortgagors and their children and against "T., B., and C., all of whom are residents, * * * and guardians of said minor children, the said T. being also one of the executors of the last will of [the mortgagor] and others," "all of which persons and corporations before named are made defendants herein." The bill also averred conveyances from the mortgagor to said T., and that "the above-named parties against whom this bill is brought have or claim to have some interest in the premises * * * by mortgage, judgment, conveyance, or otherwise," and that each and all of the defendants have neglected to pay the debt. *Held*, that T. was made a party in his individual capacity, even though the prayer for process did not contain the names of all the parties, as required by the equity rules.

2. PROCESS—SERVICE.

The subpoena in a foreclosure suit was directed against the mortgagor, and "T., B., and C., guardian, etc., and T., executor, etc.," and recited, "We command you, and every one of you, to appear," and "the above-named defendants are notified that unless they, and each of them, shall enter their appearance," etc. The return recited personal service "upon T. as guardian and T. as executor." *Held*, that T. was sufficiently served in his individual capacity.

3. MASTER'S DEED—DESCRIPTION—MISTAKE.

A mortgage was foreclosed on the "south half" of a certain section. The master's deed recited that he sold the "south half," and then recited: "Now, therefore, this indenture witnesseth that the said [master] * * * does convey the north half." *Held*, that the word "north" is presumptively a mistake, that it may be rejected, and that without the substitution of any other word the deed is operative as a conveyance of the south half.

Robert Rae and F. B. Dyche, for complainant.
Geo. R. Peck and C. W. Ogden, for defendant.

SHOWALTER, Circuit Judge. On November 27, 1875, Mrs. Green exhibited in the circuit court of the United States for the Northern district of Illinois her bill of complaint for the foreclosure of two mortgages. Mrs. Sarah H. Gage, widow of the mortgagor, and a number of other persons and a number of corporations were made parties defendant. Certain of the defendants answered; others were defaulted. The cause was referred to a master, and a final

decree of foreclosure was entered on his report on July 31, 1876. Pursuant to this decree a sale was made by the master, and Mrs. Green became the purchaser of the mortgaged property on the 7th of December, 1876. She entered into possession pursuant to her purchase, and has since remained in possession. Afterwards, and on the 3d of February, 1877, she received the master's deed. The bill in the present case was filed July 29, 1896. Prior to the foreclosure above mentioned, and in December, 1874, George W. Gage, the original mortgagor, his wife, Mrs. Sarah H. Gage, joining him in the conveyance, had alienated the property, subject to the two mortgages, to one William F. Tucker. Tucker afterwards died, and long after the foreclosure the heirs of Tucker conveyed to this complainant, Cornell. The present bill is for redemption. The fundamental claim is that the interest of Tucker was not cut off by the foreclosure mentioned. It is said that on a proper construction of the bill of complaint in that case Tucker was not a party defendant; and, again, assuming him to have been a party defendant, that he did not appear, and was not served with process. The foreclosure bill reads in part as follows:

"Your oratrix, Hetty H. R. Green, who is a resident of Bellows Falls, in the state of Vermont, and a citizen in the said last-named state, brings this, her bill of complaint, against Sarah H. Gage, a resident of the city of Chicago, Illinois, a citizen of the state of Illinois, and the widow of the late George W. Gage, deceased, and executrix of his last will and testament; Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, children of said George W. Gage, deceased, each of said children being now residents of said city of Chicago, and citizens of the state of Illinois, the said two last-named children, George W. Gage, Jr., and David A. Gage, being minors; William F. Tucker, Joseph K. Barry, and John W. Clapp, all of whom are residents of the county of Cook, state of Illinois, and citizens of said last-named state, and guardians of said minor children, the said William F. Tucker being also one of the executors of the said last will and testament of said George W. Gage, deceased; Louis L. Coburn, a resident of Chicago, and citizen of the state of Illinois [here follow the names of a large number of other persons and of a number of corporations],—all of which persons and corporations before named are made defendants herein."

In a subsequent portion of the bill the conveyance from Gage and wife of December 18, 1874, to said Tucker, of all the mortgaged premises for the consideration of \$24,000, subject to the two mortgages, is averred. It is then set forth "that said above-named parties against whom this bill of complaint is brought have, or claim to have, some interest in said premises described in said trust deed by mortgage, judgment, conveyance, or otherwise"; and, afterwards, that Gage and his executors, "and each and all of them, and all of said defendants, have hitherto wholly failed and neglected, and still do neglect, to pay" the debt. The prayer for process is, "May it please your honors to grant to your oratrix a writ of summons issued out of and under the seal of this honorable court, according to the rules of practice of said court, directed to the said Sarah H. Gage and the other defendants hereinbefore named, commanding them, and each of them," etc.

It seems to me very clear that William F. Tucker is made a party defendant on the face of this bill. Complainant says she "brings

this, her bill of complainant, against * * * William F. Tucker, Joseph K. Barry, and John W. Clapp, all of whom are residents of the county of Cook, state of Illinois, and citizens of said last-named state, and guardians of said minor children, the said William F. Tucker being also one of the executors of the last will and testament of said George W. Gage, deceased, * * * all of which persons * * * are made defendants herein." If the question were whether or not Tucker, in his character as guardian of the minor children, was made a party, some criticism might be made on the phraseology of the bill, but it seems to me to be beyond controversy that Tucker himself is named and described as one of the persons against whom the bill is brought. The two minor children were themselves made parties to the foreclosure bill. Summons was issued against them and served on them; and a guardian ad litem, appointed by the court, appeared and answered in their behalf. It is predicated of William F. Tucker that he was a resident of the county of Cook, in the state of Illinois, that he was a citizen of the said state, and that he was one of the guardians of the two minor children. It is also said of him that he was one of the executors of the last will and testament of said George W. Gage. It is also stated in the bill that Tucker himself was the owner of the equity of redemption, to cut off which was the very purpose of the bill; and as one of the persons named in the list of those who were sued he is expressly made a defendant. There is no reason for saying that William F. Tucker merely in his character as guardian, or merely in his character as executor, was made a defendant, and that he was not personally a defendant.

The prayer for process in this bill does not contain the names of all the defendants mentioned in the introductory part of the bill, as required by equity rule 23, but for the purposes of the present controversy that rule can only be treated as a formality. The prayer for process indicates with as much distinctness against whom the subpoena is to issue as though the name of each particular defendant, as well as the name of Mrs. Sarah H. Gage, had been repeated in that part of the bill. I see no reason, on account of this formal defect, for impeaching the decree, or for holding that Tucker was not personally a party.

The subpoena in the case reads in part as follows: "The United States of America to Sarah H. Gage, widow of the late George W. Gage, deceased, and executor of his will; Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, children of said George W. Gage, deceased; William F. Tucker, Joseph K. Barry, and John W. Clapp, guardian, etc., and William F. Tucker, executor, etc., Louis L. Coburn, executor, etc., David A. Gage," and so on, naming the other defendants and corporations,—“Greeting: We command you, and every of you, that you appear before the judges of our circuit court,” etc. Then, after the signature of the clerk, comes the memorandum: “The above-named defendants are notified that unless they, and each of them, shall enter their appearance in the clerk’s office of said court at Chicago, aforesaid, on or before the date to which the above writ

is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly. William H. Bradley, Clerk." The marshal states in his return indorsed on this writ: "I have served the annexed writ by personally delivering a true and correct copy thereof to each of the following named defendants on the day set opposite their names: Upon William F. Milligan, Monroe Heath, Bradford Hancock, * * * Julius White, and William F. Tucker as guardian and William F. Tucker as executor, on the 8th day of December, A. D. 1875," etc. It will be seen on the face of this subpoena that William F. Tucker is named therein as a defendant. The word "guardian" follows the name "John W. Clapp." On the face of the subpoena William F. Tucker is not mentioned as the guardian of any person, but he is named as an executor. It is stated in the return that the marshal served this writ by personally delivering a true and correct copy thereof to William F. Tucker on the 8th day of December, 1875. The recital by the marshal as to the character in which William F. Tucker was served is an immaterial matter. The copy of the writ placed in Tucker's hands gave him the information, namely, that he must come into the court, and make whatever defense he had to the bill. One copy was as efficacious for the purpose of informing Mr. Tucker that he had been sued as a dozen would have been. He saw on the face of the subpoena that he was expected to answer personally, and that he was expected to answer also as executor of George W. Gage. My conclusion is that Mr. Tucker was served with process; that the jurisdiction over him personally was complete. It would follow from this that the interest of Mr. Tucker in the land was cut off by the decree in the old foreclosure suit.

The master's deed given on the 3d of February, 1877, is set out in *hæc verba* in the bill, together with the proceedings in the foreclosure suit. Of the property sold by the master and bought by Mrs. Green one particular tract was the S. $\frac{1}{4}$ of section 13, township 38 N., of range 13 E. of the third P. M., in the county of Cook, and state of Illinois. The master's deed, after mentioning the title of the cause, the names of all the defendants, the decree of sale, and the fact that he had advertised as required, goes on with the recital that at the day and place specified in the advertisement he sold the property, proceeding with the description of the same in detail, the tract in question being in that part of the deed correctly described as the south half of section 13, township 38 N., of range 13 E. of the third P. M. Thereupon, and following the statement that the entire property had been sold to Mrs. Green, the deed proceeds: "Now, therefore, this indenture witnesseth that the said Henry W. Bishop, master in chancery, as aforesaid, in consideration of the premises, and for the purpose of carrying into effect the said sale so made as aforesaid, and by virtue of said last-named decree, and in execution thereof, hereby does by these presents remise, release, and convey to the said Hetty H. R. Green the following described property, to wit." Here follows the description of the property again, but in describing the half section above referred to the word "north" is used instead of the word "south"; that is

to say, in this part of his deed the master describes that tract as the "north half of section 13, township 38 north, of range 13 east of the third principal meridian," so that on the face of the master's deed there is obviously a mistake. Presumptively, the word "north" in the granting part of the deed was the mistake. Presumptively—even if this bill did not expressly aver that the master conveyed to Mrs. Green the property sold, and even if the records set forth in the bill did not affirmatively show the fact—the word "south" should have been written where the word "north" appears. If the word "north" be rejected as a false description, the granting part of the deed would read, "Also the half of section 13," etc.; and by reference to the introductory part of the deed it sufficiently appears that the half mentioned in the granting part is the south half. The rule is laid down in some of the text-books that where the description in the granting part of a deed contradicts that in the introductory part of the deed, the words in the granting part prevail. But this rule should not hold against an obvious intent to the contrary, shown on the face of the deed. In the present instance the master commences the granting part of the deed with the words, "Now, therefore, this indenture witnesseth," etc., as before quoted, meaning to convey the property which, according to prior recitals, he had advertised and sold. *Prima facie* and presumptively the intent of the master was to specify in the granting part of the deed the property described in the introductory part as having been sold by him to Mrs. Green. But, as already intimated, the foreclosure decree and other proceedings recited in this bill show the word "north" in the granting part of this deed to be a false description. Without this word, there is enough in the granting part of this deed, when read in the light of what goes before, and in connection with the showing of the bill, to make the instrument operative under the statute of conveyances as a good and valid conveyance of the south half of section 13. It is unnecessary to discuss other features of the case. The demurrer is sustained.

WATSON v. BETTMAN et al.

(Circuit Court, D. West Virginia. July 19, 1898.)

1. PARTNERSHIP—APPOINTMENT OF RECEIVER.

A receiver will be appointed at the instance of a partner when it appears that the firm is insolvent, that its accounts have been confused by the defendant partners with those of other firms of which they are also members, that they have fraudulently procured assignments to be made by such other firms, and have confessed judgments in favor of their relatives, which can only be satisfied out of their partnership interest.

2. STATE AND FEDERAL COURTS—CONFLICTING JURISDICTION—ASSIGNMENTS FOR CREDITORS—RECEIVERS.

The mere fact that an assignee for benefit of creditors has qualified before a New York state court, which has accepted his bond, does not give that court jurisdiction, so as to prevent a federal court from appointing a receiver for the assigned property.

3. RECEIVERS—SELECTION AND APPOINTMENT.

A receiver appointed in a suit by a partner against his co-partners charging them with mismanagement and fraudulent misapplication of

assets, should be disinterested; and the court will not appoint one, however well qualified in other respects, who is interested in judgments confessed by defendants, which can only be satisfied out of their interests in partnership assets, and who is connected by marriage with various parties secured by deeds of assignment made by defendants.

A. Leo Weil, A. Dewey Follett, and B. Mason Ambler, for plaintiff.

Frank B. Enslow, John T. McGraw, and John G. McCluer, for defendants.

V. B. Archer, for Joseph Louchheim.

JACKSON, District Judge. On the 21st day of May, 1898, Gilbert L. Watson filed his bill in equity against Marcus A. Bettman, David Bettman, Emanuel W. Bloomingdale, in his own right and as trustee, and Marcus A. Bettman and David Bettman, executors of the last will and testament of Meyer H. Bernheimer, deceased, and Mamie Mann, executrix of the said Bernheimer, deceased. The bill charges that prior to the month of December, 1897, Watson was a member of the firm of Bettman, Watson & Bernheimer, which firm was the owner of certain oil lands, oil properties, and leaseholds in the states of Ohio, Indiana, West Virginia, and Pennsylvania, and that the said firm also operated a manufacturing plant in Pleasants county, W. Va., and a general supply store in the city of Parkersburg; that Bernheimer died in the month of December, 1897, and that the business, after his death, was carried on in the partnership name by the surviving partners; that the partnership was engaged in the production of oil, and was dealing in oil-well supplies; that the partners of the firm each held a one-fourth interest; that prior to the 5th day of March, 1898, the plaintiff and his associates had been engaged for more than eight years in the oil business, and that they had acquired a large amount of property, and had drilled upon their various properties in the different states over 300 wells, most of them being productive and remunerative, and from which large quantities of oil have been taken and sold, realizing to the firm from \$10,000 to \$25,000 monthly; and that, in addition to the revenue realized from this source, the firm had sold leaseholds and other properties, amounting to \$330,000,—making a total of about \$600,000, of which \$300,000 is claimed to have been net profit; and that all the funds realized from this source had gone into the control of Stettheimer & Bettman, who are bankers and brokers. The bill charges that the Bettmans are brothers, and that their wives are sisters of Bernheimer, and that David Bettman was a member of the firm of Stettheimer & Bettman, consisting of Henrietta Stettheimer and David Bettman. The bill further charges that there was another firm doing business under the name of Stettheimer & Co., composed of Joseph Stettheimer and Marcus and David Bettman; that, Joseph Stettheimer having died, the business was continued under the name of Stettheimer & Co. by the surviving partners; that Stettheimer & Co. were owners of oil property in Pennsylvania. It appears from the bill that Watson, the plaintiff in this action, had control of all the operations in the oil fields, as

well as of the manufacturing supply company, and that the management of the accounts of the firm and its finances were intrusted to his associates, who assured the plaintiff from time to time that the business was profitable, and that the accounts were accurately and honestly kept. It is charged that the accounts of Bettman, Watson & Bernheimer were not kept in separate books, but that they were kept in the books of Stettheimer & Bettman, in New York City; and when the plaintiff made a demand that separate books should be opened and kept of the transactions of the partnership, his associates promised to do so, but the promise, to this date, has never been kept. The plaintiff also demanded and tried to get a settlement of the co-partnership business, but has never been able to do so. It is further charged that there are five different firms composed of the Bettmans, Watson, and others: First, the firm of M. A. and D. Bettman, composed of M. A. Bettman and David Bettman; second, the firm of Stettheimer & Bettman, composed of Henrietta Stettheimer and M. A. Bettman; third, the firm of J. Stettheimer & Co., composed of the executors of J. Stettheimer and the Bettmans; fourth, Bettman & Watson, composed of M. A. and D. Bettman and Gilbert L. Watson; fifth, the firm of M. A. Bettman, David Bettman, and Gilbert L. Watson, composing the partnership of Bettman, Watson & Bernheimer. That these five different firm are composed of the Bettmans, Watson, Bernheimer, and Stettheimer; the Bettmans being members of all the firms, while Watson is only a member of two of them. Bettman, Watson & Bernheimer is the oil firm, whose business is the subject-matter in controversy in this case, being the same firm that has been carried on in the name of Bettman, Watson & Bernheimer since the death of Bernheimer. It is charged that the accounts of Bettman, Watson & Bernheimer have been kept upon the books of Stettheimer & Bettman, one of the other firms, and have become so interwoven and entangled with the accounts of the other firms that it is difficult, at this time, to determine what moneys and revenues derived from the oil properties of the firm of Bettman, Watson & Bernheimer belong to it. It is not alleged in the bill that the firm of Bettman, Watson & Bernheimer is insolvent, but that the revenues have been misappropriated and misapplied in such a manner as to deprive the plaintiff in this action of his rights and interest in the co-partnership property and its revenues; but it is admitted and claimed in the answer of Bloomingdale, the trustee in these various assignments, that the oil firm of Bettman, Watson & Bernheimer is insolvent. It is charged that L. G. Bloomingdale has large judgments against the Bettmans, amounting to about \$70,000; that E. W. Bloomingdale, the trustee in these various assignments, is interested in the business of Bloomingdale Bros., as appears from the bill, and his answer does not deny, but seems to admit, it, and the allegation of the bill is sustained by the testimony of the Bettmans. It appears that there are judgments amounting to nearly \$600,000 against the Bettmans and other parties, for which the interest of the Bettmans in the co-partnership of Bettman, Watson & Bernheimer is liable. Stettheimer & Bettman claim directly

against the firm of Bettman, Watson & Bernheimer \$192,000, and, in addition to this claim, it is claimed that the firm of Bettman, Watson & Bernheimer is liable as indorser for said firm for \$109,000. In addition to the allegations of the bill heretofore referred to, it appears that sundry judgments have been rendered in the courts of New York by confession against the firm of Stettheimer & Bettman, and other firms of which Bloomingdale is assignee, in favor of the wives of the Bettmans. Two judgments alone against Stettheimer & Bettman amount to \$236,327, which judgments are expected to be made and satisfied out of the interest of the Bettmans in the firm of Bettman, Watson & Bernheimer.

It is apparent from this state of facts that E. W. Bloomingdale occupies a dual relation under his appointment as trustee, and he must, on the one hand, enforce collection of the claims of Stettheimer & Bettman against the property of the firm of Bettman, Watson & Bernheimer, one of the judgments being a judgment in favor of his own brother, which it is claimed can only be satisfied out of the individual interest of the Bettmans in the firm property of Bettman, Watson & Bernheimer; while, on the other hand, it will be his duty, as trustee, to contest the claims of Stettheimer & Bettman against the firm of Bettman, Watson & Bernheimer; and, if he was appointed as receiver of this property, the same dual relation would continue to exist. It further appears that on the 5th day of March, 1898, the five firms, which included the firm of Bettman, Watson & Bernheimer, made an assignment, in the state of New York, of all their property, to E. W. Bloomingdale, trustee, for the benefit of their creditors, which assignment the bill alleges was procured through fraudulent misrepresentations as to the insolvency of the co-partnership of Bettman, Watson & Bernheimer. Upon this state of facts the defendants E. W. Bloomingdale and Marcus A. Bettman and David Bettman, executors of the last will and testament of Meyer H. Bernheimer, deceased, filed their demurrers to the bill, setting up five different grounds of demurrer, and praying the judgment of the court upon the same, and that the bill be dismissed.

In the view the court takes of this case, it seems that all the grounds of demurrer are substantially embraced in the first and second assignments. The first assignment is, virtually, a want of equity upon the face of the bill. This ground of demurrer invokes the consideration of the court as to whether the allegations upon the face of the bill justify the court in the appointment of a receiver. From the inspection of the bill and answer, and the assignment made on the 5th day of March, 1898, to E. W. Bloomingdale, the court must reach the conclusion that the co-partnership was insolvent. It is true, the bill does not allege insolvency, but the answer of the trustee not only claims it, but admits it, and the evidence of the Bettmans, taken in support of the answer, tends to establish the truth of the allegation. This alone, independent of any other grounds, is sufficient to justify a court of equity in taking possession of the property, and putting it in the hands of a receiver. But the bill charges a fraudulent misapplication and an

improper conversion and waste of the assets of the co-partnership by the defendants Bettmans and Bernheimer, who had charge of this branch of the business at their New York office. This charge must be accepted as true, and, if true, ought not a court of equity, when appealed to, interpose, to protect the right of any member of this co-partnership as against other members, who, by their action, have so misapplied the revenues arising from the management of the property as to place the co-partnership in a condition approaching insolvency, if not altogether insolvent? I think so. There can be but one answer to the question. The Bettmans, Watson, and Bernheimer were equal partners in this property, each owning a one-fourth interest. This, in the opinion of the court, is another reason why the court should exercise its powers for the protection of the property. A further allegation in the bill is that there are heavy judgments at law against the members of the co-partnership, which, if enforced, would be ruinous to the value of the property, and entail a great loss to its owners; and, further, that there have been judgments obtained, by confession, against the Bettmans, in favor of their sisters, which can only be satisfied out of their individual interest in the co-partnership property. This allegation, coupled with the fact that it is claimed that the revenues of this co-partnership have gone into the hands of other co-partnerships in which the Bettmans and Bernheimer are interested, but in which the plaintiff, Watson, has no interest whatever, would seem to justify a court of equity in taking charge of the property. The court is of the opinion that the various allegations of the bill, being accepted as true, are sufficient in law to maintain this action, and to justify the court in appointing a receiver, and for this reason the first ground of demurrer is overruled.

The second ground of demurrer is that the assignee, Bloomingdale, qualified under the laws of the state of New York, in the supreme court of the city and county of New York, and gave bond in that court, and was, at the time of the filing of the bill in this case, acting under and by virtue of the orders of the supreme court of New York, which action, it is claimed, conferred jurisdiction on the court over the property of this defendant co-partnership. I do not concur in this position. The appointment and qualification of Bloomingdale, as assignee, under the deed of assignment, was purely a statutory proceeding under the laws of the state of New York, which required him to go before the supreme court of New York, and file his bond, to be approved by the court, before entering upon his duties as such assignee; was not an order of the supreme court for the city and county of New York, but was merely the result of the deed of assignment executed to him on the 5th day of March, 1898. This act upon the part of that court was not a judicial, but purely a ministerial, one, to comply with the requirements of the statute under which the assignment was made. It was in no sense a judicial proceeding. No order of the court was necessary, under the statute, to put the assignee in possession of the property transferred under the deed of assignment. No ju-

dicial proceeding was instituted in the court by which it became the duty of the court to take cognizance and possession of the property. No litigation has grown out of the assignment by which it became necessary for that court to take possession of the property. It is therefore apparent that there was no seizure, either actual or constructive, of the property embraced in the assignment of March 5, 1898, to Bloomingdale, under the order of the supreme court of the state and city of New York. The jurisdiction of that court did not attach, and, so far as this court is advised, up to this date, no judicial proceeding of any character has been instituted in that court that would give it jurisdiction over the property in question. I must hold, therefore, that the jurisdiction obtained under the bill filed in this case was first acquired over the property and persons of the defendant co-partnership, and that the second ground of demurrer must, therefore, be overruled.

It is apparent from the bill that the interests of all the parties connected with this property are so conflicting that it is necessary that the management of this property should be confided to some one person to control and manage it for all the interests concerned. That the property is a very large and valuable estate no one can question; and it is claimed if it is properly managed that it will not only discharge all liabilities against it, but will, in the end, prove to be very remunerative to the owners. Courts of equity appoint receivers for the assets of a firm whenever there is any misconduct upon the part of the defendants, or where partners themselves are wholly unable to agree as to the management of the property and the settlement of the partnership affairs, upon the part of the defendants in interest. Pom. Eq. Jur. § 1333. In this case there are charges of insolvency, fraudulent misapplication of the revenues, and inability upon the part of the defendant co-partnership to discharge heavy claims existing against it and judgments against its members. Irreconcilable differences exist between the members of the co-partnership as to the management of the property, and under these circumstances this court is appealed to to take charge of this property, and appoint a receiver to manage it for the benefit of all the parties concerned. In the view I take of this case, it is the duty of the court to grant this prayer of the bill.

The next question for the consideration of the court is, who shall be the receiver in this case? The court is requested to appoint Mr. E. W. Bloomingdale, the assignee under the deed of assignment of March 5, 1898, as the receiver in this cause. This request is supported and fortified by numerous letters from prominent men of the city of New York who are well acquainted with his character as a man and his reputation for integrity in business circles. So far as the personal character of Mr. Bloomingdale is concerned, the court frankly admits that the evidence filed in this case in support of his claim for the position of receiver satisfies it that he is a man of high character and unquestionable integrity, but this qualification is not the only indispensable one for such a position. A receiver should have no personal interest in the controversy, or

in the property in his charge, which would prevent the exercise of his duties and powers without favor to any of the parties. He has the custody and management of the property which is the subject-matter of judicial action. Can it be said, where a man is interested in judgments against the property of a co-partnership, and is connected by marriage with the various parties who are secured under the deed of assignment, and who is charged with being cognizant of the fraudulent misapplication of the assets of the defendant co-partnership by the defendant members of the co-partnership in this suit, that he is such a disinterested party as would justify the court in selecting him to take the control and management of the property which is the subject-matter of litigation in this cause? A statement of the facts seems to the court to answer the question. While I do not in any wise reflect, by my action, upon the character and standing of Mr. Bloomingdale, nor upon his character for integrity as a business man, which, I have said, is beyond question, still I consider it to be my duty to select some one who has no personal interest in the property whatever, and whose control and management of it could not be influenced by any personal interest in the property. But there is another reason why the court should not appoint Mr. Bloomingdale. The property involved in this suit lies in four different states, no portion of which is in the state of New York, and, so far as the court is advised, there are no assets of any kind whatever in the city or state of New York, and all the revenues that are to be collected and disbursed by the receiver should be held and disbursed under the orders of the court of this district. If Mr. Bloomingdale were appointed receiver, the revenues would be carried to the state of New York, outside of the jurisdiction of this court; and when, by the decree of the court they were to be distributed, they would be distributed from that point. This is a potential consideration, which controls the action of the court against appointing a receiver outside of this district. Mr. Bloomingdale is a resident of the state of New York, many hundreds of miles away from the location of the properties. He is largely interested in the mercantile business, and, as the evidence discloses in this case, has nearly 2,000 clerks in his employ. He could hardly be expected, under such circumstances, to give the close attention to his business as receiver that the court would require of one having charge of property of the magnitude and character of this. His interest in claims against parties of the co-partnership makes him an interested, instead of a disinterested, party. The receiver should be in touch with the court, so that, when the court finds it necessary to pass an order in vacation, he can place his hands upon him. I recall no instance, in my long experience on the bench, in which I have ever appointed a receiver outside of the limits of my district, except as ancillary to a proceeding in another court. This rule has always been enforced by me, and I have never seen any reason for deviating from it. Under these circumstances I must decline to appoint E. W. Bloomingdale receiver.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court, S. D. California. June 27, 1898.)

1. PUBLIC LANDS — CANCELLATION OF PATENTS UNDER RAILROAD GRANT — RIGHTS OF PURCHASERS IN GOOD FAITH.

In a suit by the United States under Act March 3, 1887 (24 Stat. 556), to annul patents issued to a railroad company for lands, and the certification of other lands not yet patented, to which certain purchasers from the company were made defendants, a decree was entered canceling the patents and certifications, but saving the rights of the purchasers under the act, which provided that purchasers in good faith from the grantee, who were citizens of the United States, or had declared their intention to become such, should, on proper proof before the land department, be entitled to patents for the lands so purchased. An appeal was pending in the supreme court when Act March 2, 1896 (29 Stat. 42), was passed, confirming the titles of all bona fide purchasers from patentees under railroad grants. The decree was affirmed, "subject, however, to the right of the government to proceed in the circuit court to a final decree" as to the purchasers defendant. *Held*, that the later act was applicable to such purchasers of lands for which patents had issued to the railroad company, whose titles were thereby confirmed, and would be recognized by the final decree, on proof that their purchases were made in good faith, without regard to the question of citizenship.

2. SAME—CITIZENSHIP OF PURCHASER.

As to land, however, which had been certified but not patented to the railroad company, the government was entitled to a decree quieting its title as against purchasers not shown by the evidence to be citizens, or to have declared their intention to become citizens.

3. SAME—PURCHASER FROM ALIEN GRANTEE.

That the first grantee of a railroad company of lands erroneously certified under a grant is an alien will not deprive a subsequent grantee, who is a citizen of the United States, of his rights as a bona fide purchaser, under Act March 3, 1887.

4. SAME—BONA FIDE PURCHASER DEFINED.

A bona fide purchaser of lands from a patentee under a railroad grant, within the meaning of act March 2, 1896 (29 Stat. 42), and whose right and title are thereby confirmed, is one who purchased in good faith, for value, expecting to obtain title through the railroad company, though he may have been chargeable, as matter of law, with constructive notice of the invalidity of the patentee's title.

5. SAME—PAYMENT OF PURCHASE MONEY.

The fact that a purchaser of lands patented to a railroad company holds under a contract, and has paid only a portion of the purchase money, does not affect his character as a bona fide purchaser, whose title is protected by Act March 2, 1896 (29 Stat. 42).

6. SAME—OPERATION OF STATUTES—SUBSEQUENT PURCHASERS.

The legislation of congress in relation to bona fide purchasers of lands which have been erroneously certified or patented under railroad grants is remedial in its nature, and the several acts apply to those purchasing after as well as before their passage.

This was a suit in equity by the United States against the Southern Pacific Railroad Company and others to annul the certification and patenting of certain lands to defendant company under grants by congress. A decree granting the relief prayed for against the company was affirmed by the supreme court. 168 U. S. 1, 18 Sup. Ct. 18. The cause came on for further hearing in this court, on a motion of complainant for further decree as to certain defendants who were purchasers of lands from the railroad company.

The United States Attorney and Joseph H. Call, Special Asst. U. S. Atty., for complainant.

Wm. F. Herrin and Wm. Singer, Jr., for defendants.

ROSS, Circuit Judge. On the 3d day of March, 1887, congress enacted that the secretary of the interior immediately adjust, in accordance with the decisions of the supreme court, each of the railroad land grants, theretofore unadjusted, made by it to aid in the construction of railroads. It directed the secretary of the interior, in the event it should appear, upon the completion of the respective adjustments, or sooner, that lands had been from any cause theretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by or through or under grant from the United States to aid in the construction of railroads, to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and, in the event such company should neglect or fail to so reconvey such lands to the United States within 90 days after the making of the demand, it was made the duty of the attorney general to commence and prosecute, in the proper courts, the necessary proceedings to cancel all patents, certification, or other evidence of title theretofore issued for such lands, and to restore the title thereto to the United States. Among the provisions of the act was also one to the effect that, as to such of the lands so erroneously certified or patented which had theretofore been sold by the grantee company to citizens of the United States, or to persons who had declared their intention to become such citizens, the person or persons so purchasing in good faith, and the heirs or assigns of such person or persons, should be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as should be prescribed by the secretary of the interior, after the respective grants should have been adjusted; and that patents of the United States should issue therefor, and should relate back to the date of the original certification or patenting, and directing the secretary of the interior, on behalf of the United States, to demand payment from the company which had so disposed of such lands, of an amount equal to the government price for similar lands; and, in case of neglect or refusal of such company to make payment as specified in the act within 90 days after the demand, the attorney general was directed to cause suit or suits to be brought against such company for such amount, provided that nothing in the act should prevent any purchaser of lands erroneously withdrawn, certified, or patented from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company, as by the act required. Act March 3, 1887 (24 Stat. 556).

On the 17th day of May, 1890, the original bill in this suit was filed by the United States against the Southern Pacific Railroad Company, D. O. Mills, and Gerritt L. Lansing, as the holders of a mortgage or deed of trust from the defendant railroad company upon the lands described in the bill to secure the payment of certain indebtedness of the defendant railroad company to them, as trustees, and the City

Brick Company. The purpose of the suit was to obtain a decree establishing and quieting the alleged title of the complainant to the lands therein described, as against the defendants, and enjoining them from cutting or removing from the lands any tree or wood. The lands constituting the subject of the suit are thus described in the bill:

"All the sections of land designated by odd numbers in townships 3 and 4 north, ranges 5, 6, and 7 west; township 1 north, ranges 16, 17, and 18 west; township 6 and the south $\frac{3}{4}$ of township 7 north, ranges 11, 12, 13, 14, 15, 16, 17, 18, and 19 west; also, all the sections of land designated by odd numbers, as shown by the public surveys, embraced within the townships from number 2 north to number 5 north, both inclusive, and ranges from number 8 west to number 18 west, both inclusive, except sections 23 and 35 in township 4 north, range 15 west, and except sections 1, 11, and 13 in township 3 north, range 15 west; also, the unsurveyed lands within said area which will be designated as odd-numbered sections when the public surveys, according to the laws of the United States, shall be extended over such townships, all of the aforesaid lands being surveyed by San Bernardino Base and Meridian, and being situated within the state of California."

The bill alleged, among other things, that the defendant railroad company illegally and unjustly claimed the lands described under and by virtue of grants made to it by congress, and further alleged that, while claiming and pretending to own the lands, by pretended conveyances executed in due form of law, it pretended to sell and convey large portions thereof, and the wood and timber thereon, to various persons unknown to the complainant, the names of which purchasers, together with the dates and amounts of such purchases, and the extent of whose claims, the complainant asked that the defendants be required to disclose, and that, when ascertained, such purchasers and adverse claimants be made parties defendant to the suit. The defendant railroad company, in its answer to the bill, averred that a large portion of the lands included in the bill had been theretofore conveyed to it by patents of the United States duly issued and delivered, and admitted that it had sold and conveyed its title to a portion of the lands described in the bill, and annexed to and made a part of its answer a certain exhibit, designated as "Exhibit B," containing particular descriptions of all of the lands in suit which had been sold by the defendant railroad company prior to the commencement of the suit, including the names of the purchasers, the dates of the respective sales, and the amount for which the lands were sold. Subsequently, the complainant filed an amended bill, in which the purchasers thus disclosed were made parties defendant.

Thereafter the cause came on regularly for trial, which resulted in the entry of a decree on the 19th day of July, 1894, annulling all patents theretofore issued by the United States to the defendant railroad company under the grants made to it by congress on July 27, 1866 (14 Stat. 292), and March 3, 1871 (16 Stat. 573), and by any amendatory or supplemental acts, for any and all of the lands embraced in the bill, and establishing the title thereto in the complainant, and quieting the same as against the defendant railroad company and its defendant mortgagees, but providing that the decree should not "in any wise affect any right which the defendants, or any of them, other than the said Southern Pacific Railroad Company, now have or may hereafter

acquire in, to or respecting any of the lands" involved in the suit, by virtue of the adjustment act of March 3, 1887. Upon appeal to the supreme court, the decree was "affirmed in all respects as to the Southern Pacific Railroad Company, as well as to the trustees of the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the government to proceed in the circuit court to a final decree as to those defendants." 168 U. S. 1, 66, 18 Sup. Ct. 34. Intermediate the taking of the appeal and the decision thereof by the supreme court, congress passed the act of March 2, 1896 (29 Stat. 42), which not only prescribed periods within which suits to vacate and annul patents theretofore or thereafter issued should be brought, but which also provided that "no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." After the filing of the mandate of the supreme court herein, and on the 7th day of January, 1898, on motion of counsel for the complainant, further proceedings in the suit against all of the defendants other than the Southern Pacific Railroad Company and its mortgagees were dismissed, without prejudice, as to all the lands described in the bill, except certain specified tracts aggregating 47,945.52 acres of land. In respect to these specific tracts, counsel for the government moved for further decree in accordance with the mandate of the supreme court, which motion has been argued and submitted by counsel for the respective parties, and is now for determination. Some of the specific tracts embraced by the motion have been patented by the United States to the defendant railroad company, and for some of them no patents have been issued. Some of each of these classes of the land now under consideration the defendant railroad company has contracted to sell to individual defendants, executing in each instance an executory contract of sale, and receiving from the purchaser a part of the purchase money. Some, it, in like manner, contracted to sell to a foreign corporation, styled Atlantic & Pacific Fibre & Importing Company, receiving therefrom the purchase money in full, and for some of each class the railroad company has executed deeds to the respective purchasers, having received therefrom the full amount of the purchase money. All of the lands covered by the pending motion are included in one or the other of these classes. Most of the purchasers from the railroad company of the lands under consideration are citizens of the United States, or have declared their intention to become such. One was the foreign corporation mentioned, whose interest in the tracts purchased by it was, however, subsequently assigned and conveyed, for value, to the defendant Graves, also shown to be a citizen of the United States. A few of such purchasers are not shown by the evidence to be citizens, or to have declared their intention to become such.

Enough has been stated to enable the court to indicate to the parties in interest the lines upon which the further decree must proceed, and the reasons therefor. The act of March 2, 1896, put an end to all question in relation to all patents for lands held by a bona fide purchaser from the railroad company, regardless of the citizenship of such purchaser; for it in express terms declares that no such patent shall

be vacated or annulled, and further expressly confirms the right and title of such purchaser. *U. S. v. Winona & St. P. R. Co.*, 165 U. S. 463, 476, 477, 17 Sup. Ct. 368. This act, although passed after the entry of the original decree in this cause in this court, is to be considered and applied. In the case last cited, the supreme court said:

"It is true this act [the act of March 2, 1896] was passed after the commencement of this suit,—indeed, after the decision by the court of appeals,—but it is none the less an act to be considered. There can be no question of the power of congress to terminate, by appropriate legislation, any suit brought to assert simply the rights of the government. This suit was instituted by the attorney general in obedience to the direct command of congress as expressed in the act of 1887, and congress could at any time prior to the final decree in this court direct the withdrawal of such suit; and it accomplishes practically the same result when, by legislation within the unquestioned scope of its powers, it confirms in the defendants the title to the property which it was the purpose of the suit to recover. So, if this act of 1896, taken by itself alone, or in conjunction with preceding legislation, operates to confirm the title apparently conveyed by the certification to the state for the benefit of the railroad company, that necessarily terminates this suit adversely to the government, and compels an affirmance of the decisions of the lower courts without the necessity of any inquiry into the reasons advanced by those courts for their conclusions. We are of the opinion that congress intended by the sentence we have quoted from the act of 1896 to confirm the title which in this case passed by certification to the state. It not only declares that no patents to any lands held by a bona fide purchaser shall be vacated or annulled, but it confirms the right and title of such purchasers. Given a bona fide purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the government to disturb it."

The supreme court, in its opinion in the present case, held that the effect of the decree heretofore entered herein was to leave undetermined the question whether the defendants who claimed under the Southern Pacific Railroad Company are protected by the act of March 3, 1887 (24 Stat. 556), "or any other act of congress"; and its decree of affirmance was made subject to the right of the government to proceed in this court to a final decree as to those defendants. 168 U. S. 66, 18 Sup. Ct. 34. This is the construction which the supreme court has in this case put upon the decree heretofore entered herein, and by which this court must, of course, be governed. The government has elected to proceed to a final decree herein as to the claims of those defendants in respect to certain specified tracts of the lands embraced by its original bill, and, on motion of its counsel, has dismissed, without prejudice, further proceedings against the defendants other than the Southern Pacific Railroad Company. D. O. Mills, and G. L. Lansing, trustees, as to the balance of the lands. For such of the lands embraced by the present proceeding as have been patented by the United States and been purchased by the defendants in good faith and for value, the latter are entitled to a decree against the complainant, and confirming their title; for congress has by its act of March 2, 1896, declared that no such patent shall be vacated or annulled, and has expressly confirmed the right and title of such purchasers. That act, although passed after the entry of the decree herein of July 19, 1894, is applicable to the present status of the case, and is to be given effect. It was so expressly held by the supreme court in its opinion in this very case, as well as in the *Winona Case*, above re-

ferred to. In providing, therefore, as must be done in the further decree now to be entered, in order to prevent an otherwise apparent inconsistency, that the decree of July 19, 1894, shall not be construed to enjoin the defendant bona fide purchasers of such of the lands now before the court as have been patented by the United States from asserting title thereto, the court is but carrying out the decision of the supreme court in the present case, and giving effect to its mandate.

Nor is the character of the defendants as "bona fide purchasers" to be tested by the meaning of that term as ordinarily understood in equitable proceedings. In the case just cited, the supreme court said:

"It is earnestly contended by the government that the present holders of the title are not 'bona fide purchasers'; that that term has a fixed and well-defined meaning, as announced in the frequent decisions of this and other courts; that, as said in 2 Pom. Eq. Jur. § 745, 'the essential elements which constitute a bona fide purchaser are therefore three,—a valuable consideration, the absence of notice, and presence of good faith' (U. S. v. California & O. Land Co., 148 U. S. 31, 42, 13 Sup. Ct. 458); that while two of these essential elements may be found, to wit, a valuable consideration, and the presence of good faith, the third—the absence of notice—is lacking; that all men are conclusively presumed to know the law, and that, as the true rule of construction in reference to these grants was laid down by this court, the purchasers were bound to know such true rule; that the records of the land office disclose the existence of these homestead entries and pre-emption filings, and therefore they who purchased from the railroad company knew, or at least were chargeable with knowledge, of the fact that those lands could not rightfully have been certified to the railroad company, but were excepted from the terms of grant, and in fact remained the property of the government. It is further insisted that as congress, in this statute, used this well-understood expression, it intended only the protection of such parties as came within the scope of this settled meaning. It is said that the only cases to be covered by this provision were those in which the state or the railroad company, by presentation to the land office, before the filing of the map of definite location, of a forged relinquishment by the pre-emptor, or one having made a homestead entry, or by some other fraudulent representations, secured a certification or patent to the tracts, and thereafter sold and conveyed to one who purchased in ignorance of the fraud.

"We are unable to agree with this contention of counsel, for several reasons: In the first place, the situation as it was known to exist makes against any such narrow construction. While instances of such fraudulent conduct on the part of the state to which the lands were certified, or the company to which the lands were patented, might exist, yet, in the nature of things, they would be few, and hardly worth the special notice of congress; while, on the other hand, the fact that there had been a difference between the land department and the courts, one construction obtaining in the former prior to the decisions by the latter, and the further fact that, by this difference of construction, many tracts had been erroneously certified or patented, must have been well known to congress, and naturally, therefore, a subject for its legislation. Further, there was no need of any legislation to protect a 'bona fide purchaser.' This had been settled by repeated decisions of this court. U. S. v. Burlington & M. R. R. Co., 98 U. S. 334, 342; Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 313, 8 Sup. Ct. 131, reaffirmed in U. S. v. California & O. Land Co., 148 U. S. 31, 41, 13 Sup. Ct. 458. For in each of those cases it was decided that although a patent was fraudulently and wrongfully obtained from the government, if the land conveyed was within the jurisdiction of the land department, the title of a bona fide purchaser from the patentee could not be disturbed by the government; so that this provision was absolutely unnecessary if that which is now claimed by counsel for the government is all that was intended by congress. We do not mean to assert that, because legislation to cover such a contingency was unnecessary, therefore the language used by congress necessarily implies something other

and different, because, of course, it may have been that congress intended nothing but a simple declaration of the law as it was known to exist. At the same time, the fact that under one construction it was needless raises a presumption that something more was intended, and that congress had in view the protection of other parties than were already protected by general law.

"But we need not rest on these inferences and presumptions. Other provisions of the acts of 1887 and 1896 make clear the intent of congress. Section 3 of the act of 1887 provides that, if the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant, it may be reinstated, provided he has not located another claim, or made an entry in lieu of the one so canceled, and also did not voluntarily abandon such entry. By this section, congress provided for the reinstating of the title of one deprived thereof by an erroneous ruling of the land department, but, at the same time, limited the right of reinstating to cases in which the original entryman had not voluntarily abandoned his entry, or had not since that time made a new entry. In other words, it was limiting the restoration of the title of the original entryman to cases in which he had a continuing and present equitable right to recognition. As to all other cases, congress reserved the determination of the equities between the government, the railroad company, and purchasers from the latter, and in subsequent sections it made provision for the adjustment of such equities. Section 4 of the same act, expressly referring to all other lands erroneously certified or patented to any railroad company, provides that citizens who had purchased such lands in good faith should be entitled to the lands so purchased, and to patents therefor issuing directly from the United States, and that the only remedy of the government should be an action against the railroad company for the government price of similar lands. It will be observed that this protection is not granted to simply 'bona fide purchasers' (using that term in the technical sense), but to those who have one of the elements declared to be essential to a bona fide purchaser, to wit, good faith. It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title, and in reliance upon the action of the government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to re-enforce his defective title by a direct patent from the United States, and to leave to the government a simple claim for money against the railroad company. It will be observed that the technical term 'bona fide purchaser' is not found in this section; and while it is provided that a mortgage or pledge shall not be considered a sale, so as to entitle a mortgagee or pledgee to the benefit of the act, it does secure to every one who in good faith has made an absolute purchase from a railroad company, protection to his title, irrespective of any errors or mistakes in the certification or patent. Section 5 of the same act applies to cases in which no certification or patent has issued, and yet the lands sold by the railroad company are the numbered sections prescribed in its grant, and coterminous with the constructed portions of its road; and it is there provided that, where the lands so sold by the company 'are for any reason excepted from the operation of the grant to said company,' the purchaser may obtain title directly from the government by paying to it the ordinary government price of such lands. It is true, the term used here is 'bona fide purchaser'; but it is a bona fide purchaser from the company, and the description given of the lands, as not conveyed and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defective title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a bona fide purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a 'bona fide purchaser,' has, nevertheless, purchased in good faith from the railroad company."

What was here said by the supreme court also disposes, adversely to it, of the contention made on behalf of the complainant to the effect that the purchasers from the defendant railroad company were bound to know the law, and were therefore to be charged with knowledge that the true construction of the grants made by congress to the Atlantic & Pacific Railroad Company and the defendant railroad company, respectively, excluded from the latter all lands at any time embraced by the former.

From the evidence in the case, it does not admit of doubt that the respective purchasers of the land now under consideration bought in good faith, and in the expectation of receiving, through the railroad company, title to the lands purchased. This is shown in part by the contracts and deeds introduced in evidence. That in many instances only a part of the purchase money has been actually paid is, in my opinion, wholly immaterial. As was well said by the secretary of the interior in the recent case of *Schneider v. Linkswiller* and others, decided March 18, 1898, a copy of whose opinion has been presented with the briefs:

"It is a part of the history of the times that the land-grant companies had sold much of the land within the limits of the grants to immigrants and others, and held out, as inducements to such parties, contracts giving long credit, and requiring moderate annual payments. It was through this policy that vast bodies of land in the public land states were disposed of to actual settlers, and many communities established and built up. This was well known to congress at the time of the passage of said act, and it seems certain that such contracts, whether spoken of as sales or purchases, whether fully performed or only partially performed, constitute a part of the subject with which congress was dealing, and the rights of the so-called 'purchaser' thereunder are within the protection of the statute, if acquired in good faith. If there be any doubt about the correctness of this view of the purpose and intent of the act of 1887, it is removed by a perusal of the amendment thereto of February 12, 1896 (29 Stat. 6), wherein congress expressly recognizes partly performed contracts of purchase, like that of *Schneider*, as constituting a purchase within the meaning of the law."

I am also of opinion that the legislation of congress under consideration is not to be limited to purchasers who bought prior to the respective enactments. The legislation is remedial in its nature, and therefore to be liberally construed. Attorney General Garland, in an opinion given by him in response to certain questions propounded respecting the act of 1887, said:

"The whole scope of the law, from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and bona fide purchasers, who, through the erroneous or wrongful disposition of the lands by the grants, by the officers of the government or by the railroads, have lost their rights or acquired equities, which in justice should be recognized. * * * The whole remedial part of the law was passed with the recognition of the fact that the railroad companies had sold lands to which they had no just claims."

The adjustment directed and provided for, of the various grants, necessarily required time, and a great deal of it. Until adjusted and settled, the conflicting claims of the government, on the one side, and of the railroad companies and the purchasers from them, on the other, continued. Every such purchaser who bought for value, and in the

honest belief that he would thereby acquire through the grantee company the government title to the land so purchased, is, in my opinion, entitled to the benefit of this remedial legislation, regardless of the date of his purchase, provided he possesses the necessary qualification in respect to citizenship. And this view is in accord with the rulings of the secretary of the interior. Instructions of Secretary Noble to the Commissioner of the General Land Office, August 30, 1890, 11 Land Dec. Dep. Int. 229; *Sethman v. Clise*, 17 Land Dec. Dep. Int. 311; *Andrus v. Blach*, 22 Land Dec. Dep. Int. 241. As against such of the defendant purchasers as have failed to prove their citizenship or intention to acquire citizenship, the complainant is entitled to a decree quieting its title. The defendant Graves is shown by the evidence to be a citizen of the United States, and to have purchased, for value, those of the lands in controversy claimed by him which have not been patented; but his immediate grantor, who was the purchaser from the railroad company, was a foreign corporation, and therefore not entitled to the benefits of the act of March 3, 1887. The secretary of the interior has held in several cases that if the applicant is a bona fide purchaser, and himself possesses the requisite qualifications as to citizenship, it is immaterial whether the original purchaser from the railroad company, through whom he claims, was a citizen, or had declared his intention to become such. Instructions and Decisions of the Secretary of the Interior, *supra*. In view of the nature of the legislation in question, and of the liberal rule of construction that should be accorded it, I am not prepared to differ from the construction thus adopted by the officers of the land department, especially in view of the amendatory and supplemental act of congress of March 2, 1896, under which, as has been seen, bona fide purchasers for value of such lands as have been patented to the railroad companies by the United States are confirmed in their purchases, even though they be aliens. A further decree will be entered in the case in accordance with the views above expressed.

DUNCAN et al. v. ATLANTIC, M. & O. R. CO. et al.:

(Circuit Court, E. D. Virginia. October 30, 1880.)

1. BILL OF REVIEW—TIME OF FILING.

A bill to review a decree of foreclosure and sale comes too late after the lapse of two entire terms since the entry of the decree.

2. SAME—APPEAL.

In respect to the time allowed for taking an appeal or filing a bill of review, a final decree of foreclosure and sale takes effect from the date of its entry, and not from the date of appointment of a master to make the sale.

3. RAILROAD FORECLOSURES—POSTPONEMENT OF SALE.

A sale of a railroad in foreclosure proceedings will not be postponed merely because the road is more prosperous than for some time past, when it would take nearly 10 years of such prosperity to pay the already overdue interest on the mortgage debt.

¹ This case has been heretofore reported in 4 Hughes, 125, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

4. SAME.

It is too late, two days before the date fixed for the sale, to ask for its postponement without a tender of the debt, or what is equivalent to a tender.

5. SAME—MODIFICATION OF DECREE OF SALE.

When more than a year and a half has elapsed since the entry of a final decree of foreclosure and sale of a railroad, such decree will not be modified so as to reduce the amount of the cash payment required, on an application made only two days before the date fixed for the sale. If any party suffers from any obscurity or harshness in the terms of the decree, he may, after the sale, object on that ground to its ratification.

This was a suit in equity, against the Atlantic, Mississippi & Ohio Railroad Company and others, to foreclose a mortgage on said company's road and property. A final decree of foreclosure and sale was entered on May 9, 1879. See Fed. Cas. No. 12,922, where the decree is set out in full. The decree provided that the sale should be made by a master "hereafter to be specially appointed for that purpose." The appointment was not in fact made until July 9, 1880. The sale was then set for the 1st day of November following. A few days prior to that time, a bill of review was filed by the state of Virginia, in whose favor a third mortgage on the property was reserved by statute, alleging, among other things, that she had taken an appeal from the decree of foreclosure and sale. This bill was accompanied by a motion to postpone the sale. A petition for postponement was also filed by the defendant company. Similar motions were also made by the cities of Lynchburg and Petersburg, which were both holders of stock and bonds in the defendant corporation. All these matters were heard together by the court.

BOND, Circuit Judge. This bill of review has been filed after a lapse of two entire terms of the court since the entry of the decree sought to be reviewed, and is therefore too late, under rule 88 in equity. But even if this were not so, the bill could not be entertained. The state having appealed, it has no right to file a bill of review. If the errors set forth in the bill offered are apparent on the record, they have been so apparent ever since the final decree which is appealed from was filed. It is these errors the state asks the supreme court to correct. If the reasons for the bill are that new facts have come to the knowledge of parties since the filing of the final decree, then its offer is too late. The final decree takes effect from the time of its record, and not from the appointment of the officer to execute it. In reference to the petition of the defendant company, there is no cloud on the title such as is now set up, which has not heretofore been determined to be no obstacle, so far as the parties in this suit are concerned, to the foreclosure of the mortgage and the sale of the mortgaged premises. And, as for the reasons set forth that the road is more prosperous than heretofore, we think they ought to have no weight with the court, and afford no sufficient ground to postpone the sale ordered. It would, after all the success which has attended the management of the receivers, take nearly 10 years of such success continued to pay the already overdue interest of this mortgage debt. The defendant company offers no guaranty that such prosperity will continue. It proposes to go further in debt, and to incumber the

complainants' security further to pay a present obligation. The complainants' debt is ascertained. They are entitled to execution therefor, and it was never heard to prevent such execution that the mortgagor, having been unfortunate in business, had now great hope of more success hereafter, to realize which the mortgagee ought to wait for him.

It appeared, however, that the master had omitted to serve written notice on the attorney general of the state of Virginia, and on the board of public works of the state, at least 90 days before the sale, as directed by the foreclosure decree; and, in order to afford opportunity for the giving of these notices, the court entered an order directing the master to adjourn the sale until February 10, 1881. On the 8th day of February, two days before the time designated for the sale, the defendant company, by its counsel Benjamin F. Butler, renewed its motion for a postponement. After argument, the court rendered its decision in the following terms:

BOND, Circuit Judge. This is a motion on the part of the mortgagor to postpone the sale ordered by the decree in this case filed May 9, 1879. The case has been pending in this court for nearly five years, and has regularly proceeded with no prospect of any other result than the one it is about to reach. The mortgagor has allowed the time for redemption to pass, and alleges in argument that it has been too poor to do so ever since the bill was filed. The motion before us is not made upon any proof or showing that the finances of the mortgagor have at all improved, nor that it has been promised the certain aid of any capitalist to enable it to redeem. It merely alleges that it believes that, if the court would make certain provisions in the order opening the present decree and postponing the sale, the company would be able to redeem. The facts upon which that belief is founded are not given, and the court can look at it in no other light than as the ordinary lingering hope of a debtor that his financial condition will somehow improve. The mortgagor, to be sure, offers to put in the registry of the court the sum of \$100,000 to be security for costs and loss of interest caused by the postponement of the sale; but it does not offer to pay now the defaulted interest, nor to allow the \$100,000 as a penalty for not redeeming, as it says it expects to do. Under these circumstances, the court does not think that it would be equitable to open its decree, and make the complainants risk the rise and fall of the present inflated market and the accumulation of interest, and the risk of loss of business and consequent diminished receipts of the road, but thinks the company has had abundant time to make its arrangement to redeem had it any prospects of doing so. The fact that the charters of Lynchburg and Petersburg do not allow those cities to borrow money, being large stockholders, to aid in redemption, and that the state legislature is not in session, does not alter the matter. It is too remote to prophesy what those corporations would do were they assembled; and certainly to postpone the complainants from the foreclosure of their mortgage on such a remote contingency or expectation would be most inequitable, especially as

the security for the remuneration for loss by delay, should there be such loss, is, as we have said, so inadequate.

The complainants applied for a decree of sale at the October term, 1877. The court did not grant the decree till May, 1879, although the complainants made persistent and very frequent applications throughout the whole period of delay. After the decree, the court did not order a sale till July, 1880, complainants meantime pressing continually for such order. During the whole of this delay, no effort was made by defendant company to redeem its property. It is too late, two days before the sale, to ask for its postponement, without a tender of the debt, or what is equivalent to a tender. During the whole of this delay, the court felt it was taking great responsibility; but, fortunately, the revival of business and the admirable conduct of the receivers have prevented any loss from this delay; and we do not, upon so indefinite a proposition as is now made, at this stage, propose to continue such risk. The defendant company must take its chances at sale along with all other bidders in open market.

The cause was then heard on a motion by the defendant company to modify the terms of the decree of sale, so as to reduce the amount of cash to be paid by the purchasers to the sum required to pay the interest then due, and the costs of the sale.

HUGHES, District Judge. The decree already passed states what is to be sold, and the method of sale, and determines the rights of the parties; and after so long a time since its filing and the advertisement of the sale provided by it, and on the eve of the sale, the court will not alter it, no objection to it having been made heretofore by any party to the suit. If there is any difficulty created by its terms in the bidding, and it can be shown after the sale that bidders were hindered by any obscurity or harshness of its terms, the party suffering from that defect can come into court, and object to the ratification of the sale on that ground. If the decree as it now stands results in a sale for an inadequate price, when the court comes to consider the master's report of sale, then will be proper time for reaching the objection now urged. In general, we think we have no power to amend the decree in any particular after so long a time has passed since it was pronounced.

The sale was therefore had, on February 10, 1881, and the road and property was bought in for a syndicate whose members subsequently organized the Norfolk & Western Railroad Company. The sum realized was \$8,605,000, over and above certain prior mortgages subject to which the sale was made. The decree confirming the sale was as follows:

Decree Confirming Sale.

And now, on this 4th day of April, 1881, the report of Mathew F. Pleasants, the master heretofore appointed by this court to make sale of the mortgaged premises, having been heretofore duly made and filed, a copy of which report is as follows, to wit, [omitted herefrom]; and it appearing to this court, and the court finds the facts so to be, that the thirty-days notice to the purchaser and the defendant's solicitors, as required by said decree herein, of the presentation of said report for confirmation of said sale to be

made at this time and place, has been duly given; and thereupon said report of sale being now presented to this court by the complainants' solicitors, and motion made by them that the same be confirmed, and the same having been duly considered,—it is hereby ordered that the report of said master of said sale, and said sale, be, and the same are, in all respects confirmed. Thereupon the complainants' solicitors submitted to this court forthwith a draft deed of conveyance from the said master to the purchaser, as provided by the decree herein, which draft deed of conveyance, is in the words and figures following, to wit:

Deed Conveying to Purchaser a Railroad Sold under Foreclosure.

"This indenture, made this — day of —, in the year one thousand eight hundred and eighty-one, between Mathew F. Pleasants, specially appointed a master by an order of the circuit court of the United States for the Fourth judicial circuit and the Eastern district of Virginia, made in the case hereinafter mentioned, for the purpose of making the sale hereinafter referred to, party of the first part, Clarence H. Clark, of the city of Philadelphia, of the second part, and the Norfolk and Western Railroad Company, a corporation of the state of Virginia, to be created and constituted as hereinafter mentioned, party of the third part:

"Whereas, the Atlantic, Mississippi and Ohio Railroad Company was formed under and in pursuance of an act of the general assembly of the state of Virginia, entitled 'An act to authorize the formation of the Atlantic, Mississippi and Ohio Railroad Company,' approved June the seventeenth, one thousand eight hundred and seventy (Laws 1870, p. 181), and heretofore, and on or about the ninth day of September, one thousand eight hundred and seventy-one, duly made and executed under its corporate seal, and delivered to Francis Skiddy, William Butler Duncan, and Samuel L. M. Barlow, trustees, its deed of trust bearing date on the last-mentioned day, whereby it granted, bargained, and sold, aliened, assigned, and conveyed to the said trustees all the right, title, and interest which the said railroad company then had or might afterwards acquire in and to its franchises, its entire line of railway constructed or to be constructed, extending from Norfolk, in the state of Virginia, to Cumberland Gap, in the state of Kentucky, together with all branches thereof constructed or to be constructed, together with the tolls, incomes, rents, issues, and profits thereof, and all real estate, rights of way, easements, fixtures, rolling stock, machinery, tools and equipments, and all other personal property thereunto belonging; the true intent of said deed of trust being thereby declared to be to vest all and every the property and right of property, real, personal, and mixed, and all the corporate powers and franchises, of every kind whatsoever, belonging or appertaining to the said railroad company, or thereafter to be acquired, touching the aforesaid lines of railroad, in the said Francis Skiddy, William Butler Duncan, and Samuel L. M. Barlow, trustees, the parties of the second part, to the said deed of trust, to have and to hold the said premises, property, rights, franchises, and appurtenances to the said trustees, as joint tenants, and not as tenants in common, upon certain trusts in the said deed of trust expressed, for the benefit and security of the holders of certain fifteen thousand bonds of said company proposed to be issued and negotiated by it for \$1,000 each, and amounting together to \$15,000,000, all bearing even date with the said deed of trust, and payable in gold coin of the United States on the first day of October, nineteen hundred and four, with interest thereon at the rate of seven per cent. per annum, also in gold, payable semiannually, according to the tenor of the coupons annexed to the said bonds, free of all United States government tax, as by the said deed of trust, or the record thereof, will, reference thereto being had, more fully appear.

"And whereas, there were issued by the said railroad company five thousand four hundred and seventy of the said fifteen thousand of bonds, and default having been made in the payment of the installments of interest which accrued thereon on the first day of October, one thousand eight hundred and seventy-four, and the first day of April, one thousand eight hundred and seventy-five, the said Francis Skiddy, William Butler Duncan, and Samuel L. M. Barlow, such trustees, as aforesaid, heretofore filed their bill in the

circuit court of the United States for the Eastern district of Virginia against the said Atlantic, Mississippi and Ohio Railroad Company and others, for the foreclosure or enforcement of the said deed of trust; and such proceedings were thereupon had that afterwards, and on the ninth day of May, one thousand eight hundred and seventy-nine, at a term of the said circuit court holden at Norfolk in Virginia, a decree was made in the said cause, whereby it was, among other things, declared and decreed by the said court that the said deed of trust was a valid conveyance of the railroad, franchises, and property of the said railroad company for the security of the mortgage bonds therein set forth; that the said bonds were duly issued, and the same and the proceeds thereof lawfully disposed of and dealt with under and according to the said statute of the state of Virginia, approved June the seventeenth, one thousand eight hundred and seventy, and that the said deed of trust vested in the complainants in the said cause as trustees, for the purposes therein mentioned, and according to the tenor thereof, a good and valid title to all and singular the property and franchises therein described, subject only to the lien thereon in the said decree set forth. And it was then provided by the said decree, in the third paragraph thereof, as follows, that is to say: "The court declares and decrees that the franchises and property conveyed by the said trust deed of September the ninth, one thousand eight hundred and seventy-one, to the complainants, trustees, by the Atlantic, Mississippi and Ohio Railroad Company by way of mortgage, described as near as may be, are as follows, that is to say: All the right, title, and interest of the said Atlantic, Mississippi and Ohio Railroad Company in and to the franchises of the said company, its entire line of railroad then constructed or thereafter to be constructed,—in fact, extending from Norfolk, in the state of Virginia, to Cumberland Gap, in the state of Kentucky,—together with all branches of the said line of railroad then constructed or thereafter to be constructed, with the tolls, incomes, rents, issues, and profits thereof, and all real estate, rights of way, easements, fixtures, rolling stock, machinery, tools, and equipments, and all other personal property thereto belonging, and all property, real, personal, or mixed, and all corporate powers and franchises belonging or appertaining to the said Atlantic, Mississippi and Ohio Railroad Company then possessed by the said company, or thereafter to be acquired by the said company; and for all the purposes of this decree the inventory of the receivers may be referred to for a more full and detailed description of the mortgaged premises. The description also includes all additions to the mortgaged property and premises made or to be made by the receivers, and also all railroad supplies which the receivers may have on hand at the time of sale, or may acquire thereafter before delivery of possession." And it was in and by the said decree further declared and agreed that the estate and interest of the complainants in the said cause in the said premises were, at the date of the said decree, subject to the prior liens therein particularly described, and that subject to such prior liens to the extent that they might be outstanding at the time of the sale in the said decree provided for, with interest then accrued on the sums of money secured thereby, the said premises must be sold, as afterwards directed by the said decree, and that there was a default on the part of the said railroad company in the payment of the installments of interest upon the bonds issued under the said deed of trust to the complainants, due and payable according to the tenor thereof on the first day of October, one thousand eight hundred and seventy-four, and on the first day of April, one thousand eight hundred and seventy-five, and that since the last-named date no part of such interest had been paid, and that the amount of such interest which had become and remained due and payable was, at the date of the said decree, the sum of one million nine hundred and thirty-two thousand six hundred and eighty-seven dollars and seventy-five cents, and that the mortgaged premises could not be sold in parcels without loss and prejudice to all parties interested therein, and that the nature and situation of the property was such that the interest of all parties required that it should be sold as an entirety. And it was in and by the said decree further ordered and decreed that the board of public works, or the state of Virginia, defendants in the said cause, pay into the registry of the said court, on or before the second Tuesday of

January next, after the making of said decree, the amount of the debt ascertained and declared to be due as aforesaid from the said railroad company to the complainants in the said cause, and such further sum as might become due in the meantime for interest upon the bonds secured by the said deed of trust; and that in default thereof the said board of public works and the state of Virginia be forever barred and foreclosed of and from all claim, lien, and equity of redemption of, in, or to the property and franchises embraced in or covered by the said deed of trust; and that the said defendant the Atlantic, Mississippi and Ohio Railroad Company pay into the registry of the said court, on or before the said second Tuesday of January then next, the amount ascertained and declared to be due by the said railroad company to the said complainants as aforesaid, under the said deed of trust, together with the costs of the said cause; and that, unless payment should be made by the said board of public works, the state of Virginia, or the said railroad company, as so provided in the said decree, all and singular the property and franchises of every kind described in the third paragraph of the said decree be sold by a master to be specially appointed for that purpose, subject to the amount of the prior liens and incumbrances found and stated in the fourth paragraph of the said decree, as the same might exist at the time of the sale, and subject also to all executory contracts made by the receivers in the said cause under the authority of the said court (of which the said receivers were directed to give the master, on his request, a full and accurate statement, and which contracts, if any, should be publicly announced by the master at the time of sale), and subject also to any liability that might be thereafter established against the said receivers growing out of any lawful acts done by them in their capacity of receivers, and that such liabilities, if any, would remain a lien upon the said premises until discharged. And it was further provided in the said decree that such sale (unless stayed by such payment as aforesaid) should be made at some convenient place in the city of Richmond, to be designated by the master; that he give notice of the time and place of sale by an advertisement thereof to be inserted once in each week for not less than ninety days before the sale in a newspaper published in each of the cities of Norfolk, Petersburg, Lynchburg, Richmond, and Goodson, in the state of Virginia, and in the city of Baltimore, in the state of Maryland, in the city of Philadelphia, in the state of Pennsylvania, in the city of New York, in the state of New York, in the city of Boston, in the state of Massachusetts, in the city of London, England, and once in each month for the same period in one newspaper published in each of the cities of Amsterdam and Groningen, in the kingdom of the Netherlands; that the master should also serve written notice to the like effect upon the attorney general of the state of Virginia, and the board of public works of the said state, at least ninety days before the sale; that the master should sell the premises by the said decree directed to be sold to the highest bidder, and that he should require such bidder, before making an adjudication to him, to pay in cash the sum of one hundred thousand dollars, and, if the sale be confirmed by the court, that the balance of the purchase money, as provided in the said decree, must be paid within thirty days, but that the purchaser should have the right to anticipate the day of payment; that the master report the sale and proceedings under the said decree to the said court with all convenient speed, and give notice thereof to the said complainants' solicitors, and that they might present said report to the said court on thirty days' notice to the purchaser and the defendants' solicitors in the same cause; that if, on presentation and consideration of the said report of sale, which should be at a stated or special term, sitting in open court, the court should confirm the sale, the said complainants' solicitors must forthwith prepare and submit to the court a draft deed of conveyance from the master to the purchaser, and that upon the settlement of the form thereof, and upon due compliance with the terms of sale by the purchaser, the master must execute and deliver such deed of conveyance to the purchaser; and that the purchaser or his successor or successors in interest would then and thereupon be let into possession of the premises; and that the purchaser would also at the same time be entitled to receive all books, maps, plans, papers, records, and documents of the said defend-

ant company, and of the several divisional companies in the said decree mentioned, and relating to all extension or branch roads of the said companies, and of the receivers, relating and appertaining to the franchises and property in question, and would likewise be entitled to receive, by way of further protection to the title, a transfer of all shares of the capital stock of the several divisional companies in said decree mentioned which were owned or held by the Atlantic, Mississippi and Ohio Railroad Company at the time of the filing of the original bill of complaint in said court; and that such purchaser would likewise be entitled to receive, by way of further protection to the title, the bonds mentioned in the nineteenth paragraph of the said decree. And it was, among other things, further adjudged and decreed in and by the said decree that, by the sale and conveyance to be made as aforesaid of the property and franchises so decreed to be sold by said master, the defendants in the said action, and each and every of them, including the state of Virginia and the board of public works of the said state, and all persons claiming under them, or any of them, subsequently to the commencement of the said action, should be absolutely and forever barred and foreclosed of and from all estate, right, lien, claim, and equity of redemption of, in, or to, or in respect of, said property and franchises so sold and conveyed, and each and every part thereof, as by the said decree will, reference thereto being had, more fully and at large appear.

"And whereas, the said board of public works, the state of Virginia, and the said railroad company made default in the payment of the sums required to be paid by them as aforesaid by the said decree, and by an order of the said circuit court made in the said cause on the fourth day of June, eighteen hundred and eighty, the party thereto of the first part was specially appointed a master to make the sale directed to be made by the said decree, and he having designated the north front door of the custom house of the United States, in the city of Richmond, Virginia, to be a convenient place for the making of such sale, and having given public and other notice of the time and place of such sales as required by the said decree, he did, on the tenth day of February, in the year eighteen hundred and eighty-one, at twelve o'clock at noon of that day, and at the said door of the United States custom house, sell at public auction, in pursuance of the said decree, the premises, property, and franchises as therein directed to be sold; and at such sale the said premises were knocked down for the sum of eight million six hundred and five thousand dollars (8,605,000), to Clarence H. Clark, of Philadelphia, he having bid for the said premises, property, and franchises for and on behalf of himself and associates, intending to have the same conveyed to a corporation to be created and named in the conveyance thereof, in accordance with the statutes of the state of Virginia, by which it is provided that if a sale be made under a deed of trust or mortgage executed by a company on all its works and property, or under a decree of a court having competent jurisdiction, and there be a conveyance pursuant thereto, such sale and conveyance pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may after that time, and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it; and that, upon such conveyance to the purchaser, the said company shall ipso facto be dissolved, and that said purchaser shall forthwith be a corporation by any name which may be set forth in the said conveyance, or in any writing signed by him, and recorded in the court in which the conveyance shall be recorded; and that the corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights, and privileges, and perform all such duties, as would have been had or should have been performed by the first company but for such sale and conveyance, save only that the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of or claims against the first company which may not be expressly assumed in the contract of purchase; and that the whole profit of the business done by such corporation shall belong to the said purchaser and his assigns; and that his interest in the corporation shall be personal estate, and he or his assigns

may create so many shares of stock therein as he or they may think proper, not exceeding together the amount of stock in the first company at the time of sale, and assign the same in a book to be kept for that purpose.

"And whereas, the said Clarence H. Clark did, in accordance with the said decree, pay as a deposit the sum of one hundred thousand dollars at the time when the said premises, property, and franchises were knocked down.

"And whereas, it has been declared by the said Clarence H. Clark that the name of the corporation created as aforesaid shall be the Norfolk and Western Railroad Company, and it is accordingly set forth in this conveyance by that name.

"And whereas, it has been urged by said Clark and his associates that the corporation named as aforesaid, to wit, the Norfolk and Western Railroad Company, should be designated as the corporation to whom the conveyance should be made under and in pursuance of the statutes of the state of Virginia hereinbefore mentioned or referred to; that the said Clarence H. Clark should provide and furnish, and pay and satisfy, in pursuance of the requirements of the decree, the unpaid residue of the purchase money agreed to be paid for said premises upon the bid and purchase made at the master's sale aforesaid; and that, in consideration thereof and of such designation as aforesaid of the said Norfolk and Western Railroad Company, the said corporation thus formed under the title of the Norfolk and Western Railroad Company should deliver to the said Clarence H. Clark, of Philadelphia, the following described securities, that is to say: Certain general mortgage bonds of the said Norfolk and Western Railroad Company to the aggregate amount of five million three hundred and sixty-three thousand dollars (\$5,363,000), bearing interest as agreed, secured by a mortgage or deed of trust covering the premises, property, and franchises so purchased, made to the Fidelity Insurance, Trust and Safe-Deposit Company of Philadelphia as trustee, also one hundred and fifty thousand shares of full-paid and unassessable preferred six per cent. capital stock of the Norfolk and Western Railroad Company, and also thirty thousand shares of full-paid and unassessable common capital stock of the Norfolk and Western Railroad Company; that general mortgage bonds of the said Norfolk and Western Railroad Company to the aggregate amount of five million one hundred and thirty-seven thousand dollars (\$5,137,000) should be reserved by the company, and used only for the purpose of retiring, paying, purchasing, and satisfying the nonexisting divisional securities, having lien or security upon divisions or portions of the property, roads, and franchises hereby conveyed, and the general mortgage bonds of the said Norfolk and Western Railroad Company to the aggregate of five hundred thousand dollars (\$500,000) should be retained in the treasury of the Norfolk and Western Railroad Company, the several mortgage bonds thus to be issued and delivered by the said Norfolk and Western Railroad Company to be a charge and be mortgage liens upon all and singular the premises, property, and franchises hereby conveyed to the said Norfolk and Western Railroad Company by the master, in accordance with the tenor and effect of the said several bonds and the mortgage or deed of trust so to be given for securing the same, and upon the terms and conditions specified in said mortgage.

"And whereas, the said master made his report to the said court of the sale made by him as aforesaid, and of the proceedings under the decree, and gave notice of said report to the said complainants' solicitors as required by the said decree, and they having first given such notice to the purchaser and to the defendants' solicitor, in the said cause, as is prescribed by the said decree to be given to the purchaser, and the complainants' solicitors afterwards, and on the fourth day of April, in the year one thousand eight hundred and eighty-one, presented the said report of the sale and of other matters aforesaid to the said court, sitting in open court, at a stated term thereof, held at the United States circuit court room in the city of Richmond; and thereupon the said court, upon consideration of the said report, and with the assent of the said Clarence H. Clark, by an order made in the said cause on the said last-mentioned day, confirmed the said report, and the said sale so as aforesaid made by the said master, and further ordered and directed that, upon the terms of the sale made by said master being com-

plied with by payment of the unpaid residue of the purchase money, the said Norfolk & Western Railroad Company be deemed the purchaser of said premises, property, and franchises sold by said master under said decree, and that said master thereupon, and upon the form of the deed being duly approved, convey said premises, property, and franchises to the Norfolk and Western Railroad Company, as purchaser thereof.

"And whereas, the complainants' solicitors thereupon forthwith, in pursuance of the said decree, prepared and submitted to the court a draft deed of conveyance from the master to the Norfolk and Western Railroad Company, as such purchaser, and the same has been settled and approved in the form and tenor of this indenture.

"And whereas, the terms of the said sale made by the master have been duly complied with on the part of the purchaser from him, and the said Clarence H. Clark of Philadelphia, by becoming party hereto, declares that this conveyance of the Norfolk and Western Railroad Company is made by his appointment, at his request, and with his approval:

"Now, therefore, this indenture witnesseth, that the said party of the first part, in order to carry into effect the said sale so made by him as aforesaid in pursuance of the aforesaid order made by the court on the fourth day of April, eighteen hundred and eighty-one, and also in consideration of the premises and of the said sum of eight million six hundred and five thousand dollars (\$8,605,000), the money so bidden as aforesaid at the auction sale made by said master being first duly paid as ordered and directed by the court, the receipt of which is hereby acknowledged, hath granted, bargained, sold, and conveyed, and doth hereby grant, bargain, sell, and convey, unto the said Norfolk and Western Railroad Company, party of the third part, that being the name and corporate title of the purchaser set forth in this conveyance in pursuance of the statute of the state of Virginia in that behalf, and to the successors and assigns of the said Norfolk and Western Railroad Company forever, all and singular the premises directed to be sold by the said decree, being the franchises and property conveyed by the said decree of trust of September 9th, eighteen hundred and seventy-one, to the complainants in the said cause by the Atlantic, Mississippi and Ohio Railroad Company by way of deed of trust or mortgage, and which are described as near as may be in the third paragraph of the said decree, as follows, that is to say: All the right, title, and interest of the said Atlantic, Mississippi and Ohio Railroad Company in and to the franchises of the said company, its entire line of railroad then constructed or thereafter to be constructed, in fact extending from Norfolk, in the state of Virginia, to Cumberland Gap, in the state of Kentucky, together with all branches of the said line of railroad then constructed or thereafter to be constructed, with the tolls, incomes, rents, issues, and profits thereof, and all real estate, rights of way, easements, fixtures, rolling stock and machinery, tools and equipments, and all other personal property thereto belonging, and all property, real, personal, or mixed, and all corporate powers and franchises belonging or appertaining to the said Atlantic, Mississippi and Ohio Railroad Company then possessed by the said company, or thereafter to be acquired by the said company, including everything contained in the inventory of the receivers in the said cause, and not heretofore disposed of in the business of managing the said property and running the said road, and including also all additions to the said property and premises made by the said receivers; and also all railroad supplies which the said receivers had on hand at the time of said sale, or acquired thereafter before the delivery of the possession of the premises hereby granted to the said party of the third part, in so far as the same still remains unconsumed and in their possession or control; and including all the properties, franchises, rights, privileges, and things whatsoever which by the said decree were directed to be included in the sale made by the master thereunder; to have and to hold, all and singular, and premises, properties, franchises, rights, privileges, and things above mentioned and described, and hereby conveyed, or intended so to be, unto the said party of the third part, and its successors and assigns, forever, subject, nevertheless, to the liens upon the said premises prior to the said deed of trust of September 9th, 1871, as ascertained by the said decree, and existing at the time

of the said sale and of this conveyance, and subject also to all existing contracts made by the said receivers under the authority of the said court, a statement of which has been given by them to the said master, and appears by the said report of sale, and to all such contracts made by said receivers since the date of said sale, said road since the date of said sale having been run, and said property operated and managed, by the receivers, on account of and for the benefit of the purchasers, and subject also to any liability established, or that may be hereafter established, against the said receivers, growing out of any acts done by them in their capacity of receivers, and all the foregoing liabilities on contract or otherwise shall be and remain a lien on said premises till the same are duly discharged.

"In witness whereof, the said party of the first part, as such master in chancery, hath hereto set his hand and seal, the day and year first above written; and the said Clarence H. Clark also sets his hand and seal hereto, as naming the Norfolk and Western Railroad Company as the corporation to whom the conveyance is to be made, and as declaring that the conveyance is so made by his appointment, at his request and with his approval.

_____, [Seal.]

_____, [Seal.]

"Sealed and delivered in the presence of _____."

And, the said draft deed of conveyance having been duly considered by this court, the same is now, and hereby, settled and approved. And it is hereby further ordered, adjudged, and decreed that the said master, Mathew F. Pleasants, when and so soon as the balance of said purchase money mentioned in said report of sale shall have been paid as hereinafter provided, shall make, execute, and deliver a deed of conveyance in the form aforesaid to the Norfolk and Western Railroad Company, being the name of the corporation designated as purchaser by said Clark, to whom said property was sold, as set forth in said draft deed of conveyance. And it is further ordered that the purchaser, on or before the 3d day of May, 1881, pay the balance of said purchase money over and above the one hundred thousand dollars paid at the time said property was bid off at said sale, as follows, to wit: Five millions of dollars thereof into the Union Trust Company, of the city of New York, subject to the order of this court in this cause; and three million two hundred dollars thereof into the Fidelity Insurance, Trust and Safe-Deposit Company of Philadelphia, subject to the order of this court in this cause; and the remainder of said purchase money (except the one hundred thousand dollars now deposited in the Planters' National Bank of Richmond), amounting to three hundred and five thousand dollars, shall be paid by the purchaser into the National Exchange Bank of Norfolk, Virginia, subject to the order of this court in this cause; and the said purchaser shall take duplicate certificates of deposit of said trust companies and of said National Exchange Bank of Norfolk, and deliver the same to the said master, who shall safely keep one set, and deliver the same into this court, and the other set said master shall deliver to the complainants' solicitors. And it is further ordered that upon the delivery as aforesaid of said duplicate certificates to the said master for the whole amount of said purchase money, to wit, for the sum of eight million six hundred and five thousand dollars, less one hundred thousand dollars now deposited in the Planters' National Bank of Richmond, the said master forthwith execute and deliver said deed to the purchaser; and thereupon the possession of the premises and property set out in said decree and report of sale shall vest in the Norfolk and Western Railroad Company, the grantee named by said Clarence H. Clark, who was the highest bidder at said sale, as the corporation to which said conveyance should be made; and the receivers shall thereupon hand over and deliver the said premises and property to the said Norfolk and Western Railroad Company.

Hugh L. Bond, Circuit Judge.

Richmond, April 4, 1881.

Ro. W. Hughes, District Judge.

Decree for Payment of Complainants' Claim.

Upon reading and filing the special report of Charles L. Perkins and M. F. Pleasants, master, bearing date this day, showing the amount of bonds

and coupons outstanding secured by the mortgage or deed of trust to the complainant mentioned in the final decree herein, and by whom the same are held as far as ascertained by them, and the amounts due for principal and interest thereon to this date, it is, on motion of the complainants' solicitors, ordered: That ninety-five per cent. of the principal of said bonds, and the entire amount of the interest accrued thereon since the 1st day of April, 1881, to the 3d day of May, 1881, and the entire amount due upon the coupons and interest thereon to the 3d day of May, 1881, as stated in said report, be paid at once out of the purchase money this day paid into court by the purchasers; and that Charles L. Perkins be, and he is hereby, appointed a special master to superintend such payment, and to receive and cancel the said coupons as paid, and to stamp upon said bonds the said payment of ninety-five per cent. when made. That upon delivery to said master for cancellation of the coupons, and upon presentation to him of the bonds held by it, as stated in said report, the Union Trust Company of New York, out of the moneys held by it subject to the order of the court in this cause, apply and pay to the owners of said bonds and coupons, respectively, ninety-five per cent. of the principal of said bonds held by it, to wit, 5,452 bonds, of one thousand dollars each, and the entire amount of the interest accrued thereon, from the 1st day of April, 1881, to the third day of May, 1881, and also the entire amount due for principal and interest to the third day of May, 1881, upon said coupons held by it as stated in said report; and thereupon the said master receive and cancel said coupons as paid, and deposit the same in the office of the clerk of this court at Richmond, and stamp upon each of said bonds the following words: "Ninety-five per cent. of the principal, and all the interest due upon this bond, paid this — day of —, 188—, by the order of the United States circuit court for the Eastern district of Virginia, dated May 3d, 1881, in the suit of Barlow and Duncan, surviving trustees, against the Atlantic, Mississippi and Ohio Railroad Company and others. Charles L. Perkins, Special Master." That in like manner, upon the delivery to said master for cancellation by the several firms of Morton, Bliss & Co., Clarke, Post & Martin, and Knauth, Nachod & Kuhne, of the coupons held by those firms, respectively, as shown by said report, at the office of said Union Trust Company, and upon the written order and direction of the said master, the Union Trust Company, out of the moneys held by it subject to the order of the court in this cause, pay to said firms, respectively, the entire amount due for principal and interest to the third day of May, 1881, upon the said coupons held by the said firms respectively, as stated in said report, amounting to the sum of \$18,300.52 to said Morton, Bliss & Co., \$21,911.41 to said Clarke, Post & Martin, \$44.70 to said Knauth, Nachod & Kuhne; and that said master cancel and deposit said coupons as the same are paid in like manner as directed in the case of those held by the Union Trust Company. And it is further ordered that the said Charles L. Perkins, as special master, give the public notice by advertisement to be inserted in such newspapers, and for such periods as he shall deem advisable, that the owners and holders of the other bonds and coupons outstanding secured by said mortgage or deed of trust are required to present the same for payment to him at his office in the city of New York, and that interest on the same has this day ceased; and it is further ordered that upon the presentation to said master of such outstanding bonds for stamping, and of such outstanding coupons for cancellation, at the office of the Union Trust Company, the said company, upon the written order and direction of said master, pay to the owners and holders thereof, respectively, ninety-five per cent. of the principal of said bonds, and all the interest accrued thereon from the 1st day of April, 1881, to the 3d day of May, 1881, and stamp the same upon said bonds as aforesaid, and the entire amount due for principal and interest upon said coupons to the 3d day of May, 1881, and cut off and cancel the same in the manner hereinbefore directed in respect to the other coupons. And it is further ordered that, to enable the Union Trust Company to make the said payments, the complainants' solicitors take and deliver forthwith to said trust company the certificates of deposit this day paid into court, viz. five millions of dollars issued by the said trust company, and three million two hundred dollars issued by the Fidelity Insurance, Trust

and Safe-Deposit Company of Philadelphia, all of which have been made payable to said Union Trust Company, to be held by it subject to the order of this court in this cause, and take from the said Union Trust Company a proper certificate therefor.

Norfolk, May 3, 1881.

Hugh L. Bond, Circuit Judge.
Ro. W. Hughes, District Judge.

Decree for Compensation of Mortgage Trustees.

Upon further consideration of the petition of the plaintiffs, trustees, praying for an allowance, &c., filed the 3d day of May, 1881, it is ordered by the court that a commission of two per cent. upon the amount of the sale of the property and franchises of the defendant company be, and the same is hereby, allowed to them in full payment of all their expenses, disbursements, and services in the conduct of this suit, out of which sum thus allowed a reasonable and proper fee is to be paid to M. F. Pleasants, Esq., master, who made said sale; and the said allowance is to be credited by the sum of one hundred thousand dollars already paid to said trustees under former orders of this court. And it is further ordered that the Union Trust Company of New York, upon presentation of a certified copy of this order, do pay to W. D. Shipman, Esq., solicitor for the surviving trustees, plaintiffs, &c., the sum of seventy-two thousand and ten dollars (\$72,010).

Hugh L. Bond, Circuit Judge.
Ro. W. Hughes, District Judge.

Richmond, June 2, 1881.

Decree Distributing Balance in Court after Satisfaction of the Mortgage Debt.

And now, March 13, 1882, this cause came on to be heard on motion for transfer of balance of funds in hands of the receivers February 10, 1881, and the distribution of balance of proceeds of sale of the mortgaged premises; and it appearing by the report of Charles L. Perkins, special master, that the remaining bonds mentioned in the report of M. F. Pleasants and Charles L. Perkins, special masters, filed May 3, 1881, to wit, \$273,550, with interest thereon at the rate of three per cent. from the 3d day of May, 1881, to wit, \$4,445.19, have been paid out of the purchase money heretofore paid into court by the purchaser, under the direction of said Charles L. Perkins, special master, except one bond and certain coupons which are still outstanding; and it also appearing that the purchase of the claim of the state of Virginia secured by the mortgage dated December 22, 1870, by the Norfolk and Western Railroad Company, has been ratified by the general assembly of the said commonwealth; and the Norfolk and Western Railroad Company, claimant of the said funds in the hands of the receivers as purchaser under the terms of the decree and deed of conveyance, and whose right thereto was reserved by the terms of the decree of May 3, 1881, and also as assignee of the claim of the state of Virginia of its claim secured by the mortgage of December 22, 1870, consenting to this decree; and it further appearing that many of the owners of the claims for labor and supplies are resident upon the line of the said Norfolk and Western Railroad, and that said company is the owner by assignment of a majority of the said claims, and is entitled, either as purchaser of mortgaged premises at the sale of February 10, 1881, or as assignee of the claim of the state of Virginia, to the surplus, if any, of the proceeds of sale, and of the net earnings in the hands of the receivers: It is therefore ordered, adjudged, and decreed that the balance of the said proceeds of sale, and the funds in the hands of the receivers, including the special deposit of forty-five thousand dollars in the Exchange National Bank of Norfolk, together with all the accretions of interest, be paid over to said Norfolk and Western Railroad Company, upon the special trust, however, that out of the said funds the said Norfolk and Western Railroad Company shall and will pay the principal of mortgage bond No. 2,652, and all outstanding coupons mentioned in the report of Charles L. Perkins and M. F. Pleasants, as special masters, of May 3, 1881, with interest to May 3, 1881, upon presentation, and shall and will also pay to the lawful owners and holders of claims for labor and supplies the principal of said claims, with interest to the 6th day of June, 1876, in full settlement and discharge thereof; and John S. Wise is hereby appointed special master commissioner to superintend the

payment of said claims, and his certificate of approval shall be a sufficient warrant for such payment; but in case of dispute as to the validity of a claim which shall be presented, or as to the title of the holder, the same may be brought to the attention of the court summarily by motion, jurisdiction of the cause being hereby specially retained for that purpose, and the surplus, if any, shall be taken and received by the Norfolk and Western Railroad Company on account of its claims as assignee of the commonwealth of Virginia, or of labor and supply claims, or as purchasers. And it is further ordered that the clerk of this court do check upon the Exchange National Bank of Norfolk, in favor of the Norfolk and Western Railroad Company, for the sum of two hundred and forty-five thousand two hundred and six 44/100 dollars, upon the Union Trust Company for the sum of twenty-nine thousand nine hundred and twenty-four 87/100 dollars; and that the receivers do pay over to the Norfolk and Western Railroad Company the balance of the funds in their hands after the deduction of the allowances this day made.

Norfolk, March 18, 1882.

Hugh L. Bond, Circuit Judge.
Ro. W. Hughes, District Judge.

Decree Discharging Receivers.

This cause came on again this day to be heard, and it appearing to the court that Charles L. Perkins and Henry Fink, who, by the order and decree of this court, entered herein on the — day of July, 1876, were jointly appointed receivers in this cause, have fully discharged to the satisfaction of the court all and singular the duties enjoined upon them as such receivers by the said order and decree, and all subsequent orders and decrees herein entered, and that their accounts down to this time have been duly allowed by M. F. Pleasants, Esq., master, to whom the same were referred, which said accounts have been approved and confirmed by the court; and it further appearing that they have turned over and delivered up all the property and moneys in their possession and custody as such receivers, as required by the final decree and subsequent orders entered in this cause: Now, on motion of Legh R. Page, Esq., counsel for said receivers, it is ordered, adjudged, and decreed that the said receivers, and each of them, be, and they are hereby, finally discharged from their said receivership, and from all accountability and liability as such receivers; and it is further ordered and decreed that the bonds given and filed by said receivers, severally, for the faithful discharge of their duties in the premises respectively, to wit, the bond of the said Charles L. Perkins, executed on the 8th day of June, 1876, with Richard T. Wilson and Edward Cooper as his securities, filed and approved by the court on the 12th day of June, 1876, and the bond of the said Henry Fink, executed on the 7th day of June, 1876, with Thomas L. Bocock and Charles W. Statham as his securities, filed and approved by the court June 12, 1876, be, and the same are hereby, vacated and annulled; and the clerk of this court is hereby directed to deliver up the said bonds to the said receivers, respectively, for cancellation.

Richmond, March 17, 1882.

Hugh L. Bond, Circuit Judge.
Ro. W. Hughes, District Judge.

THE M. F. PARKER.¹

(District Court, E. D. Virginia. July 24, 1880.)

ESTOPPEL.—REPAIRING VESSEL.—STATEMENT AS TO COST.

One desiring to buy a vessel asked a ship carpenter for an estimate of what he would charge for putting her in thorough repair, and was told the cost would be \$150. On the faith of this statement he bought the vessel for \$315. When the repairs were completed, the ship car-

¹ This case has been heretofore reported in 5 Hughes, 191, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

penter presented a bill which, excluding extra work specially agreed upon, amounted to about \$300. *Held* that, while there was no express contract that the work should be done for \$150, yet, under the circumstances, the repairer should be held estopped to claim more than the original estimate.

The evidence shows the following case:

The schooner was about to be sold. The present owner, Parker, got Seed, one of the libeling firm, to examine the vessel, and let him know what he could put her in good sailing condition for. Seed went upon the vessel, made the examination, and reported to Parker that the cost would be \$150. Afterwards Parker asked Seed to make another examination, and say what he could put the vessel in good condition for. Seed again reported that it would cost \$150. Parker then bought the vessel at the price of \$315. After doing so, he brought her to libelants' shipyard, and ordered them to put her in condition, but again asked what the cost would be, and was again told that it would be \$150. On this occasion, Parker called Rowley, a witness, up, and said, "I want you to witness that Seed is to do this work for \$150." Rowley testified that Seed said in reply, "I would rather do it by the day's work," and pointed to another vessel at or near his yard, saying, "That is my last piece of job work." He said, however, to Parker, "If it comes to less than \$150, done by the day's work, you shall have the benefit of it." Parker insists in his testimony that it was the understanding that the work was to be done by the job for \$150. After the work was completed, Seed presented a bill for \$356.22, which Parker refused to pay. It is in evidence that, while the work was going on, Seed said to Parker, who was often about the vessel, that "the bill would run a little over." There is no proof that any other work was done than was contemplated at the beginning, except some extra ironing and work incidental thereto, part of the iron for which was furnished by Parker; and it is admitted that the extra work, if it had been wholly done by Seed, was worth not more than \$50 or \$60. Otherwise, the libelants produced no evidence affording any explanation of the discrepancy between their estimate of \$150 furnished to Parker before the work was undertaken and their bill for \$356.22, or 133 per cent. greater, given after it was done. The owner, Parker, showed payments to the amount of \$56.45, which are to be credited on the bill of the libelants. After the libelants presented their bill to Parker, he offered to compromise by allowing \$60 in addition to the estimated \$150,—that is to say, to pay \$210; but the offer was rejected, and the vessel was libeled for the whole sum of \$356.22.

Starke & Martin, for libelants.

Sharp & Hughes, for respondent.

HUGHES, District Judge. I think that it is pretty clear from the evidence that Parker thought the job was to be done for \$150, and that Seed thought it was to be done by the job. As the minds of the two did not meet, I cannot treat the case as one of contract for the specific sum of \$150. Nor do I feel at liberty to treat the claim of the libelants as one purely of quantum meruit or quantum valebat. A vessel worth \$300 was about to be sold. A man ignorant of the cost of putting her in a proper state of repair, and thinking of buying her, applied to a firm who were in the habit of undertaking and executing such work, not merely for an opinion as to what it would cost to make the repairs, but for an estimate of what they themselves would make the repairs for. The firm gave that estimate. Thereupon the vessel was purchased,—purchased, of course, on the hypothesis that it would cost, when ready for service, \$450. The men who made the estimate were then employed to do the work, and, without offering any proof to explain the discrepancy, a bill was, in

course of time, presented for \$356; so that the purchaser found the cost of the vessel to be \$656, not much less than double what he expected it to be when he made his investment in that piece of property. Now, a property which might be desirable and profitable at a cost of \$450 might be very undesirable and very unprofitable at a cost of nearly double that amount; and Mr. Seed, an expert in the building and repairing of vessels, has probably subjected Mr. Parker to serious pecuniary inconvenience and loss, either in first misleading him by a false estimate of the cost of repairing his vessel, or else in charging him more than double the amount which the repairs ought to have cost. It seems to me that this is a claim contrary to equity and good conscience. If it is not a case in every technical particular of estoppel in equity, or estoppel in pais, which I think it is, it is a case presenting too strong an equity in behalf of the owner of the vessel to be disregarded by the court. If any reasonable explanation had been given by the libelants of the excess of their present claim over their previous estimate, the duty of the court to allow the claim might have been made clear, but none is given or attempted. The court is reduced to the dilemma of treating the estimate as the result of gross and injurious negligence or misrepresentation, or else of treating the claim exhibited with the libel as grossly excessive. I feel bound to hold the libelants to their estimate, with a liberal allowance for the extra work, which I will put at \$60. A decree may be taken for \$210, less the \$56.45 before mentioned; each party to pay his own costs.

In re WESSON.¹

(District Court, E. D. Virginia. May, 1881.)

BANKRUPTCY—DISCHARGE—FAILURE TO PLEAD.

A discharge in bankruptcy must be pleaded affirmatively in a proceeding by scire facias to revive a judgment as well as in an original suit, and the failure of the bankrupt to appear and set up his discharge in such a proceeding deprives him of the benefit thereof.

In Bankruptcy.

This was a petition filed by a discharged bankrupt to enjoin the sheriff from proceeding under an execution issued on a judgment recovered in a state court just prior to the filing of the petition in bankruptcy, and which, after becoming dormant, was revived by scire facias. The writ of scire facias had been served on the defendant, but he entered no appearance or defense.

HUGHES, District Judge. A discharge in bankruptcy must be pleaded affirmatively, just as infancy, coverture, or any other special defense to a debt must be pleaded. This is not only so, as to an original suit on a bond or other obligation, but it is so as to any subsequent proceeding to revive a judgment. The bankrupt in this case,

¹ This case has been heretofore reported in 4 Hughes, 522, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

having neglected and failed to enter the plea of bankruptcy in the proceeding for revival, or to suggest his bankruptcy in the original suit, has, as to King's judgment against him, lost by his own laches the benefit of his discharge in bankruptcy, and the judgment on scire facias, as well as the lien of the fieri facias, is good against him. Courts cannot be expected to help those who sleep on their rights. The injunction must be denied.

UNITED STATES v. ONE PACKAGE OF DISTILLED SPIRITS.

(District Court, S. D. Illinois. April 4, 1898.)

1. INTERNAL REVENUE—POWER OF COMMISSIONER.

Rev. St. § 3249, which provides that the commissioner of internal revenue may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking, and gauging of spirits, does not empower the commissioner to require an additional mark upon a package of distilled spirits in the event of a reduction in proof or volume, so as to make the absence of it a forfeitable offense under Rev. St. § 3289, as not "having thereon such mark and stamp required therefor by law," where the statutes neither prohibit such reduction nor provide for any additional marks in the event it is so reduced.

2. SAME—EVIDENCE.

Mere evidence that the contents as to volume and proof does not conform to the volume and proof as marked on the package, without more, fails to make a prima facie case for seizure or forfeiture.

J. Otis Humphrey, U. S. Dist. Atty.

W. M. Hough, Stuart Brown, and Logan Hay, for claimant.

ALLEN, District Judge. A proceeding to forfeit a package of distilled spirits, under section 3289, Rev. St. U. S., as not "having thereon each mark and stamp required therefor by law." The package in question bore stamps and marks indicating that it was entered into bond December 23, 1891, containing 48 wine gallons of 100 per cent. proof; was withdrawn, and tax paid, April 2, 1896, containing 36½ wine gallons of 107 proof; and, being gauged by a revenue officer at Cairo, Ill., in December, 1896, and found to contain 33½ wine gallons of 101 per cent. proof, was seized for forfeiture. The plaintiff proved these facts, and introduced evidence tending further to show that the change between the condition of the spirits at the time of tax payment and its condition at the time of seizure could not have occurred from natural causes alone, but witnesses for the plaintiff testified on cross-examination that the change could have been occasioned by the addition of about two gallons of water, after allowing for an evaporation of about three gallons of spirits and a loss of a gallon and a half by leakage or removal. Plaintiff further introduced in evidence a regulation of the commissioner of internal revenue to the effect that distillers or wholesale liquor dealers may reduce to their original proof, by the addition of distilled water, such distilled spirits as have increased in proof in the distillery warehouse, provided they do so in the presence of a United States gauger, and put a mark upon the stamp head of the package, indicating that it had been so reduced. With the further evidence that no such mark appeared upon the cask in question, the plaintiff rested. Thereupon the claim-

ant demurred to the evidence, moved that the information be dismissed, and the package ordered released to him. The demurrer raised the question whether evidence alone of a diminution in volume or proof of distilled spirits in a cask which had originally been properly tax paid, marked, and stamped, and which still retains all the original marks and stamps, is sufficient to make a *prima facie* case for forfeiture.

In quite a line of decisions the courts of the United States have held that the addition of water or sugar to a package of distilled spirits on which the tax has been properly paid (either of which will have the effect to reduce the proof of the spirits) is no violation of law, and does not work a forfeiture of the spirits. *U. S. v. Thirty-Two Barrels Distilled Spirits*, 5 Fed. 188; *Three Packages of Distilled Spirits*, 14 Fed. 569; *U. S. v. Bardenheier*, 49 Fed. 846; *U. S. v. Sixty-Four Packages of Distilled Spirits*, 51 Fed. 191; *U. S. v. Fourteen Packages Distilled Spirits*, 14 C. C. A. 220, 66 Fed. 984. Witnesses have testified that there is a continuing variation in both the volume and proof of spirits, from the marks and stamps upon the package, resulting alone from evaporation and lapse of time. In seeking a forfeiture, therefore, not upon direct evidence of an alleged act, but upon proof of a condition, a condition must be shown which could not have occurred by natural causes or by legal means; in other words, the government should negative every presumption of legality. The rules of evidence apply as well to the government as to other plaintiffs, with the exception that under certain conditions the burden is upon the claimant to prove that the tax has been paid on distilled spirits. That burden was removed in this case by the allegations of the information on that point, and a condition once proven is presumed to continue until evidence to the contrary. Since it was in evidence that the condition of the spirits at the time of seizure, as to volume and proof, might have been occasioned by means heretofore declared by the courts to be lawful, and all the original stamps and marks are still upon the package, no *prima facie* case was made, unless there is required by law some additional mark or stamp whenever the proof of spirits is so reduced as aforesaid. The district attorney insists that the mark required by the regulation of the commissioner of internal revenue hereinbefore referred to is such a mark. Section 3287, Rev. St. U. S., prescribes the marks and stamps which shall be placed upon a cask or package of distilled spirits at the time of manufacture and entry into the distillery warehouse, and section 3295 prescribes the stamps and marks which shall be placed upon the package at the time of its withdrawal and tax payment. Section 3249 defines proof spirits, and the latter part of this section is relied upon by the district attorney as authority for the regulation of the commissioner above referred to. It reads as follows:

"And for the prevention and detection of frauds by distillers of spirits, the commissioner of internal revenue may prescribe for use such hydrometers, saccharometers, weighing and gauging instruments, or other means for ascertaining the quantity, gravity and producing capacity of any mash, wort or beer used, or to be used, in the production of distilled spirits, and the strength and quality of spirits subject to tax, and he may deem necessary; and he may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking and gauging of spirits."

In the case of *U. S. v. Two Hundred Barrels of Whisky*, 95 U. S. 571, the supreme court of the United States held that the regulations of the department could not have the effect of amending the laws; that they might aid in carrying the law, as it exists, into execution, but they cannot change its positive provisions. In the case of *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, which was a proceeding based upon the regulation of the commissioner of internal revenue with respect to the sale of oleomargarine, the supreme court held that the department could not, by regulations, alter or amend a revenue law, and all the commissioner could do, under the authority conferred by statute, was to regulate the mode of carrying into effect what congress had indicated; and that it would be a very dangerous principle to hold that a thing prescribed by a commissioner of internal revenue as a needful regulation to carry into effect acts of congress could be construed as a thing "required by law" in such manner as to make a failure to observe such regulation a criminal offense. "Regulations prescribed by the president and by the heads of departments under authority granted by congress may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense." The doctrine announced in these cases was followed in the case of *U. S. v. Three Barrels of Whisky*, 77 Fed. 963, which was a suit for forfeiture based upon a regulation of the commissioner of internal revenue. It follows from the doctrine, well established by these cases, that, as congress has prescribed the marks and stamps which shall be put upon a package of distilled spirits at the time it is produced and tax paid, and neither prohibits the reduction in proof or volume of spirits in the original packages, nor provides for any additional marks in the event it is so reduced, the commissioner of internal revenue cannot, by regulation, require such additional mark, so as to make the absence of it a forfeitable offense under section 3289, Rev. St. U. S., as not "having thereon each mark and stamp required therefor by law." As the law, therefore, does not require any additional marks or stamps when the proof or volume of an original package of distilled spirits is reduced, either from natural causes or the addition of water, it follows that the original marks and stamps are still the proper marks and stamps for such a package; and mere evidence that the contents as to volume or proof does not conform to the volume or proof as marked on the package, without more, fails to make a *prima facie* case for seizure or forfeiture. The demurrer to the evidence is sustained, the information dismissed, and the package ordered to be released to the claimant.

The district attorney, at the time the ruling on the demurrer was announced, made a motion for a certificate of probable cause, which I have felt constrained to deny, since the granting of such a certificate would be utterly inconsistent with my ruling on the demurrer.

CITY OF ATLANTA v. OLD COLONY TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1898.)

No. 698.

STREET RAILROADS—COMPULSORY TRANSFERS—AUTHORITY OF CITY.

The city of Atlanta, Ga., has no authority to impose a compulsory system of passenger transfers upon the Atlanta Consolidated Street-Railway Company, either under the city charter, the charters of the two corporations whose property was purchased by the said consolidated company, the state statutes ratifying and confirming the incorporation of street and suburban railroad companies, or under the constitution of Georgia and the ordinance of the city of Atlanta, made in pursuance thereof, consenting to the occupation of its streets by the said consolidated company. 83 Fed. 39, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

J. T. Pendleton and Alex. C. King, for appellant.

N. J. Hammond, J. Carrol Payne, John S. Tye, Morris Brandon, and Preston S. Arkwright, for appellees.

Before PARDEE, Circuit Judge, and SWAYNE and PARLANGE, District Judges.

PER CURIAM. This is an appeal from an order continuing an injunction pendente lite restraining the city of Atlanta from executing a certain ordinance of that city relating to compulsory transfers on the lines of the Atlanta Consolidated Street-Railway Company. The case was heard in the circuit court before Circuit Judge McCormick and District Judge Newman upon a demurrer to the complainant's bill, which demurrer raised all the questions presented on this hearing. In overruling the demurrer the two judges concurred in an elaborate and well-considered opinion, which is found in the record (83 Fed. 39), with the reasoning of which we substantially concur.

On this hearing we conclude:

1. Under the charter of the city of Atlanta there is no power given to the mayor and general council to pass and enforce the said transfer ordinance.

2. The charters of the Atlanta Street-Railroad Company and the West End & Atlanta Street-Railroad Company, of which companies the Atlanta Consolidated Street-Railway Company has become the purchaser and successor, do not make the rates of fare on the Atlanta Consolidated Street-Railway Company's lines subject to the initial control of the mayor and general council of the city of Atlanta.

3. The statutes of the state of Georgia (1 Laws Ga. 1890-91, p. 169), ratifying and confirming the incorporation of street and suburban railroad companies, or any other acts of like nature to which our attention has been called, do not give the right of regulating and fixing fares and transfers on street railroads to the city of Atlanta.

4. Under the constitution of the state of Georgia, which prohibits any street-railway company from building upon the streets of a city

without its consent, and under the reservations made by the city of Atlanta in its ordinances granting such consent to the Atlanta Consolidated Street-Railway Company, the power is not reserved to the city of Atlanta to pass any ordinance which it sees fit, compelling the Atlanta Consolidated Street-Railway Company to give transfers and issue transfer tickets between the several lines of said company.

These conclusions, the reasons for which are found in the opinion of the circuit court on the demurrer, dispose of this appeal. The decree of the circuit court appealed from is affirmed.

BERLIN MILLS CO. v. CROTEAU.

(Circuit Court of Appeals, First Circuit. July 19, 1898.)

No. 212.

1. NEGLIGENCE—DANGEROUS MACHINERY OR PREMISES.

The requirements of reasonable foresight and reasonable precaution to prevent injury to another do not impose on an owner a duty to keep his premises or work in a suitable condition for those who come thereon solely for their own purposes, without any enticement, allurements, inducement, or express or implied assurance of safety. As to such persons the rules regulating the duty of a master to his servants do not apply.

2. SAME—PROXIMATE CAUSE.

A stranger went into a sawmill to collect money from one of the employés. To reach the employé, he walked along a railroad on a descending grade, down which cars were allowed to pass by their own momentum, and without a brake. As he approached the workman, the latter called to him to "look out"; and, without turning round to see what the danger was, he jumped between two cars standing on the track, and was injured by the descending car striking against them. If he had stood still, or moved in the opposite direction, he would have been safe. *Held*, that his misapprehension of the signal of the workman was the proximate cause of his injury, and the mill owner was not liable.

In Error to the Circuit Court of the United States for the District of New Hampshire.

Robert N. Chamberlin and Irving W. Drew (Merrill Shurtleff, on brief), for plaintiff in error.

Harry G. Sargent, William H. Paine, and Edward C. Niles, for defendant in error.

Before PUTNAM, Circuit Judge, and WEBB and BROWN, District Judges.

BROWN, District Judge. This is an action on the case by Albert Croteau against the Berlin Mills Company for personal injuries received through being crushed between two cars in the basement of the company's sawmill. Three car tracks in this basement were used for removing lumber and waste to the yard. From 350 to 450 car loads were removed each day. When empty, the cars were drawn by horses to a point in the yard where the grade of the tracks began to descend. The horses were then detached, and the cars allowed to run down the descending grade into the basement. The

cars were of smaller size than those ordinarily used on railroads. Croteau was not an employé of the company, but on the day of the accident went to the company's yard to see two workmen who were indebted to him, and who had previously promised to give him in payment orders upon the company for clapboards, to be delivered to Croteau and charged to the workmen. Having procured from one of the workmen, whom he found in the yard, an oral order, which was accepted by the company's selling agent, Croteau, according to his testimony, said to the agent:

"'You wait for me here. There is another man under the mill who owes me some money, and he told me he would give me an order the other day, and I would go for him;' and he said, 'All right.'"

Croteau then went to the mill, and walked down into the basement, upon the middle track. Although it appears from the evidence that Croteau knew that the tracks were in use,—to some extent, at least,—he notified no one in charge of the cars that he was going under the mill, but walked on upon the middle track, into the basement, without looking behind him. The mill was running, and there was considerable noise from the machinery and saws. After going some 60 feet into the mill, he saw the man he sought, Valliere, working upon the further side of a car that stood on the track next to that on which Croteau had entered the mill. On the track where Croteau was, there were no cars. On the next track, at a distance of 4 or 5 feet from the car that was between Croteau and Valliere, stood a second car. Croteau, upon seeing Valliere, made a signal to him signifying, "Come here." At that moment four cars were coming down from the yard,—not upon the track where Croteau stood, but upon the next track, whereon stood the two cars, at a distance of 4 or 5 feet apart. Croteau's description of his conduct is as follows:

"* * * At the same time I was making him a sign to come here, they hollered, 'Look out, look out.' Q. What did you do? A. I ran between them two cars. I didn't think them cars was going to move out of there, because they was half loaded. I made a jump between those two cars there. I thought, because they hollered out, something was coming on the track where I was. If they didn't holler, I would be all right there. * * * I supposed, when they said, 'Look out,' there was a train coming on the track where I was. Q. And, instead of looking to see, you jumped right between the cars in front of you? A. Yes, sir."

The descending cars struck the first standing car, and forced it against the second car, crushing Croteau's leg between the two cars so that amputation was necessary.

Although we are of the opinion that, upon the evidence of Croteau himself, he was guilty of such negligence as would preclude a recovery even had the company been negligent, we are also of the opinion that the company was guilty of no breach of duty to the plaintiff, and that the verdict holding the company liable was clearly unjustifiable. The errand which took Croteau under the mill was entirely his own, and had no connection with the business of the company. While his presence in the yard to procure clapboards was possibly connected with the business of the company, his going under the mill was merely to collect a debt from Valliere. This errand was no more the business of the company, than if he had gone under the mill to borrow

money of Valliere, instead of to collect a debt. So far as the company's business of selling clapboards afforded an invitation to come upon its premises, such invitation was restricted to the yard or office, and did not extend to the basement of the mill. The rule of law applicable to the present case is not, therefore, the broad and indefinite general proposition that, so far as there exist reasonable grounds for apprehending danger, a corresponding duty arises to take precautions. The cases furnish much more specific rules to aid owners of premises to understand their obligations. These specific rules are not inconsistent with, but are narrower than, that broad proposition. In *Pol. Torts*, pp. 36, 37, it is said:

"Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all," etc.

It is well settled that the requirements of reasonable foresight and reasonable precaution are not to be so extended as to impose upon an owner a duty to keep his premises or work in a suitable condition for those who come thereon solely for their own purposes, without any enticement, allurements, inducement, or express or implied assurance of safety. *Sweeny v. Railroad Co.*, 10 Allen, 368, 372, 373; *Beehler v. Daniels*, 18 R. I. 563, 29 Atl. 6; *Bigelow, Cas. Torts*, p. 705. That a stranger, on his own business, may find his way into private premises or workshops, where hazardous business is conducted, is always a possibility; but the duty of vigilance to guard against injury therefrom is not cast upon the owner, but upon the intruder, who is bound at his peril to keep away from places or machines whereof he is ignorant, and who is not entitled to demand that business operations shall be conducted with regard to his presence or safety. While there may exist circumstances of an exceptional character in which an appearance of safety tends to lead or entice a trespasser or licensee into peril, so that the premises become a "trap" giving rise to a duty to take precaution for the safety of mere licensees, and even of trespassers, the present case is obviously not of that character. The nature of the work carried on by the company, and its cars, known by *Croteau* to be running at intervals, afforded a warning, instead of an assurance of safety. Such perils as arise from the ordinary use of the premises are not a trap. *Redigan v. Railroad Co.*, 155 Mass. 44, 28 N. E. 1133. It is contended, however, that the company was guilty of negligence in running its cars without brakemen. But whether or not it was negligent towards those persons rightfully on or about its tracks is a question entirely distinct from that of its duty to *Croteau*. In determining whether the defendant is negligent, in a given case, his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others. *Fitzgerald v. Paper Co.*, 155 Mass. 155, 159, 29 N. E. 464. Employer and employed may consent to the adoption of methods which facilitate the work, though they increase the risk, and give rise to a necessity for extreme caution. These are matters to be regulated between master and servant. An inexperienced intruder cannot limit the master's right to use means that may be hazardous to those not familiar with the premises and

with the perils of the employment. *June v. Railroad Co.*, 153 Mass. 79, 26 N. E. 238. The contention that the plaintiff's knowledge was of a safe method of running the cars (i. e. with brakemen), and that his reliance upon such knowledge in some way contributed to the injury, hardly requires consideration. The plaintiff did not jump upon the track where he was injured for the reason that he supposed that the cars on that track would be stopped or regulated, but because of a belief that no cars would come upon that track. Had he known that cars were coming upon that track, it certainly would have been gross negligence for him to have stood on the track upon which they were coming, relying upon their being so controlled by the brakeman that they would not injure him. The evidence in the case does not justify an assumption that, if the cars had been braked, the plaintiff would have escaped injury. The proximate cause of the injury was, in our opinion, the plaintiff's misunderstanding of the signals. Warned by the cries which were intended to prevent him from going upon the track, he misunderstood the warning, and, without stopping to look, made a mistaken choice of a place of refuge; relying upon his belief that, because the two cars between which he was crushed were half loaded, no more cars would be sent upon that track. He reversed the meaning of the signal, and thereby was led to leave a position of safety, and place himself in danger. The defendant cannot reasonably be held to a duty to have foreseen or guarded against an occurrence of this character. The misapprehension of signals must therefore be considered an intermediate cause, disconnected from any fault in the management of the speed of the cars, if such fault existed, and in legal contemplation the proximate cause of the injury. *Railway Co. v. Kellogg*, 94 U. S. 469; *Scheffer v. Railroad Co.*, 103 U. S. 249. The injury therefore was the result of an accident for which the company was not responsible. The judgment of the circuit court is reversed, and the case remanded to that court, with directions to set aside the verdict, and to take further proceedings not inconsistent with our opinion passed down this day; and the plaintiff in error will recover its costs in this court.

McELROY v. BRITISH-AMERICA ASSUR. CO.

(Circuit Court, D. Washington, N. D. August 5, 1898.)

No. 617.

1. INSURANCE—AGENCY—IMPUTED NOTICE.

An agent of one insurance company who applies to the agent of another company to take part of the insurance he has negotiated on a vessel, and who receives from such other agent the policy issued by his company and delivers it to the insured, after attaching thereto a slip directing it to be returned to him for renewal, does not thereby become the agent of the latter company, so as to make it chargeable with his knowledge of an excess of insurance above that allowed by such policy.

2. SAME—ESTOPPEL—ACCEPTANCE OF BENEFITS.

When an insurance agent has taken for his company part of the insurance negotiated by an agent for another company, the fact that he has made a charge on his books against such agent for the premium

does not estop his company from questioning the validity of the policy, on the theory of the acceptance of benefits by it, where no part of the premium has in fact been received by the company or the agent.

Harold Preston and L. C. Gilman, for plaintiff.
J. B. Howe and S. H. Piles, for defendant.

HANFORD, District Judge. This is an action on a fire insurance policy for \$3,000, written by C. A. McKenzie, who was at the time the Seattle agent of the British-America Assurance Company of Toronto, Canada, covering the steamer Cricket, which was destroyed by fire a short time after the date of the policy. The policy is in the form known as the "Standard Policy," and it is therein stipulated that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." At the time of the destruction of the steamer there was another policy in favor of the owner for the amount of \$3,500, and yet another policy for the sum of \$3,500 in favor of a mortgagee of the vessel, making altogether insurance amounting to \$10,000. On a slip attached to the policy it is provided as follows: "\$6,500.00 insurance in all permitted, concurrent herewith,"—so that there was \$3,500 insurance upon the vessel in excess of the amount which the insurance company agreed should be carried, and the company rests its defense upon the ground that this excess of insurance constitutes a breach of the above condition of the contract. This defense is met by the plea that, at the time of delivery of the policy sued upon, the defendant company was informed and had notice that there was then in existence insurance upon the vessel, including the amount for which this policy was written, amounting to the total sum of \$10,000, and, having that knowledge, executed and delivered this policy to the owner of the vessel, and the defendant is thereby estopped from claiming that said policy is void by reason of overinsurance.

On the trial of the action it was proved that the application for the policy was made to McKenzie, by the firm of Calhoun & Co., general insurance agents, who were not authorized to represent the defendant company as its agents, but were business rivals of McKenzie. Mrs. Power, the owner of the vessel, had no dealings with McKenzie, except as she was represented by Calhoun & Co. McKenzie was informed by Calhoun & Co. that they wished to place insurance to the amount of \$6,500 upon the vessel, and asked him to take \$3,000 of the amount. McKenzie was not informed and had no notice whatever that other insurance had been written or was intended to be placed upon the vessel for any amount whatever in excess of \$6,500. On the part of the plaintiff, testimony was introduced tending to prove that Calhoun & Co. did know that the steamer was to be insured through another agent for the sum of \$3,500 for the benefit of the mortgagee. Calhoun & Co. solicited the insurance from the captain of the steamer representing the owner, and received from him payment of part of the premium, and agreed to extend to him credit for a definite period for the unpaid part, but no part of the money collected on account of the

premium was received by the defendant company nor by McKenzie. Calhoun & Co. received the policy from McKenzie for delivery to the insured, and, before delivery, pasted thereon an advertising slip, which reads as follows: "Return for renewal, transfer, or indorsement to Calhoun & Co., Insurance, S. E. Cor. Yesler Ave. and Commercial St., Seattle, Wash." It was also proved upon the trial that previous to the issuance of this policy there was a general understanding between McKenzie and Calhoun & Co. that they would divide the agent's commission on all business obtained by Calhoun & Co. and placed with companies represented by McKenzie, and that between themselves, for the purpose of renewing insurance, such business should be regarded as belonging to Calhoun & Co. The court granted a motion interposed by the defendant for a peremptory instruction to the jury that a verdict be returned in favor of the defendant, and the case has been argued and submitted upon a motion for a new trial.

In passing upon the motion for a new trial, I assume that if the defendant company or its authorized agent did have actual notice of the existence of other insurance upon the vessel in excess of \$6,500, and notwithstanding such notice issued the policy and received and retained the premium therefor, it would be estopped to say that the policy so issued is void. Giving the plaintiff the benefit of the testimony in his behalf, to the effect that Calhoun & Co. were so notified before the policy in suit was written or delivered, the plaintiff's right to claim an estoppel depends upon the proper decision of the question whether or not Calhoun & Co. were the agents of the defendant company, or were by the defendant company held out to be its agents in such a way as to justify the insured in dealing with that firm as though they were authorized to act for the defendant as its agents. I hold that the testimony shows that McKenzie did authorize Calhoun & Co. to deliver the policy to the insured and to collect the premium. To this extent Calhoun & Co. were constituted the agents of the defendant company. But the agency was limited. Calhoun & Co. were not authorized to bind the defendant company by any other or different contract than that expressed in the policy which they received for delivery. Their authority was that of a messenger to deliver this particular policy.

The case of *May v. Assurance Co.*, 27 Fed. 260, relied upon by the plaintiff as a precedent for ruling that Calhoun & Co. were legally agents of the defendant, appears to be very similar in its facts to this case, and yet it is fair to infer that the question in that case was different, and there is substantial ground for drawing a distinction. In the case referred to, an insurance agent procured a policy for the plaintiff, to be written by the defendant company. The plaintiff was a customer of the agent who made application for the policy. There was evidence of a custom of insurance agents to divide insurance business with other agencies in the same city when they received an application for a larger amount of insurance than they cared to place with their own companies. The defendant's agent who issued the policy was ignorant of the condition of the property insured, and I infer that payment of the policy was re-

sisted on the ground that there was something in the condition of the property affecting the risk which was not known to the agent who issued the policy; but the court held that the company was chargeable with knowledge of facts as to the condition of the risk which were known to the agent who applied for the policy. The decision appears to be founded upon the idea that, before issuing an insurance policy, the insurer may inspect the property or adopt any other method for ascertaining its condition, and that, if he elects to rely upon the knowledge and judgment of another, he should be bound the same as a purchaser of property, who buys after having had an opportunity to inspect it, is held to be bound by his contract, notwithstanding any after-discovered defect which might have been ascertained by inspection. But the amount of insurance upon the steamer Cricket could not have been ascertained by inspection. Without evidence of circumstances which would naturally create suspicion, the defendant cannot be considered as having neglected any duty, nor as having elected to rely upon the judgment or knowledge of any one. The defendant company tendered a policy containing a limitation of the amount for which the vessel might be insured, and a condition that, if insurance in excess of the amount of \$6,500 should be placed upon the vessel, this policy should be totally void. When the policy containing these conditions was accepted, the defendant company was not obliged to presume that the condition would be disregarded, nor to make inquiry to ascertain if it had been disregarded, nor to place any dependence upon Calhoun & Co. to obtain information as to the amount of other insurance then existing or to be placed upon the steamer. If applied to the facts of this case, the argument of the opinion in *May v. Assurance Co.* is not satisfactory, to my mind. Judge Brewer says: "The plaintiff did not go to an insurance broker to employ him to solicit insurance. He never thought of employing an agent to act for him; but he, as principal, wanting to buy insurance, went to a man who was selling insurance, and proposed to buy from him \$20,000 worth of insurance." The same argument has equal force, turned the other way; for, referring to the case in hand, it may be said that the defendant did not employ Calhoun & Co. as its agents to solicit insurance. But the company, as principal, having insurance to sell, received an application from Calhoun & Co. to buy insurance for Mrs. Power. If Calhoun & Co. may be considered as representatives of the defendant in negotiating with the insured, it must also be noted that they spoke for and acted in behalf of Mrs. Power in negotiating with the insurer. As middlemen they acted in behalf of both parties to the contract, and, if their knowledge of the intention of the insured as to the amount of insurance to be placed upon the vessel can be imputed to the insurer, their knowledge of the intention of the insured to limit the amount of insurance to a total sum of \$6,500 must also be imputed to the insured. Having that knowledge, she cannot say that she was misled to her prejudice by the issuance of the policy, and the chief element of an estoppel is lacking.

The insured has no just ground for claiming that the defendant company held out to the public that Calhoun & Co. were its agents. No act, declaration, or silence of the defendant company is shown to have operated as an inducement to the making of this contract. The paster on the outside of the policy does not represent Calhoun & Co. to be agents of this company, with authority to bind the company as to any conditions or terms inconsistent with the policy. The paster is, at most, an invitation to the policy holder to return it to Calhoun & Co. for renewal, transfer, or indorsement. If the insured had been dissatisfied with the terms of the policy, she might have treated this paster as a direction to return it for alteration to Calhoun & Co.; but, so far as appears from the evidence, no reliance whatever was placed upon this paster, and the policy upon its face shows that McKenzie was the Seattle agent of the company.

In the argument it was urged that the defendant is estopped to deny the validity of the policy, or has waived the condition as to overinsurance, by accepting the benefits of the contract. The rule as to the effect of accepting benefits is stated in section 148 of Mechem on Agency, as follows:

"It is a rule of quite universal application that he who would avail himself of the advantages arising from the act of another in his behalf must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own, with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole. But here, as in other cases, it is indispensable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without inquiry. Otherwise the receipt and retention of the benefits of the unauthorized act is no ratification of it."

The application of this rule cannot in any way operate to the advantage of the plaintiff. It must be observed that the rule does not bind the principal where the benefits have been without his knowledge received or appropriated by the agent, whose unauthorized act is the subject of controversy. The principal must himself receive the benefit, receive it intentionally, and retain it, after having been apprised of the facts of the transaction, or intentionally act without inquiry as to the facts when the circumstances are such that a prudent man should inquire, or else he cannot be held to have ratified an unauthorized act. Neither the defendant company nor its authorized agent, McKenzie, received, appropriated, or enjoyed any benefit or advantage from this contract, and no facts or circumstances were brought to the attention of McKenzie which required him to make inquiry as to any matter communicated to Calhoun & Co. by the insured. McKenzie made a charge against Calhoun & Co. of the amount of the premium. But no benefit can accrue to him or to the defendant from that entry in his books, because, the policy being void, the premium cannot be collected.

It is my conclusion that the evidence fails entirely to show that the defendant has committed any act justifying a belief on the part

of the insured or her agent that it had assumed an obligation different from what the policy sets forth, and therefore the instruction given to the jury to return a verdict for the defendant was correct. Motion denied, and judgment upon the verdict ordered.

BEARD v. MILMINE et al.

(Circuit Court, N. D. Illinois, N. D. July 5, 1898.)

1. PRINCIPAL AND AGENT—EMBEZZLEMENT BY AGENT—BANKS—GAMING.

Brokers who receive from a bank president drafts of the bank in payment for his private losses in board of trade speculation, under circumstances charging them with notice that the drafts represent money embezzled from the bank, are liable to the bank for the proceeds of such drafts.

2. SAME—NOTICE.

Knowledge that their customer is president of the bank, that his purchases and sales are purely speculative, and that he has been steadily losing money in such speculations for 10 years, is sufficient to charge the broker with notice that the drafts represent money embezzled from the bank.

At Law.

This was an action by John Beard, receiver of the First National Bank of Pella, against Edward C. Bodman and others, co-partners as Milmine, Bodman & Co.

The court, to whom the case was submitted without a jury, specially found the facts as follows:

First. The plaintiff was before and at the time of the commencement of this suit, and is now, the receiver, duly appointed by the comptroller of the currency, of the First National Bank of Pella. The plaintiff was, and at the time of the commencement of this suit is, a citizen of the state of Iowa. The said First National Bank of Pella is a national bank, organized under the banking laws of the United States in 1871, and is located at the town of Pella, in the state of Iowa.

Second. The defendants, George Milmine, Edward C. Bodman, Charles E. Milmine, Elliot H. Phelps, and Luther W. Bodman, are co-partners as Milmine, Bodman & Co., the said George Milmine, Edward C. Bodman, and Charles E. Milmine being residents and citizens of New York at the time of the commencement of this suit, and the said Elliot H. Phelps and Luther W. Bodman being, at the time of the commencement of this suit, residents and citizens of the city of Chicago, in the Northern district of Illinois, state of Illinois.

Third. The said First National Bank of Pella is situated at Pella, a town of about 3,000 inhabitants, in the midst of a farming community, and was organized in 1871, under the banking laws of the United States, with a capital stock of \$50,000. E. R. Cassatt was the principal person engaged in its organization, and after the year 1883, together with his relatives, owned a majority of the stock, all of which was controlled by Cassatt. From the time of the organization of the bank to its failure, Cassatt was president and principal executive officer of the bank, and enjoyed in a high degree the confidence of its stockholders and of the people of Pella and of the surrounding territory. Subsequent to 1881 the management of the bank was entirely under the control of E. R. Cassatt. The board of directors performed their duties largely in a perfunctory manner, and their knowledge as to the affairs of the bank was derived almost exclusively from statements made to them by said Cassatt. Cassatt dictated the persons to whom loans should be made, and

had the entire discretion as to the acceptance of all bills receivable which became part of the assets of the bank. The method by which the affairs of the bank were conducted, the duties which the clerks performed, the manner of selling exchange, and the other executive methods of the bank were devised by said Cassatt, and carried on under his directions, without interference from the directors. The board of directors reposed implicit confidence in Cassatt, and accepted his statements as true in regard to all the affairs of the bank, and made no examination of the bills receivable to ascertain whether they were spurious or not. Cassatt had charge of the bills receivable of the bank and of the cash chest. Cassatt was accustomed, from the organization of the bank down to the time of its failure, to draw drafts on the funds of said bank on deposit in other banks, signing such drafts in the name of the bank by himself as president. The affairs of the bank were examined twice a year by the examiner appointed by the comptroller of the currency of the United States. At the times of such examinations Cassatt was accustomed to exhibit to the examiner the bills receivable and the cash on hand, and then return them to the safe. At such times the proper amount of cash was on hand, and such bills receivable as the books of the bank showed should be on hand. The balance of the stock, outside of Cassatt's holdings, was held in small amounts, the average being about \$2,000 of stock, at its par value.

Fourth. The said First National Bank of Pella went into the hands of a receiver June 25, 1895. At the time of its failure it was, for the first time, ascertained by its stockholders, and by the other officers, that said Cassatt was a defaulter to the bank in the sum of about \$65,000. Such sum had been taken by Cassatt, from time to time, from the moneys of the bank, and had been concealed by means of forged, spurious, and other fictitious notes, other evidences of loans having been put into the bank by said Cassatt. The forged and fictitious notes were so adroitly executed that there was nothing that would suggest to the ordinary observer that the notes were not genuine, as they purported to be. The said Cassatt has since that time been duly indicted, tried, and convicted for the embezzlement of said \$65,000, and is now serving his sentence on account of such conviction.

Fifth. The said Cassatt began to have business dealings with the defendants, commission merchants on the board of trade, in the city of Chicago, in 1884, continuing to have such transactions down to and including a portion of the year 1894. Said dealings were substantially as follows: The said Cassatt would either personally or by wire direct the said defendants to purchase or sell certain futures in either wheat, oats, or provisions, which said direction would be executed by the defendants on the Chicago Board of Trade by buying of or selling to some other broker on such board the futures stipulated. Such purchases or sales would thereupon be carried by said defendants in the name of, and for the benefit of, said Cassatt, until another order was received by Cassatt, closing out the same, either by purchase or sale, as the case might be. Under the rules of the board of trade, the defendants would have been obliged to have delivered, in case of sales, or accepted, in case of purchases, from the brokers with whom they had transactions, the cereals or provisions in question, when the deals matured, and the said Cassatt would have been obliged to have taken or delivered to the defendants the cereals or provisions called for in such deals at the time when they would have matured. As a matter of fact, however, no consequential amount of the sales made by the defendants on account of Cassatt ever resulted in the delivery of any grain or provisions, and no consequential amount of any of the purchases made on his account ever resulted in obtaining, or the acceptance of, any grain or provisions. The deals were, in nearly every instance, closed before the future to which they related had arrived, and without the passing or intention to pass of any actual grain or provisions. All the transactions of Cassatt with the defendants were intended by him to be purely speculative transactions in futures on the board of trade, and were so understood by the defendants, and none of said transactions contemplated the purchase or sale of grain or provisions with any other purpose than the subsequent disposal of the same without the actual delivery or acceptance of the grain or provisions involved. The purchases and sales were numerous, frequently comprising several transactions in a day, and represented, in the aggregate,

a large amount of dealing. The defendants were protected from losses by margins put up, from time to time, with them by said Cassatt for that purpose. The general course of said speculation was unfavorable to Cassatt. He occasionally had some profits, but more frequently suffered losses. The money which was sent to Milmine, Bodman & Co. to pay the losses, aforesaid, was in turn paid out by Milmine, Bodman & Co. for the purpose of discharging the contracts made in behalf of Cassatt by them, upon which the losses occurred, and no profit resulted to Milmine, Bodman & Co. by reason of any of the dealings with Cassatt, except the commissions which they earned as brokers in negotiating the transactions for him. The whole course of the transactions would have disclosed to an ordinary observer, fully informed of the facts, that Cassatt was gradually losing, and that some funds, owned or controlled by him, must have been gradually eaten into by the losses, from time to time incurred, and the margins put up. The defendants themselves must have known this prior to and at the time they received the drafts sued upon, unless they willingly suffered themselves to be deceived.

Sixth. Said Cassatt, in order to carry on his deal with said defendants, kept two accounts in the said First National Bank of Pella, one in his own name and the other in the name of E. R. Cassatt & Co. During the period of said deals, Cassatt remitted to the defendants, on account of margins aforesaid, from time to time prior to the drafts sued on in these cases, twenty-seven drafts, each of which was exactly similar to the drafts sued on in this case; that is to say, each was signed, "First National Bank of Pella, by E. R. Cassatt, President." All of these drafts were collected by the defendants in the same way as the drafts in the suit. The earliest of the series of drafts prior to the drafts in suit was August 21, 1884, and the latest was April 6, 1891. Of these drafts, there were five in 1884, eight in 1885, six in 1886, two in 1887, one in 1888, two in 1889, one in 1890, and two in 1891, and were for the amounts and bore the dates as follows:

1884.		1885.	
August 21st	\$ 500 00	January 5th	\$ 200 00
October 11th	300 00	February 19th	250 00
November 19th	300 00	March 25th	500 00
December 1st	500 00	April 27th	500 00
December 9th	300 00	July 27th	425 00
1886.		October 5th	300 00
April 12th	\$1,000 00	October 10th	1,500 00
April 17th	1,000 00	October 15th	1,000 00
May 14th	500 00	1887.	
September 11th	300 00	February 19th	\$ 300 00
September 25th	300 00	July 8th	300 00
October 11th	300 00	1888.	
1889.		December 3d	\$1,000 00
March 18th	\$1,800 00	1890.	
April 13th	500 00	February 13th	\$ 500 00
		1891.	
		January 6th	\$ 500 00
		April 6th	1,000 00

Each of said drafts was charged by the National Bank of Illinois to the First National Bank of Pella, and monthly statements were sent by the National Bank of Illinois to the First National Bank of Pella, which were checked up by the clerks in the latter bank, but during the two years immediately preceding the failure the checking was done by Cassatt himself. Most of the drafts sent by E. R. Cassatt, as aforesaid, both those prior to the ones in suit as well as the drafts sued upon in this case, except as hereinafter noted, were charged upon the books of the First National Bank of Pella either to the account of E. R. Cassatt, or to the account of E. R. Cassatt & Co., which account, at the time of such charging, had an apparent credit balance sufficient to pay or offset the charge so made against it. Such of said drafts as were not charged to E. R. Cassatt or to E. R. Cassatt & Co. were charged to some other account upon the books of said bank, which account, at the time of said charges, had an apparent credit balance sufficient to pay or offset the charges so made against it. Said drafts were all signed by E. R. Cassatt as president. The drafts sued on in this case were all drawn upon the National Bank of Illinois, payable to Milmine, Bodman & Co., and

signed, "First National Bank of Pella, by E. R. Cassatt, President," and were of dates and amounts as follows:

1891.		1892.	
August 20th	\$1,400 00	June 13th	\$2,000 00
August 31st	800 00	August 27th	1,000 00
September 19th	500 00	September 5th	1,000 00
1893.		1894.	
January 30th	\$1,000 00	October 22d	1,000 00
February 14th	600 00	October 28th	1,000 00
February 18th	1,500 00	January 24th	\$ 300 00
March 13th	600 00	February 10th	500 00
June 21st	2,500 00	February 12th	,600 00
November 23d	300 00		
December 21st	500 00		

Seventh. None of the said drafts were used or intended to be used to pay off any debt or obligation of the said bank, but all were used to supply the margins in the private transactions of the said Cassatt with said defendants as aforesaid. Such transactions were kept secret from the bank by said Cassatt. The telegraphic correspondence between said Cassatt and the defendants was carried on in cipher. On one occasion the defendants failed to observe this cipher, and, on a protest from said Cassatt, promised that such oversight should not occur again. It is not unusual, however, for board of trade commission men to communicate with their customers in cipher. The cipher used in this case was the so-called "Robinson Cipher." Nearly every dealer in the country has a copy of this. The telegrams were neither signed nor addressed in cipher, but were addressed and signed by the correct names of the respective parties.

Eighth. There is no evidence from either side, other than the foregoing, tending to show that the said Cassatt was or was not a man of means, independently of his holdings in the said First National Bank of Pella. The defendants knew that Cassatt was president of the bank, and had access to its funds, but made no inquiry as to whether said Cassatt had means independently of his holdings in said bank, and made no inquiry of said Cassatt, the other officers of the bank, or any one else likely to know, whether said Cassatt was using his own means in the speculative transactions aforesaid, and no inquiry looking in that direction.

Ninth. The avails of the drafts sued upon in this case, through the means already described, were taken purposely by the said Cassatt, without authority of law, but as an act of theft and embezzlement, from the funds of said bank, and the defendants in receiving the avails of said drafts were, in fact, receiving the moneys stolen by said Cassatt from said bank. The court further finds that reasonable and prudent men, having no selfish interest to subserve, would have been led, by the facts in possession of the defendants, to suspect that said Cassatt might be unlawfully using the funds of the bank to supply the margins transmitted to the defendants, and especially so late as the margins transmitted by means of the drafts sued upon.

Hamline, Scott & Lord, for plaintiff.

Green, Robbins & Honore, for defendants.

GROSSCUP, District Judge. When, in violation of his right, an agent makes an appropriation of his principal's money, and turns it over to a third person, the principal may recover from the third person the money so appropriated, unless the third person is a bona fide holder for value and without notice. Under this rule, the plaintiff can, indisputably, recover from the defendants upon the facts found, unless the defendants are bona fide holders for value and without notice. The principal question, therefore, is whether the findings of fact show that the defendants are chargeable with notice of Cassatt's misappropriation.

Transactions in futures, of a purely speculative character, where nothing is put up, except for margins, are, in many essential results,

different from ordinary business transactions. There is, in these transactions, no investment of money in anything tangible,—in any property of supposedly equivalent value,—that remains when the deal is ended. If a trader in ordinary pursuits meets misfortune, or becomes involved, something usually remains of his investment. Unless his fortune be entirely swept away or he be dishonest, there is an estate. But the speculator, investing his money in margins, invests, practically, in nothing but a turn in the market. If he meet misfortune, nothing remains. It is essentially putting his money into a turn of chance. The effect, upon the man, of transactions so radical in their money outcome has come to be notable. Transactions of this kind are, indeed, separated very narrowly, if at all, from gambling, pure and simple. Both feed upon the same human propensity, and both lead to the same result. Each is an attempt, by the exercise of wit, to get what another is expected, by the want of wit, to lose. Both lead up to false notions of wealth accumulation. Both bring on the loss of mental equipoise. Each fills its participant with a dangerous character of excitement,—often a radical and desperate aggressiveness. No one knows these things better than the brokers themselves. They see, now and then, striking instances of moral and business degeneration under the stimulus of this excitement. They see, now and then, instances of men, pressed for margins, losing all sense of what is their own and what is another's. They witness, as well as the public, that almost unaccountable submergence of judgment and sense, under the effect of which trust funds are misappropriated, and bank funds embezzled, by those who have, at the time, no thought of not eventually making good the loss. They, as well as the public, know how quickly crime, thus secretly begun under the radiance of hope, soon expands into the daring of despair. They have seen, in nearly every community, men press eagerly towards these rainbows of fortune, only to fall quickly into disgrace and a prison. These impressive lessons are a part of the history of every considerable community. Instinctively we shudder for him who loves speculation, and can find the means for feeding that love in access to the monies of another.

Cassatt was a banker, so far as the record discloses, without means of his own. Through 10 years he had, to the knowledge of defendants, poured a steady stream of margins into his deals on the board of trade. Whence did the money come? How was it recruited? Why should this losing, almost desperate, play against ill fortune keep on? No real friend of Cassatt, who knew his opportunities in Iowa, and his practices in Chicago, would have been without painful apprehension. No depositor in the Pella bank, coming into a knowledge such as the defendants had, would have let a day go by before withdrawing his deposit. No stockholder would have failed to institute instant and thorough investigation. The facts known to these defendants would, if communicated to the world, have put every intelligent man, interested in Cassatt's pecuniary condition, upon inquiry. They would have, intuitively, marked him out as a man in peril. Inquiry, in the situa-

tion of the defendants, was a moral duty. In their omission to perform that duty they proceeded at their peril. Neglect, in such a case, is followed by all the consequences of bad faith. "If," in the language of *Knapp v. Bailey*, 79 Me. 195, 9 Atl. 124, "a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make a further inquiry, and he avoids the inquiry, he is chargeable with notice of the facts which, by ordinary diligence, he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong in failing to heed the signs and signals seen by him. It may be well concluded that he is avoiding notice of that which he, in reality, believes or knows."

These marts of trade are, in many respects, greatly beneficial to the interests of mankind. They balance, like the governor of an engine, the otherwise erratic course of prices. They focus intelligence from all lands, and the prospects for the whole year, by bringing together minds trained to weigh such intelligence and to forecast the prospects. They tend to steady the markets more nearly to their right level than if left to chance or unhindered manipulation. Nor are the purchase and sale of futures intrinsically wrong. They are the means of bringing about those stable and steadying results. But the tendencies and excesses of human nature—its susceptibility to warp in the fierce heat of excitement or distress—are facts to be heeded by the broker as well as by the public. He may not close his eyes to probabilities, or even strong possibilities, that are patent to the rest of mankind. If he does, the law rightly makes him accountable to those who thereby innocently suffer.

CHIATOVICH v. HANCHETT et al.

(Circuit Court, D. Nevada. July 11, 1898.)

No. 634.

1. LIBEL AND SLANDER—ACTIONABLE WORDS.

A notice to the employes of a firm that a merchant was antagonistic to the firm, and requesting them to refrain from disclosing to him anything concerning their business, and saying, further, "And his expressed intentions being to hinder and embarrass us still further, * * * we especially request our employes to refrain from associating with him, either directly or indirectly, * * * and suggest that no one of our agents, representatives, or employes trade or deal with him in any manner whatever," is actionable, if charged with proper innuendoes.

2. SAME—PLEADING—INUENDOES.

A charge that defendants "meant and intended to convey" certain ideas by certain words is a sufficient innuendo, although it would be better pleading to aver, in direct terms, that the language was so understood by the persons reading it.

2. SAME—PLEADING—DAMAGES.

An averment that certain named persons were induced to discontinue dealing with plaintiff, whereby he was damaged in a certain sum, is a sufficient allegation of special damages, without stating the purchases of each individual, or how much plaintiff would have profited in the aggregate but for the libel.

4. SAME—DEMURRER.

The question whether or not defendant caused the libel to be published is a question to be determined from the evidence, and not upon demurrer.

This was an action for libel, heard on a demurrer to an amended complaint.

M. A. Murphy and Robert M. Clarke, for plaintiff.

Reddy, Campbell & Metson and Torreyson & Summerfield, for defendants.

HAWLEY, District Judge (orally). The amended complaint, after stating that the plaintiff is, and for more than 25 years last past has been, engaged in business as a merchant at Silver Peak, Esmeralda county, Nev., and during all that time maintained a good reputation for fair dealing, and has conducted and demeaned himself with honesty and fidelity, alleges:

"(2) That on or about the 1st day of June, 1896, at Silver Peak, Esmeralda county, state of Nevada, the defendants, L. J. Hanchett and L. E. Hanchett, did cause to be typewritten, posted, and circulated, in and around said town, the following words of and concerning this plaintiff:

"'Notice to Our Employés.

"'As John Chlatovich entertains for us feelings of animosity, and as his actions have tended to interfere with our business, and his expressed intentions are to hinder and embarrass us still further, we deem it advisable, in our own interest, to abstain from all communication with him. We especially request our employés to refrain from associating with him, either directly or indirectly, and to disclose to him nothing that might tend to indicate the present condition of our business. We caution all against so doing, and recommend a total absence of all communication. We trust that our employés will further our interests in this matter, which demand a total cessation of communication between us and him. We respectfully enjoin our people silence concerning ourselves, our business, and our property, and suggest that no one of our agents, representatives, or employés trade or deal with Chlatovich in any manner whatsoever. His interests are so antagonistic to ours—his purpose is so manifestly hostile—that those who favor him cannot complain if we consider them as equally unfriendly to us.

"'L. J. Hanchett, L. E. H.'

—"Which are the initials of L. E. Hanchett, the defendant above named.

"(3) That the defendants meant thereby that this plaintiff was circulating false and malicious reports of and concerning the business of these defendants, and their manner and methods of conducting the same; and that this plaintiff's conduct and manner of doing business was such that he was not a fit or proper person for his neighbors to associate, communicate, or trade with.

"(4) That the said words, so typewritten, published, posted, circulated, and read, were a false, scandalous, malicious, and defamatory libel, so written, published, posted, and circulated wrongfully and maliciously, by which the defendants wished and intended to and did convey the idea, and to have it understood and believed by those who would read, and did read, said notices, so posted and circulated, that the plaintiff was dishonest, wanting in probity, untruthful, and was wholly unfit and unworthy for his neighbors and friends to associate or communicate with him; and that his place of business was not a fit or proper place for the citizens and residents of the town of Silver Peak, and the neighboring valleys, towns, and mining camps, to resort to, or to do business in; and by means thereof the plaintiff has been and is greatly injured and prejudiced in his good name, reputation, and credit, aforesaid, to his damage in the sum of \$10,000."

The complaint further alleges, in substance, that at the time said notice was published the plaintiff's business was profitable, and that

in consequence of the publication of said notice his business was greatly injured; that all the employes of defendants, about 50 in number, whose names are given, quit trading and dealing with him, and withdrew their patronage, to his damage and loss in the sum of \$10,000.

To this complaint the defendants interpose a demurrer upon the following grounds:

"(1) That the notice alleged to have been posted, published, and circulated by defendants is not libelous or defamatory of plaintiff, and does not tend to impeach the honesty, integrity, virtue, character, or reputation of plaintiff, and does not tend to expose plaintiff to public hatred, contempt, or ridicule, nor does it set forth facts sufficient to constitute libel.

"(2) That the language of the notice alleged by plaintiff to be libelous is nonlibelous per se, and is incapable of a construction injurious to plaintiff's character or business, under the ordinary rules of accepted meaning of the English language, and is incapable of being extended in its meaning by colloquium or special averment.

"(3) That it does not show that the defendant L. J. Hanchett caused to be typewritten, posted, published, or circulated the alleged libelous notice set forth in plaintiff's amended complaint.

"(4) That it does not show that defendant L. E. Hanchett was authorized or instructed to sign or publish or print or post the said alleged libelous notice set forth in plaintiff's amended complaint.

"(5) That said amended complaint does not state the aggregate amount of purchases, or each individual amount, that the persons named in plaintiff's amended complaint would have purchased from the plaintiff, nor how much plaintiff would have profited in the aggregate, or from each person individually, had it not been for the alleged libelous notice set forth in plaintiff's amended complaint."

It is admitted by the plaintiff that the defendants had the right to give notice to their employes that plaintiff entertained feelings of animosity against them, and that they deemed it advisable to abstain from all communication with him, and to make the request that their employes should not disclose to him anything concerning the present condition of their business, and to keep silent concerning themselves, their business and their property. But the other portions of the notice are specifically claimed to be libelous. The most objectionable phrases being:

"And his expressed intentions are to hinder and embarrass us still further. * * * We especially request our employes to refrain from associating with him, either directly or indirectly, * * * and suggest that no one of our agents, representatives, or employes trade or deal with Chiatovich in any manner whatsoever."

Touching the merits, two main questions are presented: (1) Is the language used in the notice susceptible of any construction which would subject the plaintiff to public contempt, hatred, ridicule, or obloquy? (2) Is it susceptible of any construction which would impute to plaintiff any dishonesty in his dealings, impeach his credit or standing, or injure him in business as a merchant?

1. In *Odgers, Lib. & Sland.* 21, the author says that, in cases of libel, "any words will be presumed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbors, * * * and * * * all words * * * which, by thus engendering an evil opinion of him in the minds of

right-thinking men, tend to deprive him of friendly intercourse and society." *Bailey v. Holland*, 7 App. D. C. 184, 189; *Rider v. Rulison*, 74 Hun, 239, 26 N. Y. Supp. 234; *Morey v. Association*, 123 N. Y. 207, 210, 25 N. E. 161; *Byram v. Aikin* (Minn.) 67 N. W. 807; *Baker v. State* (Neb.) 69 N. W. 749, 751; *State v. Norton*, 89 Me. 290, 293, 36 Atl. 394; *Newell, Defam.* 67, 77; *Townsh. Sland. & Lib.* § 21, notes; 13 Am. & Eng. Enc. Law, 299. In the present case it is unnecessary to determine whether the portions of the publication to which the innuendoes relate are libelous per se or not. If libelous per se, there would be no need of any innuendoes (*Turton v. Recorder Co.*, 144 N. Y. 144, 148, 38 N. E. 1009); and, if an innuendo was necessary, it is found in the complaint.

The question to be decided is whether or not the language used in the notice is susceptible of the construction placed upon it by the innuendoes of the complaint. Words must be construed with reference to their natural sense and ordinary meaning. *Morgan v. Halberstadt*, 9 C. C. A. 147, 60 Fed. 592, 594; *Dun v. Maier*, 27 C. C. A. 100, 82 Fed. 169, 173; *Bettner v. Holt*, 70 Cal. 270, 274, 11 Pac. 713. The language of the publication should not be forced beyond its ordinary meaning, in order to make it libelous. The courts do not seek to find an innocent meaning for words prima facie defamatory, and should not attempt to put a forced construction on words which by any reasonable construction may be fairly deemed harmless. *Publishing Co. v. Mullen* (Neb.) 61 N. W. 108. Nor will innuendoes be allowed to enlarge the meaning of the words. *Dun v. Maier*, 27 C. C. A. 100, 82 Fed. 169, 172; *State v. Boos*, 66 Mo. App. 537; *Townsh. Sland. & Lib.* § 342. The language of the notice is to be construed by the court in the sense in which the community at large might understand it, giving to the words used their ordinary meaning. The sense in which words are received by the world is the sense which courts of justice ought to ascribe to them. But it is always admissible to aver and prove that words alleged to be defamatory, which have a covert or ambiguous meaning, were intended and used with the object of defaming plaintiff, and were understood in that sense by those who read them. *Maynard v. Insurance Co.*, 34 Cal. 48, 59; *Edwards v. Publishing Soc.*, 99 Cal. 431, 435, 34 Pac. 128; *People v. Collins*, 102 Cal. 345, 36 Pac. 669; *Mattice v. Wilcox*, 147 N. Y. 624, 633, 42 N. E. 270. If the words published are fairly capable of two meanings, one harmless and the other defamatory, it is a question for the jury to determine from the evidence in what sense the persons to whom the notice was addressed, or persons who read the same, may have understood them. *Twombly v. Monroe*, 136 Mass. 464, 468; *Publishing Co. v. Hallan*, 8 C. C. A. 201, 59 Fed. 530, 539; *Newell, Defam.* 290; *Odgers, Lib. & Sland.* 94, 539, 544.

Applying these general principles to the case in hand, I am of opinion that the words used in the objectionable paragraphs of the notice might be susceptible of the meaning charged in the innuendoes of the complaint. Whether the publication was made as charged, or whether it was justified by the circumstances under which it was made, can only be properly determined when the facts in relation thereto are fully disclosed and presented to the court and jury. I am also of

the opinion that the averments in the innuendoes, as to the understanding of the parties reading the same, is sufficient, although it would have been better pleading to have averred in direct terms that the language was so understood by the parties to whom the notice was addressed.

2. Touching the second question, it seems clear that the tendency of the publication was to injure the plaintiff in his business as a merchant. The employes of the defendant must have understood the suggestion in the notice for them not to "trade or deal with Chiato-vich in any manner whatsoever" as a notice that, if they did, they must abide the consequences of a discharge, because the notice further states that "his interests are so antagonistic to ours—his purpose is so manifestly hostile—that those who favor him cannot complain if we consider them as equally unfriendly to us." The law guards with jealous care the rights, privileges, property, and business of every person. It is well settled that damages may arise, not only out of injuries to the person, to his health, his liberty, or reputation, but also out of injuries to his property or his business. Any wrongful invasion of either is a violation of his legal rights. As a general rule, it may be said that every person has an absolute right to refuse to have any business relation with any particular person or persons. This proposition, however, in so far as it applies to cases like the present, must be confined and limited to the individual action of the men who assert the right. It is not true in law—although some authorities to that effect may be found—that one person having the right himself may, from his ill will, malice, revenge, or other evil motive, influence other persons to do the same thing. There are, of course, certain distinctions between damages caused by mere rivalry in business, without the intention of injuring the trade of the plaintiff, and those where such intent is shown with personal malice towards him,—questions which may or may not arise upon the trial of this case, but have nothing to do in determining the mere sufficiency of the averments of the complaint.

In *Walker v. Cronin*, 107 Mass. 555, 564, the court said:

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right, by contract or otherwise, is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to [which hold parties liable for the damages incurred]."

In *Railway Co. v. Greenwood*, 2 Tex. Civ. App. 76, 80, 21 S. W. 559, 561, where the questions involved bear directly upon this point, the court said:

"Did appellant have the right to prohibit its servants from patronizing appellee's hotel and saloon? If, in issuing the order or threat, it only exercised a legal right, it may be admitted that appellee cannot complain, though it resulted in loss to him, whatever may have been the motive with which the act was done. If appellant would have had the right to discharge its serv-

ants for doing the forbidden things, then it must follow that it could lawfully notify them that it would exercise it. It had the same right to discharge its servants as all masters have under similar conditions. This right was not to dismiss the servants arbitrarily or capriciously, but for reasonable causes only. Were the acts, the doing of which appellant declared to its servants should be the cause of their discharge, such as would justify the action which was threatened? The allegation is that the employ  s were threatened with discharge if they 'in any way patronized plaintiff, either by eating at his house or drinking at his bar.' We think it too plain that, as thus stated, there would have been no just ground for discharging the servants for doing what they were thus forbidden to do. This is charged to have been done maliciously, with intent to injure plaintiff. The employ  s, presumably, had the right to eat and drink where they chose, so long as they violated no contract with their employer and performed their service well, and the malicious use of such moral coercion upon them by the appellant as this petition alleges, for the purpose of injuring appellee, was wrongful, and made appellant liable for such damage as was thereby inflicted. Appellant did not have the right to intentionally induce others to abstain from patronizing appellee, except for a legitimate purpose."

The general tendency of the authorities is to the effect that published words which tend to injure a man in his trade, business, or occupation are actionable and libelous per se, and, unless the defendant lawfully excuses them, the injured party is entitled to recover without any allegation or proof of special damages. *Easton v. Buck* (Sup.) 48 N. Y. Supp. 158, 160; *Moore v. Francis*, 121 N. Y. 199, 204, 23 N. E. 1127; *Mains v. Whiting*, 87 Mich. 172, 180, 49 N. W. 559; *Landon v. Watkins*, 61 Minn. 137, 143, 63 N. W. 615, 617; *Newell, Defam.* 192 et seq.

In *Moore v. Francis* the court said:

"The principle is clearly stated by Bayley, J., in *Whittaker v. Bradley*, 7 Dowl. & R. 649: 'Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business, are actionable.' When proved to have been spoken in relation thereto, the action is supported, and, unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed."

In *Landon v. Watkins* the court said:

"Under proper allegations in the complaint,—and there were such in this,—evidence of general diminution of profits and a loss of trade is admissible in an action for libel. *Newell, Defam.* 864; *Starkie, Sland. & Lib.* 313, 486 (426, 647). When the injury complained of is a loss of trade in ordinary cases from a libel, a general allegation of such loss is sufficient, and such allegation may be supported by evidence of such general loss."

But in this case special damages are alleged. The averments in the complaint with reference thereto are sufficient, without stating the aggregate amount of purchases by each individual, or how much plaintiff would have profited in the aggregate had it not been for the alleged libelous notice. *Odgers, Lib. & Sland.* 314; *Newell, Defam.* p. 867, §§ 41, 42.

3. The questions whether L. J. Hanchett caused the notice to be published, or whether L. E. Hanchett was authorized to publish the notice, are matters to be determined from the evidence. The demurrer is overruled.

MARSH V. UNITED STATES.

(District Court, N. D. Florida. May 16, 1898.)

1. CLERKS' FEES—METHOD OF COMPUTING FOLIOS.

Where the journal entries in criminal cases are made up in pursuance of an order of court requiring the proceedings to be entered, not in the form of a mere recital, but each order, motion, and proceeding in a paragraph separate from others under the same caption, the clerk is entitled to charge 15 cents for each of said separate orders, motions, etc., although they may relate to the same case, and be entered under the same caption.

2. SAME.

The clerk is entitled to a fee of 10 cents for each person sworn under direction of the court in order to determine his qualification as a juror.

3. SAME.

The clerk is entitled to a fee of 15 cents per folio for the entry of orders for the removal of United States prisoners from a jail in which they had been committed, under mittimus of a commissioner, to await trial, to the jail of the place where court is to be held for their trial, and for such a number of certified copies as the court may direct the clerk to deliver to the marshal, and for filing and entering the return of said order by the marshal, and for entering in the journals of the court orders remanding, and for the production of prisoners for sentence.

4. SAME—PRÆCIPE TO JURY COMMISSIONER.

The clerk is entitled to a fee of \$1 for issuing a præcipe to a jury commissioner, which is in the nature of a summons, and the only method, under existing rules of court, to procure his attendance for the drawing of the jury.

5. SAME—MEMORANDUM RECORD OF ENTRY AND FILING OF PAPERS.

The clerk, when required by rules of court to keep such a record, is entitled to a fee of 15 cents for the record memorandum in his record book known as the "Clerk's Combined Docket," in addition to the filing fee of 10 cents for each paper, and the regular docket fee.

6. SAME—SEALS.

The clerk is entitled to a fee of 10 cents for swearing, 15 cents for the jurat, and, where there has been no express waiver, 20 cents for the seal of the court attached to affidavits taken before him.

7. SAME—CERTIFIED COPIES AND SEALS.

The requisition for a duly-certified copy of any particular record in possession of the clerk ordinarily requires the formality of a seal to the certificate; and, unless there has been an express waiver thereof, the clerk should attach the same, and is entitled to his fee therefor.

8. SAME.

The clerk is not entitled to charge for seals to copies of orders on the marshal to procure meals for the jury, as such seals have been waived by the department.

9. SAME.

The clerk is entitled to a fee of 15 cents for preparing orders of court, when directed by the court so to do.

10. SAME.

The clerk is entitled to a fee for making certificates to attach to the marshal's account, relative to the method of the issuance of bench warrants, as these were required by the department in proof of said accounts.

11. SAME.

The clerk is entitled to charge for attaching duplicate jurats to the duplicate accounts of the deputy marshals, where the oath has been taken before him as to these vouchers in the marshal's account.

12. SAME.

The marshal's accounts are required to be made in duplicate, and this includes all oaths, copies of orders, and incidental proof as the department,

by its regulations, requires; and, wherever the charge for the original is proper, the clerk would be entitled to an equal fee for the duplicate.

18. **SAME.**

The clerk is entitled to a fee of 10 cents for administering oaths to accounts of deputy marshals, being their vouchers in the marshal's account, and for like services to the actual expense account of the chief office deputy marshal and district attorney.

14. **SAME.**

The clerk is entitled to charge at the rate of 15 cents per folio for entering the names and addresses of persons selected by him to be placed in the jury box.

15. **SAME.**

The clerk is entitled to charge the regular statutory fee for filing all papers sent up by the commissioner in criminal cases; for filing pleas in abatement in criminal prosecutions; for entering orders approving accounts of officers of the court, even though the rendition of said accounts may have been unnecessary, by reason of the failure of the officer rendering them to include the items therein in a previous account; and for filing certificates of deposit of money covered into the treasury; and for making the certificate of service indorsed on a writ of error sued out by the United States; and for entering on the minutes of court, in pursuance of an order thereof, the oaths of office of deputy marshals; and for making such certificates as the department has required by the forms furnished to the marshal.

16. **SAME.**

The clerk is entitled to a fee of \$1 for issuing, in pursuance of an express order of court, commissions to the commissioners appointed under the act of May 28, 1896; and for filing each paper and docket sent up by the old set of commissioners, whose office had expired by virtue of said act, a fee of 10 cents; and a fee of 10 cents per folio for making copies of the orders appointing said commissioners, to forward to the attorney general.

17. **SAME.**

The clerk is entitled to a fee of 15 cents per folio for making reports of the disposition of certain cases, when called upon by a department of the government to do so; and, if those reports are required to be made on separate slips, each slip may be computed as a folio.

18. **SAME.**

The clerk is entitled to charge at the rate of 15 cents per folio for making report of the taking of testimony in an admiralty cause referred to him.

19. **SAME.**

The clerk is entitled to charge 10 cents for filing orders of court for the subpoena of poor persons, witnesses, who have applied, under Rev. St. § 878, for such order.

(Syllabus by the Court.)

F. W. Marsh, in pro. per, and Buckner Chipley, for petitioner.
John Eagan, for the United States.

SWAYNE, District Judge. The petition shows that the petitioner has complied with all the requisites of the act of congress of March 3, 1887, conferring jurisdiction on this court to hear cases of this nature. Taking up the schedules as they are presented in the petition, and demurred to in toto by the government, I am able to discern the following principles applicable thereto:

Schedule A: For entries in the minutes of the court in criminal cases, charged as separate entries as to each proceeding, but disallowed by the comptroller on the ground that they must be counted consecutively, and allowed as a single entry for any and all proceedings on a particular day. It may be well to preclude what may

be said as to this question by setting forth a copy of the order of the court in the premises:

"It appearing to the court that the adoption of forms as a guidance to the clerk of this court in making the journal entries in criminal cases would be both expedient, and a protection to said officer, the following forms are hereby adopted, and declared to be proper entries in criminal cases; each motion, order, plea, or sentence to be made separate and distinct." From the order of April 7, 1898.

The court has therefore set out what shall be criminal entries, and that it is not a mere recital of proceedings, but places on record the orders, motions, pleas, verdicts, sentences, etc., incident to the prosecution; separating each in a paragraph by itself. Petitioner contends that, as each order or proceeding is entered in a separate paragraph, he is entitled to be paid at the rate of 15 cents per folio for each of said entries, under section 828, subd. 8, Rev. St., which reads:

"For entering any return, rule, order, continuance, judgment, decree, or recognizance or drawing any bond, or making any record, certificate, report or return, for each folio, fifteen cents."

And section 854, Rev. St.:

"The term folio in this chapter shall mean one hundred words, counting each figure as a word; when there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted except where the whole statute, notice, or order contains less than fifty words."

The supreme court, in passing upon the construction of the former section relative to the making up of the final record in criminal cases, holding such to be but one instrument, says, in connection with the entries in litigation here:

"By this method of computation the clerk charges for each entry, many of which are less than a dozen words in length, as for one hundred words. This may be proper where the charge is made under the first clause of the paragraph, 'For entering any return, rule, order,' etc., upon the journals of the court." *U. S. v. Kurtz*, 164 U. S. 50, 17 Sup. Ct. 15.

The same view of this paragraph is taken by the court in *Cavender v. Cavender*, 3 McCrary, 383, also reported in 10 Fed. 828.

The fact that the entries are kept separate, as to each proceeding, under order of court, and for a purpose which the court has already adjudged sufficient, makes the method of computing the folios seem correct; and the clerk's fees should be allowed in accordance with this method.

Schedule B: Consisting of several items for "swearing on the first day all persons summoned, and those thereafter on special venire, before they had qualified and been accepted as jurors, as to the truth of their answers relative to their qualifications as grand or petit jurors." Disallowed by accounting officers, and claimed to be merged in the docket fee. It is the established practice in this district, on the first day of the term, for the clerk to call the names of those persons appearing on writ of venire facias whom the marshal has returned as found. They are then sworn by the clerk, at the bar

of the court, "well and truly to answer all questions touching their qualifications to sit as petit [grand] jurors in and for the Northern district of Florida"; and those of them found to possess the statutory qualifications are impaneled, and those not qualified are then excused, without ever becoming jurors at all, or serving in such capacity. It is contended by petitioner that this service does not fall within the exceptions of subdivision 4, § 828, Rev. St., which provides, "For administering an oath or affirmation, except to a juror, ten cents," but that the oath is not one to a juror, but to a person who has presented himself pursuant to summons, and who has not qualified as such. Bouvier's Law Dictionary defines a juror to be "a man who is sworn or affirmed to serve as a juror." 1 Bouv. Law Dict. 684. Also 2 Toml. Law Dict. p. 299: "One of those persons who are sworn on a jury." And Burrill's Law Glossary (volume 2): "One of a jury; a person sworn on a jury; a jurymen." The exception in the above paragraph of the Revised Statutes is undoubtedly made to apply to the oath administered to the jurors on voir dire, when being examined relative to specific cases, and the general oath to the jury; but the claim here is for an oath to a person who has never become a juror, and could not properly be designated by that name. The statute will be strictly construed as against the contention of the government. Judge Hammond has thoroughly and learnedly gone over this question in *Clough v. U. S.*, 55 Fed. 921, upholding the contention of the petitioner; but, so far as I am able to ascertain, the question has not been passed upon otherwise. As the claim is not for swearing a juror, but a person whom the court has directed to take an oath in order to ascertain his qualifications as a juror, the charge is a proper one.

Schedule C: "For entry on journals of the court of orders for the removal of United States prisoners, who were at the time confined in county jails, other than at the place of trial, under mittimus of United States commissioners; and for three certified copies of such order, furnished to the marshal; and for filing and entering the return of the marshal." This court held in *Puleston v. U. S.*, 85 Fed. 570, that these charges did not fall within the purview of section 1030, Rev. St., and that a United States marshal was entitled to charge the statutory fee for the service of such orders, and fully investigated and set forth the practice in this connection; approving the case of *Taylor v. U. S.*, 45 Fed. 538. It is therefore unnecessary to further go into this subject.

Schedule D: For entering orders in the journal of the court remanding prisoners to custody after trial of a cause, and for orders for the production of prisoners for sentence. These charges are analogous to those in Schedule C, and have been disallowed on the same ground. The practice in this regard has been fixed by the court, as set forth in Schedule A, by which it is prescribed that an entry of an order remanding prisoners who are convicted, and before sentence, if same should not be pronounced on the same day as the conviction, should be entered as of course. Hence, if section 1030, Rev. St., has no application, then the clerk would be entitled to his fee. Said section reads:

"No writ is necessary to bring into court any person or prisoner in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney, for which no fee shall be charged by the clerk or marshal."

The only question presented is, does this fee refer to the writs, or to the orders? There is no charge here for a writ or order, but for the entry of a proceeding of the court. It may happen that this is an order of the court for the defendant to appear for sentence, or an order remanding him. The charge is for an entry, and this cannot be affected by this section. The fee there spoken of—construing it strictly—refers to the issuance of a writ. At least, a liberal construction in favor of the petitioner would admit of this, and "words should be construed liberally, in favor of the officer, and not strictly, in favor of the United States." *McKinstry v. U. S.*, 40 Fed. 818 (opinion by Judges Pardee and Lamar); *Taylor v. U. S.*, 45 Fed. 538; *Puleston v. U. S.*, 85 Fed. 570.

Schedule E: Issuing *præcipe* to jury commissioner for the Northern district of Florida, under rule 5, rules of practice of the circuit court. This fee is provided for by subdivision 1, § 828, Rev. St.: "For issuing and entering every process, commission * * * or other writ * * * one dollar." The issuance of this process is rendered necessary by rule 5, rules of practice of this district, which reads: "Upon the receipt and entry of an order for filling the jury box (also drawing the jury) the clerk will issue a *præcipe* to the jury commissioner, citing such order, and directing him to attend on a day certain," etc. This *præcipe* is a summons, and the only method prescribed for obtaining the proper attendance of the jury commissioner on the day selected by the clerk for the drawing of the jury. The fee is provided for by this section of the Revised Statutes, and therefore the charge is proper. *Goodrich v. U. S.*, 47 Fed. 267; *Clough v. U. S.*, 55 Fed. 921. The former case holds a charge for a *præcipe* to a jury commissioner to be a proper fee, and the latter that a commission to a supervisor of elections was properly charged for.

Schedule F: For entering memorandum of the filing of any particular paper, in civil causes, filed by and on behalf of the United States, in the record known as the "Clerk's Combined Docket," under rule 8, rules of practice of this district. The said rule provides:

"The clerk of this court shall keep a Clerk's Combined Docket, of all causes and proceedings, commenced or brought into this court on the civil side, upon which shall be entered at the time of its commencement, every suit or proceeding, with a memorandum of the time and manner of its commencement, the nature of the action, and the name of the attorney or solicitor of the plaintiff or complainant, and of the defendant, if he shall appear, and a memorandum of all papers filed, of the issue and return of process, of the fees and costs, as the same shall be taxed from time to time, and shall enter therein all rules and orders made and entered by the clerk as of course, during the progress of the cause."

It is contended that the fee for making the record entry of the time and manner of filing any particular paper, with a description thereof, is merged in the docket fee. It will be observed that this rule provides the method of keeping this docket, and, further, that

certain records shall be kept therein. In fact, this book is a condensed record of all matters relative to the case. It might as consistently be contended that the entry of all orders entered as of course by the clerk, and the return of process, would be covered by the docket fee; but these items are allowed invariably, although their entry is in the same manner, and upon the same page of this record. Judge Whitney, in *Amy v. Shelby Co.*, Fed. Cas. No. 345 (decided Aug. 7, 1872), in passing on this question, says:

"The accounting officers of the proper department of the government allow ten cents for filing each paper, and fifteen cents additional for entering in the calendar a note of the filing; holding, I suppose, that such entry is a record, entitling the clerk to a fee of fifteen cents a folio. When the number of words are less than one hundred, they are counted as a folio; and, inasmuch as such entry is in fact a record, I am inclined to regard the department construction the proper one, which gives the clerk ten cents for filing a paper, and fifteen cents for the record entry in the calendar."

It therefore seems that up to 1872 the department allowed these items, and has since changed; but upon what judicial decision, I am unable to find. The charge seems to be proper. In some cases, where there are 300 or 400 papers filed, or in cases such as the one just cited, where there were 2,000, the docket fee is grossly inadequate to compensate the clerk. The docket fee is made to apply to those acts which are similar in all cases, such as the entry of the style of the cause in the various dockets, the indexing, swearing the jury, taxing costs, and other analogous acts; and the supreme court has not been disposed to broaden the meaning and scope of this paragraph, as in the case of *U. S. v. Van Duzee*, 140 U. S. 199, 11 Sup. Ct. 941; and it should not be construed to increase, to a burdensome extent, the duties of the clerk under this fixed fee, but should be classed under the expansive clause relative to entries. This record entry seems distinct from such acts as are classed under the docket fee, and should be allowed as a record entry.

Schedule G. Item 1: This item is proper and ordinary, and, unless some clear rule of law, or some fact as to its fairness, is shown to the contrary, should be allowed.

Items 2 and 3: In swearing a person to an ordinary affidavit, a clerk of a United States court acts merely in the capacity of a notary public, and it is the usual practice to attach his seal. There are no authorities directly on this point, but it seems reasonable to allow a clerk the regular fee of 10 cents for the oath, 15 cents for the certificate, and 20 cents for the seal, where a paper requires an oath, and proper evidence of same, before it can be filed. See Rev. St. § 900. Rev. St. Fla. § 221, provides as fees for notaries public: Oath, 10 cents; certificate and seal, 50 cents,—and speaks of a certificate and seal in conjunction, and makes no separate fee for either. It would seem that the clerk ought to receive for analogous acts what a notary public by law can charge; and, if the district attorney had gone before a notary public, he could have been required to pay 60 cents for the same services that the clerk here charges 45 cents for. I think that it may fairly be said that the seal is required, and that, as the district attorney and the court have never waived the placing of the seal to such affidavits, it is a proper charge. Section 900,

Rev. St., requires, in the re-establishment of lost records, "a copy [of application] of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated," etc.; and the order of the court in the cases in which the charge for seals to certified copies of this notice is made specified what this notice was to be, to wit, to be issued by the clerk, under seal of the court, giving the defendants certain notices, etc. The only way these notices could be served by the marshal was by copy. Should that copy be under seal? I think, from the tenor of the order, it should be a certified copy, including the seal.

Items 4, 5, 6, 7, 8, 11, 14, 15, 16, 17, 18, 19: Where a duly-certified copy of an order of court is required, does this not also imply the formal authentication of that order? In this instance the clerk was directed by written order of court to make a duly-certified copy of an order, to be transmitted to certain persons for a particular purpose. The charge for the seal was disallowed in each instance, as being unnecessary. It is the general rule that, whenever a copy of any official record in the clerk's office is required to be duly authenticated, a seal should be affixed to the certificate. The supreme court, in *U. S. v. Van Duzee*, 140 U. S. 175, 11 Sup. Ct. 760, says:

"The question is not so much what the law requires as a sufficient authentication of the copy of an order for formal proof of such order in a case upon trial, but what method of authentication the department requires. The department has the right to waive the formal proof which would be required in a court of law."

But in these items the question is not between the department and the clerk. Neither has there been any waiver of formal proof by the person to whom these copies were required to be given, but, on the other hand, in most instances an order of court was made, directing a duly-certified copy to be made. If this does not require a seal, what can the phrase mean? When can the clerk determine whether a seal is proper or not? Is there any rule left to adhere to? Clearly, whenever a duly-certified copy is required, unless express waiver of a seal is expressed, the clerk should attach a seal. In *Taylor v. U. S.*, 45 Fed. 535, Justice Jackson says:

"Upon principle, a court of record can only speak from its records, and, when the original cannot be used, can only speak, outside the court, from a copy of the records, duly authenticated; * * * the general principle being that, where copies of court records are to be used as evidence elsewhere, the highest form of authentication known to the law should be employed."

As in some or most of these items the court directed the form of authentication, it will be binding on the government; and the supreme court, in the above citation, clearly laid down the principle that, unless such waiver was in some way shown, the officer ought to adhere to the rule of proper authentication, by the affixing of the seal. At least, it seems a proper inference.

Items 9, 12, 13: The auditor in these items required a copy of a certain order, or a certificate of certain facts, to be furnished as proof in the adjustment of certain accounts. There was nothing said in his directions as to the seal, or manner of authentication, but a certificate or certified copy was required. There seems to be no

general rule of the department in this regard, as in some instances certificates with seals are required, and in others no seal. This item seems not to fall within any regulation. How was the clerk to know that the formality of a seal had been waived by the auditor? The certificate was made in the customary manner, and a seal attached. Unless the auditor expressly waived this formality, it should be allowed, as per previous authority.

Item 10: For seals to copies of orders on marshals to furnish meals to juries. In instructions to marshals (Cousar's Dig. 222) such copies of orders are required. Nothing is said as to the necessity of seals, but the following certificate is required: "A true copy from the minutes. ———, Clerk." I believe this is properly construed as a waiver of the formality of the seal, and a strict compliance with the instructions would render a seal unnecessary.

Item 20: This charge is for a certified copy of an order for procuring books of record for the clerk's office in Tallahassee. The copy of the order was required by the department in order to pass upon the requisition for money for the payment thereof. It is contended that the clerk should have complied with certain requirements then unknown to him, but, as the department required the copy as evidence, it should have been allowed in the clerk's fees.

Items 21, 22: For preparing orders under the direction of the court. The court often desires, of its own motion, to make certain orders, and in these instances called upon the clerk to prepare the same. It is contended that there is no fee provided therefor. Subdivision 8, § 828, Rev. St., provides, "For entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, certificate, return or report, for each folio, fifteen cents." On the other hand, it may be suggested that, as the clerk is required by lawful authority to draft an order, the doing of this work, and the subsequent submission of the same to the court, may be classed under the head of "Making a Report." I think this would not be an overliberal construction.

Items 23, 38: Making certificates to marshal's accounts relative to the issuance of bench warrants, as required by regulations. These regulations referred to in this item will be found in Cousar's Dig. 232. The marshal construed this to require him to furnish a certificate to the effect that all bench warrants had been properly issued. The department now claims that such certificate was not required, but as the matter was not determined until after these services were performed, and the marshal adopted this construction, and called for these certificates, based upon these requirements of the department, it seems fair that the government should be held liable therefor.

Item 24: Duplicate jurats to accounts of deputy marshal's actual expense accounts. It is hard to understand why the accounting officers disallowed these items. The act of February 22, 1875 (18 Stat. 333), requires that accounts and vouchers of marshals be made in duplicate. The duplicate filed in the office of the clerk must, in fact, be a duplicate of the account transmitted to the attorney general, and not merely a copy. Cousar's Dig. 216, "Instructions of

Attorney General." And "a deputy must swear to his voucher. This affidavit must be executed before an officer having general authority to administer oaths, and must be on or attached to the voucher." "Instructions of Attorney General," Id. 233. In *re* Marsh, 2 Compt. Dec. 482, the comptroller decided that a clerk was entitled to 10 cents for administering oath to a deputy marshal, 15 cents for original certificate, and same for duplicate certificate to the voucher. I understand that this has since been the ruling of the department, and it undoubtedly is correct under the law. The duplicate jurat in these instances seems necessary, equally so with the original, and will be allowed on the same ground.

Item 25: Copies of certain orders furnished to the marshal. This service was required by the marshal to attach to his account, under "General Directions of Attorney General," Cousar's Dig. 233:

"Emergencies may arise where it will be impossible to first obtain authority from the department, but in all such cases the facts must be clearly set forth, and these particular expenditures specially approved by the court."

The circumstances of these charges are thus: The court ordered the marshal to procure benches to accommodate a great crush of witnesses,—the need was immediate,—which order was entered of record. This order was in effect a special approval of these particular expenditures, and necessarily should be certified to the department, accompanying the marshal's account, in analogy to other orders approving the marshal's accounts. The services of the clerk in this particular were actual and necessary.

Items 26, 27, 32, 43, 51, 53: Fees for the duplication of proofs of orders, certificates, etc., in cases where there is no question as to the legality of the original, to be attached to accounts current of court officers. In no item of these charges is there a claim that the certified copy of the order approving the account should be in duplicate, but merely such proof as is required to be attached to witness and juror pay rolls, or certificates relative to the entry of orders for the marshal to furnish meals to jurors. The accounts the marshal renders to the court must in fact be a duplicate. *Supra*, item 24, etc. This applies to every detail, and this must in fact include all such proofs as the department requires relative to the items, vouchers, oaths, copies of orders and certificates. as each account serves a different purpose,—the one, for settlement at the department; the other, for deposit for inspection among the files of the court. All items here should be allowed. Cousar's Dig. 66.

Items 28, 30, 31, 36, 37, 48, 49, 50: For administering oaths to accounts of deputy marshals (their vouchers in the marshal's account), actual expense account of chief office deputy and district attorney, and jurat to original and duplicate. These questions have been thoroughly adjudicated in favor of the petitioner in the cases of *Puleston v. U. S.*, 85 Fed. 570, and *In re Marsh*, 2 Compt. Dec. 482, and upon that authority should be allowed. The former case held that the marshal was entitled to be reimbursed for expense incurred for oath and jurat to his current accounts after the passage of the act of May 28, 1896; and in the latter the comptroller allowed the same fees in other items charged.

Item 29: Entering on slips of paper the names of jurors, to be placed in the jury box. In *Fuller v. U. S.*, 58 Fed. 329, Judge Newman, of Georgia, says:

"For entering names of jurors, with post-office addresses, on slips of paper for the jury box, the clerk is entitled to charge 15 cents per folio. In the case of *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. 439, the supreme court, in discussing services of this kind, says: 'We think that the construction given to this section is conclusive against the claim of the clerk for per diem services in the drawing of juries, or for such services as are not taxable, as orders, certificates, or the like, under section 828, fixing the compensation of clerks.' The clerk has made his charge for this service under subdivision 8, § 828, Rev. St. * * * The charge is 15 cents per folio, as for making any other record, and it seems to be the only proper way in which the clerk can be compensated for his service."

This decision seems very clear, and should be followed.

Items 33, 39, 58: Filing papers in criminal cases. It is admitted that five out of the twelve filed were by defendant. The five demurrers filed by the district attorney in item 33, and two papers in item 39, are undoubtedly correct, and arose over a misapprehension as to the party who filed them, and seem to be among the usual and ordinary costs allowed. As to the filing of pleas in abatement, it may be said that the accounts show that a fee for entering a plea to the indictment when the prisoner is arraigned is unquestionably allowed, together with the other journal entries; no deduction from the journal entries being made in the number of folios for this entry. I can find no ground for a distinction being made as to pleas in abatement. The one is as much a part of the expense of the prosecution as the other, and, in accordance with the practice of the accounting officers in that particular, should be allowed.

Items 34, 35, 40: Entering orders approving accounts of officers of the court, and certified copies, certificates, and seals, for forwarding to the department. It is contended, in connection with these items, that these accounts should have been rendered with the regular quarterly accounts, or that they should have been included with other accounts. With this the clerk had nothing to do. The court in fact made the orders or approval; and it was necessary that the clerk enter them, and make out the copies for transmission in accordance with law. So far as these items were concerned, it made no difference whether the officer presenting them had complied with the regulations of the department or not. That was not a matter for the determination of the clerk. He was only concerned in their proper transmission to the department. And there can be no question of law relative to their justness, as the supreme court, in *U. S. v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. 758, has expressly so declared. See, also, *Jones v. U. S.*, 39 Fed. 410; *Erwin v. U. S.*, 37 Fed. 470; *Marvin v. U. S.*, 44 Fed. 405.

Items 41, 44: Entering on the minutes of the court, in pursuance of rule 9, § 5, rules of practice of United States courts, Northern district of Florida, the oaths of office of deputy marshals. It is hard to understand why the department clerks, in the face of a plain decision of the supreme court, will disallow items properly charged. These items are discussed and allowed in full in the case of *U. S.*

v. Van Duzee, 140 U. S. 169, 11 Sup. Ct. 758, sustaining the court in Van Duzee v. U. S., 41 Fed. 571; the ruling being plain, and leaving no doubt as to the justness of these charges.

Item 45: This item is for an entry of an order in a civil case prosecuted by the government at the instance and for the benefit of the government, and the fee therefor is correct legally, and no question can be maintained on demurrer relative thereto.

Item 46: For filing certificates of deposit of money covered into the treasury by the clerk. The treasury department has a summary method of declaring accounts closed after a quarter's accounts have been passed upon, allowing no supplemental account for other fees omitted. At least, such was their ruling in these items. But as there is no such rule of law binding on the courts in this respect, and no statute of limitation, except as to six years, these items should be allowed, under the ruling of the supreme court in U. S. v. Kurtz, 164 U. S. 53, 17 Sup. Ct. 15; item 5 in said opinion allowing these fees.

Item 47: Indorsing on writ of error sued out by the United States the certificate of service, as made by the clerk. The accounting officer who made this disallowance seemed to be wholly ignorant of the legal method of serving writs of error, contending that such services were the duty of the marshal who effected the service of the writ; seeming not to understand that by law the clerk effected service by lodging a copy with the files of his court, and returning such writ, with the certificate of such fact indorsed thereon,—no other officer having any duty to perform in said service. If the department had understood this, I feel sure that the item would have been allowed. It is a proper charge, and required by section 1007, Rev. St.

Item 52: For making certificates relative to the entry of orders to furnish meals to juries. The blank forms furnished by the department (form 8) to the marshals require this particular certificate to be made by the clerk. These forms had the effect of a specific requirement for these certificates, and, under the ruling in the case of U. S. v. Allred, 155 U. S. 591, 15 Sup. Ct. 231, should be allowed.

Items 54, 59: Administering oaths and affixing jurat in proof of accounts of office deputy marshals and district attorney after the passage of the act of May 28, 1896, and swearing bailiffs attending upon juries. These fees seem to fall within the ruling of this court in the case of Puleston v. U. S., 85 Fed. 570; and the latter item, under the ruling in the case of Davis v. U. S., 45 Fed. 162.

Item 55: Issuing commissions to the new commissioners appointed by the court, as per order of court. In accordance with the express orders of the court, July 1, 2, 3, 1897, commissions were issued to the four commissioners appointed under the act of May 28, 1896, which required the district court to appoint such number of commissioners, etc. "The appointment of such United States commissioners shall be entered of record in the district court." Although there is no specific requirement relative to the issuance of such commissions by the court, yet the order of the court has the effect and operation of law. "When the clerk performs a service in obedience

to an order of court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services." U. S. v. Van Duzee, 140 U. S. 169, 176, 11 Sup. Ct. 758. Hence the order of the court requiring the issuance of these commissions is conclusive, and the fee proper, under section 828, subd. 1: "For issuing and entering every process, commission, etc., \$1.00."

Item 56: Making copies of orders appointing commissioners, and certificate and seal, sent to attorney general. The above-cited act also requires "notice thereof [of the appointment of a commissioner] at once given by the clerk to the attorney general." 29 Stat. 184. For such notice there is no other fee, except as for a copy of the order. As the law requires a notice, the selection by the clerk of this form is a compliance with the act, and should be regarded as actual and necessary.

Item 57: The same act also requires that "said commissioners shall then deposit all records and other official papers appertaining to their offices in the office of the clerk of the circuit court by which they were appointed." Does this authorize the filing by the clerk of all papers sent in under this act? It seems clear that they become part of the records and files of the court. Some of the papers so sent in would in any event be sent up to be filed by the clerk, being papers in criminal cases, which there is no dispute as to the duty of the clerk to file; and in fact all but five dockets are papers of this nature, which should have been filed in any event. As to the others, as they become part of the files of the court they should be properly indorsed and placed on the files. It is necessary for the clerk to maintain possession of the papers so sent up, to place them away in a safe place, and do all such acts as are included in the filing fee. There is no other compensation provided therefor, and the clerk should not be thus burdened without compensation, when there is an adequate and proper fee.

Item 60: Making 11 separate reports, upon request of a department of the government, relative to the disposition of certain criminal causes. Subdivision 8, § 828, Rev. St., provides a fee for "making any report, for each folio fifteen cents." One of the departments of the government forwarded blank forms, upon which the clerk was required to make up a report of certain criminal cases, and judgments therein. Each case in which this data was required was placed on a separate sheet by the department, thus requiring a separate report in each case. The fee for searching for these judgments was allowed, but the report disallowed. It seems clear that the latter fee is proper, under this paragraph of the fee bill, and should be allowed.

Item 61: For making report relative to the method of taking testimony in an admiralty cause, in pursuance of an order of court. The government maintains that the fee for taking and certifying depositions at 20 cents per folio covers this fee of the commissioner for making his report, under rule 35, admiralty rules of this district. This charge was made under subdivision 8, instead of subdivision 6, § 828, Rev. St. The number of folios of testimony was estimated at 20 cents per folio, and the number of folios in the re-

port at 15 cents. If the clerk had made the charge as the department claims he should, he would have been entitled to 25 cents more than he claimed; but, estimating in the usual and proper manner, it is disallowed, seemingly on the ground that it is not a sufficient charge for the services, for if the estimate of the total number of folios had been on the basis of 20 cents per folio, as for depositions, then the clerk's charges would have been for five folios more than they were. The method here charged for seems correct, and should have been allowed.

Item 62: Filing affidavits for subpoena of witnesses in pauper criminal cases, with the order of the court indorsed thereon, directing same to be issued, etc. For filing this affidavit with the order indorsed thereon, it is contended, on two grounds, to be correct: First, that the fee is for filing an order of court for issue of subpoena for defendant's witnesses at the cost of the government. The comptroller of the treasury, upon an appeal taken by the clerk, allowed the fee for entering these same orders in the journals of the court, in pursuance of section 878, Rev. St., which declares, "In such cases the cost incurred by the process and the fees of witnesses * * * shall be paid in the same manner as witnesses subpoenaed in behalf of the United States." What is the cost of process? Clearly, under the ruling of the comptroller, the fee for entering the order is allowed (2 Compt. Dec. 578), but the fee for filing the order disallowed, which is a very unreasonable and illogical discrimination. The fact that this order is indorsed on the back of the affidavit is immaterial. The clerk can now elect to charge his filing fee as for the order. It is unnecessary to discuss the second contention, relative to the legality of the fee independent of the indorsement of the order.

UNITED STATES v. SAN FRANCISCO BRIDGE CO.

(District Court, N. D. California. June 25, 1898.)

No. 3,485.

1. INFORMATION—VIOLATION OF EIGHT-HOUR LAW—INTENTION.

Under Act Aug. 1, 1892, making it unlawful for contractors on public works to require or permit laborers to work more than eight hours in any calendar day, the intention is an essential ingredient of the offense, and must be charged in an indictment or information.

2. SAME—CONSTRUCTION AFTER VERDICT.

An allegation in an information that defendant, as a contractor on public works, "required" laborers to work more than eight hours in a calendar day, necessarily implies that the act was done intentionally, and is a sufficient allegation of the intent to support the information after verdict.

3. UNITED STATES—JURISDICTION—LAND PURCHASED FOR PUBLIC BUILDING.

A state retains complete and exclusive political jurisdiction over land within its limits purchased by the United States as a site for a public building, unless such purchase was with the consent of its legislature, or jurisdiction has been otherwise ceded to the United States, and any offense against its laws committed thereon is punishable in its courts.

4. SAME—PUBLIC WORKS—REGULATION OF HOURS OF WORK.

Congress has power to regulate the hours of labor which may be required or permitted on public buildings or works of the United States,

and the federal courts have jurisdiction to punish violations of such regulations, though the buildings or works where committed may be situated on land within the political jurisdiction of a state.

The San Francisco Bridge Company was convicted of the violation, as a contractor on the new post office at San Francisco, of the act of congress of August 1, 1892, by requiring and permitting laborers to work on such building more than eight hours in one calendar day. Heard on motion in arrest of judgment.

Samuel Knight, Asst. U. S. Atty.
R. Percy Wright, for defendant.

- DE HAVEN, District Judge. The defendant has been convicted of the violation of "an act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August 1, 1892 (2 Supp. Rev. St. [2d Ed.] p. 62), and has interposed a motion for an arrest of judgment. Section 1 of the act referred to makes it unlawful for any officer of the United States government or of the District of Columbia, or for any contractor or subcontractor whose duty it shall be to employ, direct, or control the services of laborers or mechanics upon public works of the United States or of the District of Columbia, "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." By section 2 of the act it is provided "that any officer or agent of the government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia, who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor."

The information charges that the defendant was a contractor upon public works of the United States, to wit, the new post office of the United States in the city and county of San Francisco; that as such contractor its duty was to employ, direct, and control laborers employed and working thereon; and that the defendant did on the 1st day of December, 1897, in violation of the act of congress above referred to, "require and permit said laborers to work more than eight hours in the calendar day last aforesaid, to wit, nine hours and forty minutes in such day, upon said contract and public works, there being then and there no case of extraordinary emergency for the employment of such laborers for the length of time last aforesaid, or for any length of time in excess of said eight hours in said calendar day."

The motion in arrest of judgment is based upon two grounds: First, it is claimed that the information does not charge that the defendant intentionally required or permitted the laborers, employed by it upon the public works referred to in the information, to labor more than eight hours in each day; second, because it is not alleged in the information, nor was the fact proved upon the trial, that the United States has exclusive jurisdiction over the land upon which the post office referred to in the information is being constructed.

1. There can be no doubt that, in order to constitute the crime de-

scribed in the law under which the defendant is prosecuted, there must be an intentional violation of its provisions by a defendant; that is to say, the act which that law forbids must be knowingly or intentionally committed, in order to make the doing of such act a crime. *U. S. v. John Kelso Co.*, 86 Fed. 304; *U. S. v. Ollinger*, 55 Fed. 959. This particular intention, constituting, as it does, an essential element of the crime, as described in the law, must therefore be alleged in the information or indictment in order to sufficiently charge a defendant with the commission of such offense. 1 Bish. Cr. Proc. §§ 523-525; *Com. v. Boynton*, 12 Cush. 499; *Com. v. Slack*, 19 Pick. (Mass.) 304. After verdict, however, and in passing upon a motion in arrest of judgment, the allegations of an indictment or information should be liberally construed, and an informal or imperfect allegation of an essential fact will be deemed a sufficient averment of such fact. *U. S. v. Noelke*, 1 Fed. 426. The information in this case does not in express terms charge that the act of the defendant in requiring and permitting its laborers to work more than eight hours in each calendar day was intentional, but such charge is necessarily implied from the language used in the information. As before stated, the intention which enters into the offense described in the act of congress above referred to is simply an intention to do the act which is prohibited by that statute, and such intention is, in my opinion, in effect charged by the information in this case. The language of the information is that the defendant did require and permit its laborers to work more than eight hours on the day stated. To "require" is to order, direct, or command, and the charge that the defendant required its laborers to work more than eight hours on the day named in the information necessarily implies that in making such requirement there was an intention upon the part of the defendant that its order or direction should be obeyed. So, also, the word "permit," as used in the statute, means to allow or consent to; and the charge in the information that the defendant permitted its laborers to work more than the prescribed number of hours may properly be regarded as the legal equivalent of an allegation that such work was done with its knowledge and consent, and, if so, there was an intentional violation of the law by the defendant. The information would doubtless have been in better form and more valuable as a precedent if it had followed the language of the statute, and alleged, in so many words, that the defendant intentionally violated the provisions of the law by directing and permitting laborers employed by it to work more than the prescribed number of hours; but, in my opinion, the information is sufficient to support a judgment of conviction.

2. Section 8 of article 1 of the constitution provides that congress shall have power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings." It is not alleged in the information, nor does the fact otherwise appear,

that the land upon which the new San Francisco post office is being constructed was purchased by the United States with the consent of the state, or that political jurisdiction over the same has been otherwise ceded to the United States by the state. Upon this state of facts, it must be held that the state of California retains complete and exclusive political jurisdiction over such land, and, this being so, there can be no question that persons there committing murder, or any other offense denounced by its laws, would be subject to trial and punishment by the courts of the state. 2 Story, Const. § 1227; *People v. Godfrey*, 17 Johns. 225; *Ex parte Sloan*, 4 Sawy. 330, Fed. Cas. No. 12,944; *U. S. v. Stahl*, 1 Woolw. 192, Fed. Cas. No. 16,373; *U. S. v. Ward*, 1 Woolw. 17, Fed. Cas. No. 16,639; *U. S. v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867. In the case last cited it was said by Mr. Justice Story:

"But although the United States may well purchase and hold lands for public purposes, within the territorial limits of a state, this does not, of itself, oust the jurisdiction of sovereignty of such state over the lands so purchased. It remains until the state has relinquished its authority over the land, either expressly or by necessary implication."

In view of this principle of constitutional law, it is now urged that this court is without jurisdiction to pronounce judgment upon the verdict, and that the act of congress should be construed as only applying to public works upon land over which the United States has the right, under the constitution, to exercise exclusive political jurisdiction and dominion; that is to say, that it should be construed as applying only to public works in the District of Columbia, or in the territories of the United States, or upon lands purchased by the United States with the consent of the state, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. In support of this position, counsel for the defendant has argued, with great earnestness, that, unless so construed, the statute cannot be upheld, because congress has no power to legislate in regard to the number of hours laborers shall be permitted to work each day in places or upon land not within the exclusive political jurisdiction of the United States. The statute under consideration, however, by its express terms, is applicable only to public works of the United States and of the District of Columbia; so that the question presented here is not whether congress possesses the power to legislate generally in regard to the number of hours laborers shall be permitted to work in any one day when engaged in the construction of some building or in some other employment over which the United States has no right to exercise any supervision or control, but rather this: Has congress the power to prescribe the terms and conditions under which labor shall be performed in the construction of public works of the United States, and without reference to the fact whether such public works are or are not upon land over which the national government exercises exclusive political jurisdiction? I entertain no doubt of the authority of congress in this respect. Public works are instrumentalities for the execution of the powers of government. In the construction of its public works, the United States exercises a power which belongs to it as a sovereign nation, and, as a necessary incident of its sovereignty, has

the right to legislate in regard to all matters relating to the construction of such works, including the number of hours which shall constitute a day's labor for those employed thereon. Laws have been passed limiting the hours for the labor of letter carriers in any one day (25 Stat. 157); and for those employed in the navy yards of the United States (12 Stat. 587); and for all laborers and mechanics employed "by or on behalf of the government of the United States" (15 Stat. 77); and the power of congress to pass such laws has never been seriously questioned. In my opinion, congress may also provide that laborers upon public works of the United States, whether employed directly by the government or by a public contractor, shall not be required or permitted to work more than eight hours in one day, and may compel obedience to such a law by providing that its violation shall constitute an offense against the United States, and be punished as such. Nor is the power of congress to thus legislate in the least impaired or affected by the fact that such public works may be erected upon land over which the state retains political jurisdiction, as the sovereignty of the state does not extend to matters connected with or incident to the construction of public works of the United States; and congress in providing, as it has, for the punishment of any contractor upon such public works, or any officer of the United States who should violate the provisions of the law under consideration, was not legislating upon a subject which in any manner trenches upon the reserved powers of the state. The subject-matter of the law is one which concerns only the government of the United States, and over which it has the right to exercise supreme and exclusive control, notwithstanding the fact that the state, for all purposes relating to the government of the state and the administration of its laws, retains political jurisdiction over the land upon which such public works may be erected. This conclusion necessarily results from a consideration of the fact that, under American constitutional law, the national government and the states which compose it are clothed with separate powers of sovereignty in relation to the subjects within their respective constitutional spheres of action, and each may therefore exercise the powers pertaining to its own sovereignty without coming into conflict with the other. This view is in harmony with what was said by Chief Justice Taney in delivering the opinion of the supreme court of the United States in *Ableman v. Booth*, 21 How. 516:

"The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."

The motion will be denied.

LARROWE-LOISETTE v. O'LOUGHLIN et al.

(Circuit Court, S. D. New York. June 22, 1898.)

1. COPYRIGHTS—WHAT CONSTITUTES PREVIOUS PUBLICATION—RESTRICTION ON USE BY PURCHASER.

The selling of copies of a book by the author to all persons paying him for a course of instruction connected therewith, during a number of years, constitutes a publication which deprives him of the right to subsequently obtain a copyright, though each purchaser was bound by contract not to communicate the contents of the book to any one else.

2. JURISDICTION OF FEDERAL COURTS—COPYRIGHTS.

After a federal court has determined, in an action for the infringement, that a copyright is invalid, it has no jurisdiction, as between parties who are citizens of the same state, to grant relief on other grounds.

Swayne & Swayne, for complainant.

Philip Carpenter, for defendants.

TOWNSEND, District Judge. The complainant herein, being the widow, executrix, and sole beneficiary under the will of Alphonse Loiset, in September, 1896, duly copyrighted a work entitled "Assimilative Memory; or How to Attend and Never Forget,"—of which work her late husband was the author. She brings this bill to restrain the defendants from selling a work entitled—"Memory: A Scientific Practical Method of Cultivating the Faculties of Attention, Recollection, and Retention. By A. Loiset,"—published and sold by defendants during the years 1895 and 1896, and advertised as a system devised by said Loiset.

There was an agreed statement, in which the following facts were admitted:

Loiset was the author of a system for training the memory, which he taught extensively for many years by means of lectures, correspondence, and pamphlets, and prior to 1894 Loiset did not distribute, sell, or give away any copies of these pamphlets, unless the person receiving such pamphlet previously signed one of these contracts, namely: "In consideration of Professor A. Loiset undertaking to teach me his system of memory, in his own way in every respect, I do hereby promise that I will not communicate to any person whatsoever any idea or part of his system of memory, without his previous consent therefor in writing; and I further agree to pay said Professor Loiset, his heirs, executors, administrators, and assigns, the sum of five hundred dollars, as liquidated damages, for each and every person to whom I may communicate any idea or part of his said system of memory, without said written consent." Prior to 1886 said Loiset duly registered at Stationers' Hall, London, England, sheets containing his lectures and exercises by entering the titles thereof; and he subsequently printed, prior to 1886, second and third editions, in sheet and pamphlet form, containing additional matter, upon the pages of which was printed, "Entered at Stationers' Hall. Prof. A. Loiset." "No copies of either of said editions were ever filed either at Stationers' Hall or in any of the public libraries of Great Britain or in the British Museum." In 1886 he printed a fourth edition of these pamphlets, and entered the title pages thereof in the office of the librarian of congress at Washington, but, owing to the negligence of his agent, no copies thereof were ever transmitted to Washington. On these pamphlets were printed both the English and United States copyright notices. No persons except those who had previously signed a copy of the above contract ever had access either to said pamphlets claimed to have been copyrighted in England or those claimed to have been copyrighted in this country prior to 1894, except where a purchaser from Loiset allowed such pamphlets to be read irrespective of his contract.

Some two years after this edition was printed, Loissette first learned that said copies had not been transmitted to Washington, and he then published another edition or reprint of said edition of 1886 without said copyright notices. "However, Loissette continued after this time to circulate his edition, bearing the English and American copyright marks, and, further than that, he mixed the two editions indiscriminately, and sent out sets having parts of each, some bearing the copyright mark and some not." "Sets have also been put out by Loissette wherein some of the parts or books were of the edition above referred to which have borne the 'Copyright, 1896,' print, and some were not; some were of the edition above referred to, which have borne the 'Entered at Stationers' Hall' print, and some were not; and some have had no copyright print upon them of either England or America, while others of the same set issued have had both." "Of all of these editions, some of the books or pamphlets bore the notice, 'These lesson papers must not be shown to any one;' others bore this notice, 'Printed solely for the pupils of A. Loissette.' Some had both notices, and others had neither of these notices, nor any such notice, upon them." Thereafter Loissette issued two other editions, each consisting largely of a reprint of said edition of 1886, the later of which was duly copyrighted by the complainant, and is the one as to which infringement is alleged. The work published by defendants was copied entirely from said editions of 1886, without the consent of said Loissette or of complainant. Defendants never purchased said pamphlets from Loissette; were never bound by said contract hereinbefore set forth; and were ignorant of any publication other than the one of 1886, from which they made their copy.

There are some ambiguities in the agreed statement of facts. Although it appears that defendants either procured said pamphlets prior to 1894 from some purchaser from Loissette under said contract, or in 1894, or thereafter, when said work had been copyrighted, it does not necessarily appear that such pamphlets bore any notice of any restriction under said contract. If it can be assumed that, as some of the pamphlets of all the editions bore some notice, and that, although some bore no notice, defendants probably purchased a complete set of pamphlets of a single edition, and therefore had notice of the restriction upon some one of the pamphlets, and were therefore chargeable with notice of such restriction as to the series,—facts which do not seem to be sufficiently proved,—the question is presented as to how far such restriction affects the rights of defendants, who "were ignorant of any publication other than the one of 1886, from which they made their copy." It does not appear that defendants may not have copied the 1886 matter from the 1893 edition after Loissette had published, copyrighted, and publicly sold the work without any contract restriction. Although Loissette failed to comply with the requirement of the copyright statutes in England as to filing copies of his work in certain libraries, this did not affect the copyright, but only made him liable to a penalty for such failure. 5 & 6 Vict. c. 45, § 10. Loissette duly registered one edition of said work in England at Stationers' Hall in 1883, and on the official book at Stationers' Hall appears the entry, "Loissettian School of Instantaneous Memory, 2d Edition, published December 29th, 1893," and on every copy of said edition he stated that it was so registered.

No literary work can be lawfully registered in England before it is published. *Drone*, Copyr. 279; *Correspondents' Newspaper Co. v. Saunders*, 11 Jur. (N. S.) 540. It must therefore be assumed that the edition of 1883 was published in England. By this publication Loi-

sette forfeited his claim to a subsequent copyright in this country of the matter therein contained. In 1886, Loisetette entered the title pages of the edition of 1886, of which defendants' edition is a copy, in the office of the librarian of congress at Washington; but although, through the negligence of his agent, he never filed the copies of said pamphlets as required by law, yet, after notice that such copies were never filed, he has circulated said pamphlets, bearing, not only an English copyright notice, but also a United States copyright notice, thereby subjecting himself to liability for a penalty of \$100, and has also published another edition without such notices. Loisetette charged each person who took up this study individually, \$25 for the course. He charged those who attended his lectures at his rooms in the daytime, \$15 each for the course; those who attended his classes at his rooms in the evening, \$10 each for the course; and those who were members of correspondence classes of 10 or more persons, \$5 each for the course. Each person received a set of pamphlets containing the system, with directions for putting it into use, and with exercises upon the same.

From the agreed statement of facts it appears, therefore, that Loisetette advertised widely and furnished a copy of his book to any one who paid him \$25. Those who chose to form classes of 10 could obtain a book for \$10. The books were sold absolutely; no restriction being placed upon the title or upon their use other than the contract not to communicate to any person any idea or part of Loisetette's system of memory. I think this distribution amounted to publication. To hold that a person may offer a book to every person in the world who will buy it and pay a certain price for it with an agreement not to show it to any other person, and that this course of distribution might be continued for many years, and then a copyright secured for the legal term, would be a large advance upon, and wide departure from, any decisions which have been cited in this case. In most, if not quite, all the cases in which a distribution has been held not to be a publication, the author did not part with the title to the books distributed.

Complainant's brief probably states her case as strongly as it can be stated, and quotes the most pertinent authority to maintain her position, but she furnishes no precedent which sustains her contention. This book was exposed for sale so that the public, without discrimination as to persons, might have an opportunity to enjoy it, within the meaning of *Drone, Copyr. p. 91*. In *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 84 Hun, 12, 32 N. Y. Supp. 41, where the book remained the property of the plaintiff, and the respondent contracted for its return, Judge O'Brien says:

"We think the appellants overlook the fact appearing, that the book was never sold. * * * This was not such a publication as would destroy the plaintiff's original property rights in the book. * * * A person may print any number of copies of which he remains the owner, and by contract may so restrict their use, by those to whom he lends them, as to retain his original rights."

But the *Jewelers' Mercantile Agency Case* was taken to the court of appeals of New York, and since the argument in this court has been decided by that court. 49 N. E. 872. That court says:

"Out of a few cases of the same general character seems to have grown the idea that it is possible for a man, by putting restrictions on the use of his books by subscribers, however numerous they may be, to retain in him forever the common-law right of first publication. If that position be sustained by the judgment of the courts, then will have been obtained judicial legislation of far broader scope and much greater value to authors and others than that offered by the copyright statute."

The opinion in that case is an exhaustive one, and is applicable to the one at bar; and if that decision is correct, as I believe it is, there was a publication in the present case, and the copyright is void.

Furthermore, the notice in the edition of 1886, that it was copyrighted in England, was equivalent to a notice that it had been published therein, and I think that the notice of a United States copyright, known by Loissette to be untrue, estops his representatives from denying that it was published here.

Complainant's counsel insisted that defendants could only have obtained a copy of Loissette's work, from which to make the publication sought to be prohibited, by means of a breach of trust, and that, therefore, they should be enjoined. The jurisdiction of this court is founded only on copyright, and there is no copyright. Complainant and the principal defendants are alleged to be citizens of New York, and if complainant has any cause of action founded on breach of trust, which the decision in the Jewelers' Agency Case would seem to indicate that she has not, her place to prosecute it is in the courts of New York, rather than in those of the United States.

COLGATE et al. v. ADAMS et al.

(Circuit Court, N. D. Illinois, N. D. July 5, 1898.)

TRADE-MARKS—INJUNCTION—CASHMERE BOUQUET SOAP.

The manufacturer of Cashmere Bouquet soap, who has built up a large business in making and selling it, may have an injunction restraining the use by a rival manufacturer of the words "Violets of Cashmere" to describe another soap.

In Equity.

Suit by Bowles Colgate and others against Charles L. Adams and others to enjoin infringement of a trade-mark, and restrain unfair competition in trade.

Rowland Cox and William O. Belt, for complainants.
Banning & Banning, for defendants.

GROSSCUP, District Judge. The bill alleges that about the year 1869 the complainants began the manufacture and sale of a toilet soap, to which they gave the trade-mark or trade-name of "Cashmere Bouquet," a designation never before used in connection with soap or similar products; that the complainants have spent large sums of money in advertising and popularizing their product, so that it has become one of the most popular toilet soaps in the United States; that their business in the manufacture and sale of this soap under this trade-mark or trade-name has become one of great magnitude; that in the trade their soap has come to be known and called

for as "Cashmere Soap"; that the words "Cashmere Bouquet" and the word "Cashmere" have become invested with a secondary meaning, as indicating complainants' product; that the defendants, soap manufacturers in Chicago, well knowing the value of the complainants' good will, have knowingly and fraudulently made use of the word "Cashmere" in connection with their manufacture and sale of soap; that the defendants have stamped the word "Cashmere" upon their soap, and upon the boxes the designation "Violets of Cashmere," being displayed and accentuated so as constitute, to all intents and purposes, the name and designation of the soap. It is alleged that this use of these words by the defendants, whether the complainants had a technical trade-mark or trade-name in the word "Cashmere" or not, constitutes an inequitable and fraudulent competition in business, and is a trespass upon the good will in the manufacture and sale of Cashmere Bouquet soap. The answer denies all these material allegations, and the especial defense is set up that the word "Cashmere" is a geographical word, and therefore incapable of exclusive monopoly as a trade-mark or otherwise. The proof satisfies me that the statement of the case by the complainants is substantially correct, and that the defendants' manufacture and sale of soap under the name "Cashmere," or the name "Cashmere" in connection with some other name, as "Violets," is calculated to mislead the public into the belief that in purchasing such soap they are purchasing complainants' soap. I think I am justified in holding, too, that the selection of this name by the defendants for their soap was due to the fact that the complainants had already built up a large trade under that name. This would constitute unfair competition. Whether the word "Cashmere," were this a case of technical trade-mark, would be held to be a geographical word, and therefore insusceptible of use, under the doctrine of *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, I need not decide. I doubt, however, if the word carries to the senses any conception of place or geography. It was adopted, probably, because of its familiar sound to the public ear in connection with shawls, and conveys, if anything, an impression rather of fineness and softness, than of place. It is not, of course, strictly a word of quality, but by association impresses the mind with the thought of superior or desirable quality, rather than of place. Whatever would be my ruling were it a trade-mark case, pure and simple, the case, as presented, being one of unfair and inequitable competition, is controlled by *Flour-Mills Co. v. Eagle*, 30 C. C. A. 386, 86 Fed. 608, recently decided by the circuit court of appeals for this circuit, and an injunction must go against the defendants.

The defendants insist that complainants are entitled to no injunction, by reason of abandonment. This contention finds no satisfactory support either in the proven facts or the law. A decree may be drawn for an injunction only and costs.

NEW DEPARTURE BELL CO. v. CORBIN et al.

(Circuit Court, D. Connecticut. June 23, 1898.)

No. 891.

1. PATENTS—INVENTION—SPECIAL EQUITIES.

The fact that, from the previous relations and conduct of the parties, there are special equities in favor of complainant (as where an employé, after making an invention and assigning it to his employer, leaves the employment, enters that of another, and procures a new patent to avoid the former one), is not to be considered in determining the question of patentable invention, since the public interest demands that the true facts shall be known as against the original patent.

2. SAME—LIMITATION OF CLAIMS.

When, on the face of the specifications and claims, and through the file wrapper and correspondence with the patent office, the inventor has stated that he confines himself to the specific form shown, and when, furthermore, the prior art shows that on any other theory the patent must be void for lack of novelty, the patentee will not be permitted to extend the scope of his claims.

3. SAME—BELLS FOR CARS.

The Rockwell patent, No. 517,395, for improvements in bells, construed, and *held* not infringed.

This was a suit in equity by the New Departure Bell Company against P. & F. Corbin and E. D. Rockwell for alleged infringement of letters patent No. 517,395, issued March 27, 1894, to E. D. Rockwell, for improvements in bells.

Newell & Jennings, for complainant.

Mitchell, Bartlett & Brownell, for defendants.

TOWNSEND, District Judge. This case presents the common features of a complainant claiming as assignee under a patent to one of its employés, of the employé entering the service of another company, and getting up a new patent to avoid the former one, and the defenses of lack of patentable novelty and noninfringement in view of the relations of the parties and the prior art. It is strenuously argued in these cases, and seems to be assumed by counsel, that, inasmuch as the equities are against such defenses, the patent is entitled to a favorable consideration upon the question of validity against them. I do not so understand the law. It may be true that, upon the naked question of infringement, these considerations are relevant in suggesting a favorable consideration to the patent; but as was said by Mr. Justice Shiras, in *Haughey v. Lee*, 151 U. S. 285, 14 Sup. Ct. 332, "the defense of want of patentable invention in a patent operates not merely to exonerate the defendant, but to relieve the public from an asserted monopoly." In such cases the public interest demands that the true facts shall be shown as against the original patent, which has been secured by the patentee from the patent office, upon representations that it covers a valuable invention.

This patent is limited in terms to a certain form of gong or bell for cars. Every element of the patented combination was old, and it is difficult to understand upon what theory the patent office granted it. The only theory which receives any support is that advanced by the

defendant, namely, that the inventor claimed the specific construction shown, with all the self-imposed limitations of his claim as to details, and secured a patent on the ground that the adaptation of well-known constructions to specific purposes of a car bell involved some slight exercise of inventive skill. In the familiar statement of the well-settled law by Mr. Justice Brown in *Potts v. Creager*, 155 U. S. 608, 15 Sup. Ct. 194, is found the reason for such narrow patents, namely, that it might require as much exercise of inventive ingenuity to adapt a construction found in one branch of the art to the varied requirements of another branch of the art as to originally invent or devise a new construction. But when, as in this case, upon the face of the specification and claims, and through the file wrapper and correspondence with the patent office, the inventor has stated that he confines himself to the specific form shown, and when, furthermore, the prior art shows that upon any other theory the patent must be void for lack of patentable novelty, the patentee will not be permitted to extend the scope of his claim.

Although the patent is for a bell for cars, no car bells were ever made under it, and the complainant now seeks to enjoin the defendants from using a similar construction for a bicycle bell. The bell itself is precisely the same in construction as the one which the court of appeals held to be void for want of patentable novelty, in *New Departure Bell Co. v. Bevin Bros. Mfg. Co.*, 19 C. C. A. 534, 73 Fed. 469, except that in that case the bell was provided with a thumb piece, while in this case the patent covers a projecting cog wheel. That these parts are interchangeable or equivalent is shown in patent No. 500,951, applied for by the patentee of the patent in suit within one week after he filed his application for said patent, and by the history of said patents in the patent office, and by a great number of prior patents. Furthermore, the single claim of the patent in suit contains a mistake, which renders the meaning of the claim unintelligible except by alteration. Let the bill be dismissed.

THE IRIS.

(District Court, D. Massachusetts. June 23, 1898.)

No. 933.

1. MARITIME LIENS—REPAIRS AUTHORIZED BY OSTENSIBLE OWNER.

Where a vessel is sold, and, after part payment of the purchase price, is delivered to the purchasers, under the circumstances stated below, with authority to repair her at their own expense, the seller thereby invests the purchasers with power to create a lien for repairs made by persons without notice of the vendor's title.

2. SAME—INQUIRY AS TO TITLE.

Under the circumstances stated below, a repairer may rely on the apparent authority of the legal possessor and ostensible owner of a vessel to bind her for necessary repairs, and need not institute an inquiry into her record title.

3. LIEN GIVEN BY STATUTE—INTENT TO GIVE CREDIT TO VESSEL.

In determining if credit was given to the vessel or only to her owner, in the absence of express agreement, regard will be had to the circumstances of each case, including the laws and usages of the port in which the repairs were made.

4. REPAIRS AUTHORIZED BY OSTENSIBLE OWNER — PERSONAL LIABILITY OF OWNER.

The owner of a vessel is not personally liable for repairs made in reliance on the ownership of one whom he had clothed with possession and apparent ownership.

Carver & Blodgett, for libelants.

Charles S. Hamlin, for respondent.

LOWELL, District Judge. The steamer *Iris* was the property of Mr. Woodworth, the claimant, and her home port was Boston. Having been laid up for several years, she was greatly out of repair, both as to her hull and her machinery. On December 23, 1897, Woodworth agreed to sell her to the North American Mining & Transportation Company. A part payment of \$1,000 was made at the time the agreement was signed, and the balance of the purchase money, \$6,000, was to be paid on or before February 21, 1898. By the agreement, the company was permitted to "make such alterations and repairs, such as painting and joiner work, etc., as may be necessary to put said vessel in proper trim for a voyage to Alaska; to move her to some proper place in Boston where she may undergo the above repairs, etc., at the expense of" the company. The agreement further provided that if the full purchase money was not paid by February 21, 1898, the company should forfeit whatever money had been paid; also, expenses incurred by it on repairs, etc., at that time. On February 21 a further part payment of \$2,000 was made, and the time of final payment was extended to March 14. Before that time the company had become hopelessly insolvent, and the claimant thereupon retaken the steamer. At various times in January and February the libelants made repairs on the steamer, and furnished her with supplies. They assert a lien under Pub. St. Mass. c. 192, § 14 et seq. The claimant denies that the vessel is liable for the repairs.

About January 4, 1898, one Bartlett, a master mariner, was engaged by the company as master of the *Iris*, and was directed to cause her to be repaired so that she could make the proposed voyage to Alaska. The company gave him a letter, addressed to the claimant, which read as follows: "Please give Captain Bartlett an order for removing the *Iris* to Simpson's dry dock on our account." The claimant thereupon gave Capt. Bartlett an order, addressed to the custodian of the *Iris*, directing him to deliver the steamer *Iris* to the bearer, to be taken to East Boston. Capt. Bartlett took her to Simpson's dry dock accordingly, procured a survey of her by the United States inspectors, and engaged the libelants to make the repairs, most of which were ordered by the inspectors. All the repairs made were reasonably necessary. Doubtless, they were more extensive than had been contemplated by the parties at the time the agreement was signed, and the nature of some of them lies outside the precise terms of the agreements; but they were necessary to carry out the general intent of the parties, the claimant was sufficiently informed of their nature as they were made, and he offered no objection to their execution. As against the libelants, he cannot now be heard to object that they were made in violation of the contract. By thus delivering the *Iris* into the charge of the company, and permitting it to employ the libelants in

making repairs on the vessel without giving them notice of his title to the vessel, I think that the claimant held out the company to the libelants as the owner of the vessel, so that, as between the libelants and the claimant, the company is to be taken as her owner. There is here no question of mortgagee's rights, and, as between the claimant and the company, the former is, of course, the true owner; but that the company was the owner of the vessel, at least in so far as to be able to create a lien upon her for repairs, seems to me the conclusion which a reasonable man in the libelants' position would draw from the claimant's conduct. Very extensive repairs were to be made. The execution of these repairs, under the statutes of Massachusetts, frequently gives rise to a lien. It was probable that some, at least, of the contractors would seek to hold the vessel for the amount of their bill. They understood, as Capt. Bartlett understood, that they had a lien. The understanding was not the less definite because unexpressed. Capt. Crandall's understanding of the matter exemplifies the view of it which would be taken by a reasonable man. In the absence of notice, and under the circumstances of the case, a delivery of the vessel to the company seems to me a waiver of any objection against the creation of a lien by the company.

It is argued that no representations were made by the claimant to the libelants. But it was the claimant's conduct, rather than his words, which constituted the representations; and this conduct, as the claimant should have foreseen, naturally influenced the libelants' actions. Moreover, as will be shown, the claimant made several verbal representations to Capt. Bartlett, which representations, as might have been expected, determined Bartlett's conduct to the libelants, and so affected the libelants' action. It may be said, of course, that the libelants should have inquired of the claimant. But few, if any, of them knew of his existence, and this ignorance of theirs the claimant must have known to be probable. Moreover, it is by no means clear that a visit to Mr. Woodworth would have enlightened anybody. A moment after he had given Capt. Bartlett the written order to the custodian of the vessel, Capt. Bartlett came back into his office, and asked if it was all right to make these repairs on the boat. Mr. Woodworth testified that he replied that he had nothing to do with the repairs; that he had sold the boat to the transportation company, which had paid a forfeit of \$1,000, and had 60 days in which to pay the balance; that his whole interest in the boat was to get the balance of the money, and see that she was not injured by the repairs; that he had given the transportation company permission to make the repairs at its own expense, so long as it did not injure the vessel. This is Mr. Woodworth's story. On the other hand, Capt. Bartlett and Mr. Ball, an engineer, testified that, in reply to Capt. Bartlett's question, Mr. Woodworth said that he might go ahead and make repairs, and that anything said by the agent of the transportation company was right. This conflict of testimony does not seem to me very important. Capt. Bartlett sought to learn if he might make repairs on the vessel as directed by the company. Mr. Woodworth told him that he might do so, but that he (Woodworth) would not pay the bills, inasmuch as they were to be paid by the company

which had bought the vessel. Even if Mr. Woodworth described to Capt. Bartlett the contract of sale as precisely as Mr. Woodworth testified that he did, still I think he came short of indicating that the repairers were to have no lien upon the vessel. He told Capt. Bartlett that he had sold the vessel to the company, and he did not add explicitly that the title to the vessel had not yet passed. Doubtless, a lawyer would have drawn from his words an inference to that effect, but it is not at all clear that a sailor would naturally do so. Mr. Woodworth desired to impress upon Capt. Bartlett that he (Woodworth) was not to be held personally liable for any work done on the vessel. That he made abundantly clear, but I do not think his language fairly suggested any intention to negative the company's right to create the lien which existed under the law of Massachusetts in the case of repairs made upon a vessel. In this interpretation of his language I am confirmed by an interview between the claimant and Capt. Crandall, the United States inspector. Capt. Crandall, who feared that a misunderstanding might exist concerning the lien of the libelants, went to Mr. Woodworth soon after the repairs were begun, and asked him if the steamer was really sold to the company, to which Mr. Woodworth replied in the affirmative. Capt. Crandall continued by explaining the reason of his question, saying that he did not know how it might turn out with Mr. Woodworth if the company did not pay the bills. Capt. Crandall added that he knew that the libelants had the steamer to fall back upon, and would naturally look to her for the payment of the bill. Mr. Woodworth replied that it was understood that the company should fit up the vessel, but said nothing indicating any understanding on his part that his ownership was to defeat the usual lien. This conversation was brought to the notice of Capt. Bartlett, and naturally confirmed him in his belief that he had full power over the vessel. It is valuable, also, as indicating clearly what was Mr. Woodworth's conception of the whole transaction. I doubt if he ever gave the idea of a lien a moment's thought. Even the assertion by Capt. Crandall that a lien existed did not interest him. He was careful to assert to every one that he was not to be held personally liable for the cost of the repairs, but he permitted every one to assume that the lien existed. Not only, then, did the claimant's conduct naturally lead the libelants to think that the company had a right to create a lien upon the Iris for the repairs executed, but the claimant himself, when questioned, gave a silent assent to that interpretation of the contract of sale.

The view I have taken of the effect of the transaction is sustained by several decided cases, such as *The John Farron*, 14 Blatchf. 24, Fed. Cas. No. 7,341, reversing the decision of the court below; *The James H. Prentice*, 36 Fed. 777; *The Alvira*, 63 Fed. 144; *The James Smith*, 2 Pars. Shipp. & Adm. 146. In *The H. C. Grady*, 87 Fed. 232, the repairs, for the cost of which a lien was claimed against the vessel, were executed in part after the libelants knew that the person who had ordered the repairs, and into whose custody the vessel had been put, was not her owner. This knowledge was certainly sufficient to put the libelants upon inquiry. As to the remaining repairs, it is not stated plainly in the opinion if, at the time of their execution, the

libelants knew the claimant's relation to the vessel. From the facts which are stated, I am disposed to infer that the libelants did know it, or ought to have known it; and, if so, *The H. C. Grady* is entirely distinguishable from the case at bar. It is true that it is said in the opinion, at page 238, that the possession of the steamer did not give ostensible authority to create a lien for repairs. In *The H. C. Grady*, as in *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, this may well have been true. Mere possession does not always give such authority, but, in the case at bar, possession, taken together with the other evidence in this case, seems to me to confer upon the possessor "ostensible authority." I need not here discuss the cases of which *The Valencia* is a type. In that case the supplies were furnished on the order of a charterer, and it was held that the circumstances put the libelant upon his inquiry as to the existence and terms of the charter party. See, also, *The H. C. Grady*, 85 Fed. 239. I can find nothing in this case to put the libelants on inquiry. It is true that, if they had gone to the registry, they would have found that *Woodworth* was the owner of the vessel; but I think they were justified in relying upon *Woodworth's* holding out the company as the owner of the *Iris*, without instituting an inquiry into the condition of her record title. If they were bound to go, then every repairer who contracts with the legal possessor and ostensible owner of a vessel takes his risk that the registry may disclose some defect in the possessor's title. Indeed, if the libelants had gone to *Woodworth* himself, as has been already observed, it is improbable that they would have been undeceived.

Assuming then, as between the libelants and the claimant, that the company is to be taken as the owner of the vessel, at least so far as to be able to create a lien upon her for repairs, I must next consider if the libelants obtained that lien. That they are within the terms of the statute, there can be no doubt; but, as was said in *The Lottawanna*, 21 Wall. 588, in order that this court may enforce the statutory lien, not only must the requirements of the statute be complied with, but, in addition thereto, in order to bring the lien within the jurisdiction of a court of admiralty, credit must be given the vessel. See, also, *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323. In the case at bar it is clear that the libelants intended to give credit to the vessel, and did this so far as they were able; that is, they consistently charged the repairs to the vessel, and looked to the vessel for reimbursement. It is also true that if they had applied to the company, which, in my opinion, must be held to be the owner of the vessel so far as they are concerned, that company would undoubtedly have expressly assented to the lien. This application, however, the libelants did not make. It is contended by the claimant that, while repairs made on the vessel at her home port may give a lien if it is expressly agreed to by both parties, yet the presumption is that no such lien exists, but that the credit is given solely to the owner,—in this case, the transportation company.

By the civil law, a lien in favor of those who make repairs exists against both foreign and domestic vessels; and this apparently as a matter of strict right, and not in consequence of a presumption that

such a lien has been agreed to in the particular case by the vessel's owner. Lord Stowell has stated that this was once the law of England. See *The Zodiac*, 1 Hagg. Adm. 321, 325. And such apparently for some years the law was held to be in this district. See *The George T. Kemp*, 2 Low. 477, Fed. Cas. No. 5,341. In England the common-law courts have encroached so far upon the jurisdiction of courts of admiralty that the repairer has now no maritime lien, unless he has taken and retained possession of the vessel. See *The Henrich Bjorn*, 10 Prob. Div. 44, 11 App. Cas. 270; *The Marlon*, 1 Story, 68, Fed. Cas. No. 9,087. In the United States the maritime lien of the repairer exists in full force, if the repairs are made on the credit of a foreign vessel; and, in the absence of the owner, it is said that repairs made upon a foreign vessel are presumed to have been made upon its credit. But if the owner be present, though in a foreign port, it has been said that there is a presumption that the repairs were made, not on the credit of the vessel, but on the credit of the owner personally. *Thomas v. Osborn*, 19 How. 22. The presence of the owner does not, however, defeat the lien as a matter of law, but at most does no more than establish a presumption of fact that the lien does not attach. See *The Kalorama*, 10 Wall. 204. This presumption that a lien does not exist for repairs made upon a foreign vessel, if the owner be present, is, in different decided cases, rested upon one or more of three grounds:

First. It has been said that, if the owner be in the port, the master of the vessel has no implied authority to bind either him or his vessel. This proposition seems in general to be sound; for, in so important a matter, the repairer, if he wishes to bind the master's principal, should apply to the principal himself. Where the owner is absent, the master of the vessel has very extraordinary authority; but, where the owner is present, it is but reasonable to hold that the master's authority is much curtailed. "Undoubtedly the presence of the owner defeats the implied authority of the master." *The Kalorama*, 10 Wall. 204, 214. If, however, the owner himself authorizes the repairs, no question of the master's authority is involved; and, if the owner expressly or impliedly assents that the repairs shall be made on the credit of the vessel, the vessel is bound. Thus, it is said in *The Kalorama*:

"When the owner is present, the implied authority of the master for that purpose ceases; but, if the owner gives directions to that effect, the master may well order necessary repairs and supplies, and, if the ship is at the time in a foreign port, * * * those who make the advances will have a maritime lien, if they were made on the credit of the vessel." 10 Wall. 213.

Second. It has been said that, when the owner is present in a foreign port, the repairer has ordinarily no lien upon the vessel, because in such case the repairer is presumed not to care for a lien upon the vessel, but to be satisfied with the personal liability of the owner. This state of mind on the part of the repairer is a question of fact. In *The George T. Kemp*, Judge Lowell says that he never heard of a repairer who was satisfied with the owner's personal liability, but perhaps that is stating the rule too strongly. If the contract for repairs be duly authorized and binding upon the owner, however, a

lien upon the vessel will exist, if the circumstances of the case show that there was an understanding that the repairs should be made on the vessel's credit. The question to whom or to what credit is given should be answered after consideration of all the facts, including the usages and laws of the country where the port is situated.

Third. It is said in not a few cases that the lien of the repairer is conditioned upon a necessity for pledging the credit of the vessel in order to prosecute the voyage, and that this necessity is presumed not to exist when the owner is present in the port. However it may be historically, the statement is now incorrect or meaningless. In the absence of the owner, the necessity is conclusively presumed; and though the owner be present, and abundantly supplied with money, his agreement to a lien will bind the vessel.

These three different principles, according to which it is held to be presumed that there is no lien when the owner of a foreign vessel is present in port, have been stated indiscriminately as if they were identical, yet plainly the nature of the presumption will differ greatly according as it depends upon one or another of them. It seems, on the whole, that in the United States a repairer has a lien on a foreign vessel, if the repairs were made on the vessel's credit; that, if the owner was absent from the port where the repairs were ordered by the master, there is a presumption of fact that the master had authority to order them, and that credit was given to the vessel. Where the owner is present, he must order the repairs himself, or authority from him to order the repairs must be shown. Where he has ordered them himself, or due authority from him is shown, the execution of the repairs will or will not be deemed to give rise to a lien, according to the facts of the case, including the laws and usages of the port.

These principles of maritime law applicable to liens upon foreign vessels have now to be applied to liens upon domestic vessels given by statute. These last liens are enforceable in the courts of the United States, and in those courts only. *The Lottawanna*, 21 Wall. 558; *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930. In order that a lien may attach, not only must the terms of the statute be strictly complied with, but the libellant must show that credit was given to the vessel. *The Lottawanna*, 21 Wall., at page 581. The repairing a domestic vessel has been likened to the repairing a foreign vessel whose owner is present in the port; and it has been said that in the case of a domestic vessel there is a presumption that the repairs were not made on the credit of the vessel, and that there is therefore a presumption that the lien does not exist. As in the case of a foreign vessel, so in the case of a domestic vessel. If the presumption be taken to mean that the authority of the master of a domestic vessel to contract for her repair cannot always be presumed, the statement is reasonable. The owner of a domestic vessel in some cases must be sought out, and the authority of the master to bind him will not be presumed as readily as in the case of a foreign vessel whose owner is absent; but where the master had authority to order the repairs, or where they were ordered directly by the owner, it seems that credit is to be deemed to have been given to the vessel, or to the owner personally, or to both, according to the laws and usages of the domestic port, and the circumstances of the

particular case. That a lien upon a foreign vessel is not conditioned upon a necessity to pledge the vessel's credit has been shown, and it may safely be said that a necessity for pledging the vessel's credit has nothing to do with a lien upon a domestic vessel, except, perhaps, as evidence that credit was given to the vessel rather than to the owner. It is tolerably plain that the purpose of the statute was not so much to aid a domestic vessel in distress as to protect the repairer.

In *The Valencia*, 165 U. S. 264, 271, 17 Sup. Ct. 323, it is said, indeed, that:

"In the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived."

In *The Valencia*, however, the real dispute was concerning the authority of the person ordering the supplies, and the remark above quoted was made obiter. That an agreement for a lien, expressed or implied, is necessary, there can, of course, be no doubt. The question to be answered is this: From what facts is a lien to be implied? In *The Valencia*, the law, usages, and circumstances may well have been different from those in the case at bar. In the case of *The St. Jago de Cuba*, 9 Wheat. 409, 416, 417, also, from the opinion in which a part of the above-cited extract from *The Valencia* is quoted, the expressions relied on by the claimant were made obiter. It must be added that a lien in favor of any material man or laborer is, by reason of the numerous statutes which have given such liens, much less in derogation of common custom than it was 75 years ago, when *The St. Jago de Cuba* was decided. This change of law may well modify a presumption of fact which was properly drawn under other conditions.

Applying the principles above stated to the facts of this case and having assumed, for the reasons first given, that the transportation company is to be treated as the owner of the *Iris*, we find that the repairs were made upon her, and the supplies furnished, by the order of Capt. Bartlett. It has not been suggested in argument that Capt. Bartlett did not have full power to bind the company for the materials, repairs, and supplies, and it is admitted that the company is itself liable for them to the libelants. Inasmuch as the laws of Massachusetts give a lien generally in these cases, which fact must be presumed to have been known to all parties concerned, and inasmuch as the custom of repairers is to look to the vessel for credit, I think it is not going too far to hold that in this case credit was given by the libelants to the *Iris* without the objection, and with the assent, of the company. There must therefore be a decree for the libelants. The conclusion is the more satisfactory because any other would do great injustice. That the claimant, who owned on January 1 a thoroughly unseaworthy vessel, should on April 1, without the expenditure of a cent, own a thoroughly seaworthy vessel, and \$3,000 to boot, while those whose labor repaired the vessel go without pay, is a conclusion which should be escaped, if escape is in any way legal.

The claimant has filed a petition to have his stipulation canceled upon the ground that it is for a larger amount than the true value of

the steamer. As the claimant entered into the stipulation deliberately, and without objection to its amount, his error in valuation is not a sufficient reason for cancellation.

The claimant also has asked that his liability be limited to the value of the steamer, or, rather, to the amount of his stipulation. Clearly, the libelants have no right to a decree against the claimant in personam. It has been held that they have a lien upon the vessel, because the claimant held out to them the transportation company as its owner; but it would be highly unjust to permit the libelants to deny the claimant's ownership for the purpose of maintaining their lien, and in the same action to assert his ownership for the purpose of holding him personally liable. Capt. Bartlett had in fact no authority to bind the claimant personally, and no one of the libelants ever supposed that he had. He had authority only to bind the company, and to create a lien upon the vessel. The fact that the vessel is liable does not conclusively establish the liability of her owner. See Henry, Adm. Jur. & Prac. § 42; *The Freeman v. Buckingham*, 18 How. 182; *The Alvira*, 63 Fed. 144, 145.

THE FRED M. LAWRENCE.

(District Court, E. D. New York. May 27, 1898.)

ADMIRALTY PRACTICE—SUITS IN REM—RELEASE BOND—ADDITIONAL SECURITY.

Under the admiralty rules of the district court for the Eastern district of New York, where the original sureties in a stipulation for the release of a vessel in an action in rem have become insolvent the court may order the security to be strengthened, and, in default of obedience to such order, may strike out the claimant's answer, and allow libelant to have a decree, enforceable against the claimant and such sureties, to the same extent as would be proper if no issue had been raised on the merits.

This was a libel in rem by the Union Marine Insurance Company, Limited, against the steam canal boat Fred M. Lawrence.

Carpenter & Mosher, for libelant.

Hyland & Zabriskie, for claimant.

THOMAS, District Judge. The question involved on this motion is this: May the court order the security given on the valuation of a vessel seized in an action in rem, to secure the release thereof, to be strengthened, upon the original sureties becoming insolvent; and, in default of obedience to such order, may the claimant's answer be stricken out, and the libelant allowed to have a decree, enforceable against the claimant and such sureties, to the same extent as would be proper if no issue had been raised on the merits?

The Revised Statutes (section 913) authorize the district court to make rules, not inconsistent with the laws of the United States, relative to forms and modes of procedure. Pursuant to this power, the court of this district has established certain rules, stating under what conditions a vessel seized in an action in rem will be surrendered to a claimant thereof, and the alleged lien of the libelant thereon be released. These rules provide that such result may be ef-

fectured by the libellant giving a stipulation with sureties, as required, and that "such stipulation shall contain the consent of the stipulators, that in case of default or contumacy on the part of the principals or sureties, execution to the amount named in such stipulation may issue against the goods, chattels and lands of the stipulators." Rule 23 provides:

"In all cases of stipulations in civil and admiralty causes, any party having an interest in the subject matter may at any time on two days' notice, move the court on special cause shown for greater or better security; and any order made thereon may be enforced by attachment, or otherwise."

With such rules in existence, the libellant and his sureties, with presumptive knowledge thereof, executed a stipulation as follows:

"* * * And whereas, a claim to said vessel has been filed by Elizabeth E. Hickok, as owner, and the value thereof has been fixed by consent at thirty-four hundred dollars, as appears from said consent indorsed hereon and now on file in said court, and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimant or her sureties, execution for the above agreed value, with interest thereof from this date, may issue against their goods, chattels, and lands: Now, therefore, the condition of this stipulation is such that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Hyland & Zabriskie, Esquires, proctors for the claimant of said steam canal boat, abide by and pay the money awarded by the final decree rendered by this court or the appellate court if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue."

Thereupon such stipulation was tendered, and the court was asked to accept it as a consideration for the release of the vessel, and in substitution thereof. The sole purpose and object of the stipulation is to obtain the release of the vessel to the claimant. As the court no longer holds the vessel in trust for the satisfaction of any judgment that may be recovered by the libellant, and as the vessel cannot be re-seized, only recourse to the stipulation can be had to secure the payment of such judgment. Hence the stipulation should be sufficient at the outstart, and its sufficiency should be maintained. Rule 23 authorizes the court to require "greater or better security" at any time, the stipulation is executed and delivered in contemplation of such rule, and the rule impliedly becomes a part of the stipulation. The stipulation is merely given in place of the res, and takes the place of a fund or property applicable to the payment of a decree in libellant's favor. The court, in effect, rules:

"If the claimant, with sufficient sureties, will give a stipulation conditioned that the claimant shall obey any lawful order or decree of the court in the action, the res may be released, and an order that 'greater or better security' be given, shall be a lawful order, within the meaning of this rule; and such terms of the court shall be deemed accepted by the claimant and his sureties, by the giving of such stipulation."

This does not mean that the valuation of the res may be increased; that is fixed once for all; but the court may direct that the security based upon such valuation be strengthened. Now, the stipulation is given in accordance with rules of court; greater or better security may be ordered at any time; and, in default of compliance with this

direction, the same rule authorizes the court to enforce the order "by attachment or otherwise"; and it has been held that this includes power to strike out the answer, if one has been interposed. *The Virgo*, 13 Blatchf. 255, Fed. Cas. No. 16,976; *The City of Hartford*, 11 Fed. 89. That this is a just exercise of power, binding on the sureties, appears from this. The stipulation is not given to enable the claimant to appear, or appear and answer. It is simply given to obtain a release of the res. The claimant may answer, whether the stipulation for the value of the res be or be not given. If he answer, the court may strike out the answer if the claimant fail to comply with its lawful order. The rules and the stipulation contemplate such action by the court. With the answer stricken out, the case proceeds to judgment as if no answer had been filed; and the sureties are then called upon, to the extent of their liability, to discharge the judgment. The sureties did not contract that they would be obligated to pay any claim of the libelant that should be established after answer filed, and a final determination of the issue thus raised in behalf of the claimant. Their liability was the same whether judgment went by default or after trial. The stipulation was to pay any judgment which the court had power to order. Certainly the court had power to order the claimant to give additional security, and in default thereof to strike out the answer, and thereafter leave the libelant to make proof of his claim, and, if he did so, to order a judgment therefor. Such a judgment is a lawful judgment, and the stipulators agreed to pay all lawful judgments, up to the amount of the valuation of the property. This conclusion is logical; accords with the rules of the court, and with the very terms of the stipulation. However, it is just that the sureties should have an opportunity to protect themselves. Hence, if the claimant fail to observe the order of the court for greater or better security, the sureties should have an opportunity to fulfill the order. In the present case the sureties may furnish such sufficient security within 10 days from the entry of an order pursuant to this opinion, and thereupon a trial of the issues raised by the libel and the claimant's answer may be had at such time as the court shall direct. Otherwise the answer will be deemed stricken out, and the libelant may proceed in the action as if no answer had been interposed.

TERRE HAUTE & I. R. CO. v. HARRISON et al.

(Circuit Court of Appeals, Seventh Circuit. March 1, 1898.)

No. 461.

1. PRIORITY OF RAILROAD MORTGAGE—OPERATING AGREEMENT—EQUITABLE LIEN FOR BETTERMENTS.

A railroad company in possession of a branch line under an operating agreement wherein it agreed to take up, and hold as security, a mortgage thereon, cannot acquire an equitable lien, prior to the mortgage, on any part of the mortgaged property, for betterments thereto, or for any balance due it on an accounting with the mortgagor.

2. SAME—INVALIDITY OF OPERATING AGREEMENT—EQUITABLE LIEN FOR BETTERMENTS.

Where a branch line, held by a railroad company under an invalid operating agreement, was, with the consent of such company, mortgaged by the owner to procure money to build an extension and pay for additional equipments, all of which were delivered to, and for years used by, said company under said agreement, such company was not entitled to an equitable lien, prior to such mortgage, for betterments added to the property, either prior or subsequent to the date of the mortgage.

Appeal from the Circuit Court of the United States for the District of Indiana.

Appellee Benjamin Harrison, trustee, on December 30, 1896, exhibited his bill in the circuit court of the United States for the district of Indiana against his co-appellee, the Terre Haute & Logansport Railroad Company, and this appellant. He sought to foreclose a deed of trust wherein his co-appellee had alienated to him on January 1, 1883, certain railroad property to secure the payment of bonds of that company aggregating \$1,000,000, with interest to be paid semiannually at the rate of 6 per cent. per annum. The bill was taken as confessed against the Terre Haute & Logansport Railroad Company. Appellant answered, and filed its cross bill. Exceptions were sustained to certain portions of the answer, the cross bill was dismissed for want of equity on demurrer, a final decree of foreclosure went in favor of appellee Harrison, and appellant brings the record here on appeal.

On November 1, 1879, the Terre Haute & Logansport Railroad Company owned a line of railroad from Rockville to Logansport, in Indiana. It also held a road from Rockville south to Terre Haute, under a long lease from the owner, the Evansville & Terre Haute Railroad Company. This property, together with all other property which the appellee railway company then had or might thereafter acquire for use in connection with said railroad, was on that day alienated to Benjamin Harrison, trustee, to secure coupon bonds aggregating \$500,000, payable January 1, 1910, with interest to be paid semiannually at the rate of 6 per cent. per annum. Appellant then owned and operated a line of railway from Indianapolis westward through Terre Haute to the Illinois state line. Under date of November 22, 1879, the Terre Haute & Logansport Railroad Company, as party of the first part, and appellant, as party of the second part, made the following agreement:

"Operating Contract between Terre Haute and Logansport Railroad Company and Terre Haute and Indianapolis Railroad Company, under date of November 22nd, 1879, for Ninety-Nine Years from December 1st, 1879.

"This indenture, made this twenty-second day of November, A. D. 1879, by and between the Terre Haute and Logansport Railroad Company, a corporation of Indiana, party of the first part, and the Terre Haute and Indianapolis Railroad Company, likewise a corporation of Indiana, party of the second part, witnesseth: Whereas, the party of the first part is the owner of and is operating a line of railroad extending from Rockville, Parke county, Indiana, to Logansport, Cass county, Indiana, and, under a contract with the Evansville and Terre Haute Railroad Company, is in possession of and operating a rail-

road extending from said town of Rockville to Terre Haute, Indiana, the said two lines of railroad being operated as one continuous line from Logansport to Terre Haute, Indiana, at which latter place it connects with the line of railroad owned and operated by the party of the second part; and whereas, said line of railroad of the party of the first part is in bad repair, and poorly equipped with rolling stock, and is wholly lacking in machine or repair shops, terminal and depot facilities, and the party of the first part has not the means in hand to make the necessary repairs, and enlarge its equipment of rolling stock, or build machine shops or depots, or acquire terminal facilities; and whereas, if said railroad of the party of the first part be operated in conjunction with the railroad of the party of the second part the present and immediate necessities of said railroad of the party of the first part can be relieved, and the said line of railroad operated with economy, and its business developed, to the great and mutual advantage of both parties hereto: Now, therefore, it is mutually agreed by and between the parties hereto:

"Article First. That in consideration of the covenants and agreements to be performed by the party of the second part, as hereinafter specified, the party of the first part hath agreed and doth hereby agree to put said party of the second part, its agents, servants, and employes, into possession of the line of railroad owned and operated by the party of the first part, as aforesaid, extending from Terre Haute, in the county of Vigo, through the counties of Vigo, Parke, Montgomery, Boone, Clinton, Carroll, and Cass, to Logansport, in said county of Cass, all in the state of Indiana, a distance of about 118 miles, together with all property, real and personal, and all the rolling stock, equipment, and franchises, to said line of railroad appertaining or belonging.

"Article Second. The party of the second part, in consideration of the premises, agrees to take charge of said line of railroad and property, and operate the same for a period of ninety-nine (99) years from the first day of December, A. D. one thousand eight hundred and seventy-nine (1879); and after retaining seventy-five (75) per cent. of the gross receipts from all traffic moved over said line, or business done thereon, for its own separate use and exclusive benefit, the party of the second part agrees to appropriate the remaining twenty-five (25) per cent. as follows, to wit: First. To the payment of taxes assessed against the property held and operated under this contract. Second. To the payment of the interest as it falls due on the first mortgage bonds of said party of the second part; being an issue of bonds to the amount of five hundred thousand dollars, bearing interest at the rate of six (6) per centum per annum, payable on the first day of January, A. D. 1910, and secured by a deed of trust conveying to Benjamin Harrison, of Indianapolis, Indiana, as trustee, the line of railroad and property of the party of the first part, hereinbefore described. Third. To the payment of rental accruing to the Evansville and Terre Haute Railroad Company for the use of its said line of railroad, extending from Terre Haute, Indiana, to Rockville, Indiana. Fourth. The surplus, if any, to be paid annually to said party of the first part.

"Article Third. The party of the second part further agrees that if the said 25 per cent. shall not be sufficient to pay the taxes, interest, and rental aforesaid, and proper cost of maintaining the corporate organization of the party of the first part, then the deficit shall be advanced by the party of the second part at such time or times as may be necessary to make prompt payment of the said interest, taxes, and rental and costs as the same become due; and the amount so advanced shall be charged to and repaid by said party of the first part to the party of the second part.

"Article Fourth. The party of the second part further agrees that it will, at its own expense, during the continuance of this agreement, keep, preserve, and maintain the said line of railroad of the party of the first part in good working condition and repair, and will in like manner maintain and preserve in good repair all the rolling stock, buildings, fixtures, and machinery, and all other property, belonging and appertaining to said railroad, and taken by the party of the second part by virtue hereof, whether the same be received at the time of the taking effect of this agreement, or be hereafter acquired, pursuant to the terms hereof.

"Article Fifth. Inasmuch as the line of railroad to be operated under this contract is comparatively incomplete, as to rights of way, rolling stock, grades, embankments, cuts, trestles, bridges, fences, depots, stations, sidings, and terminal facilities, and other items of construction, and it is anticipated by both parties hereto that it will become necessary or advisable to make changes and additions that will be, in their nature, permanent improvements to said line, therefore it is understood and agreed that said party of the second part may, in its discretion, make such changes, additions, improvements, and replacements to and along said line of railroad, and may purchase and acquire such rights of way, rolling stock, and equipment, as to the party of the second part may seem advisable or necessary for the proper and successful operation of said road; and the party of the first part covenants and agrees to repay the party of the second part all outlays made or expenses incurred in making such changes, additions, improvements, purchases, and replacements, including any additional real estate or interests therein procured for the use of said line of railroad.

"Article Sixth. The party of the second part agrees to pay and satisfy all legal and valid claims for damages to persons or property occasioned by the operation of the said line of railroad by the party of the second part, and to save and keep harmless the party of the first part from all costs or expenses on account thereof.

"Article Seventh. And it is expressly understood that the party of the first part will not in any way further encumber its said railroad property, and will at the maturity of its bonds hereinbefore mentioned, amounting to five hundred thousand dollars, protect the party of the second part in its quiet enjoyment of the said line of railroad and property taken by the party of the second part under this agreement, as against a foreclosure and sale of said railroad and property to pay said principal, and if the party of the first part has not the means to pay said principal, and is unable to procure the same, then the party of the second part agrees to advance the means to take up the said bonds at their maturity; but it is expressly agreed that, in the event said bonds are so taken by the party of the second part, they shall not be deemed paid, but shall remain valid and subsisting securities in the hands of the party of the second part for the repayment to it by the party of the first part of the advances made to take up said bonds as aforesaid: provided, always, that the party of the first part may, if it so desires, at the maturity of said bonds renew them for a further period of 30 years at a rate of interest not exceeding six (6) per centum per annum.

"Article Eighth. It is agreed that possession of said line of railroad, franchises, and property is to be given under this indenture on the first day of December, A. D. 1879. And the party of the first part covenants and agrees to and with the party of the second part that the said party of the second part shall have the quiet and uninterrupted use and exclusive enjoyment of said line of railroad, property, and franchises for the said term of ninety-nine years, and shall enjoy, peaceably and without interference, all the powers, rights, and privileges of the said Terre Haute and Logansport Railroad Company, so far as the same may be needful to maintain and operate said railroad in the manner aforesaid, including the right to impose and collect tolls and rates for transportation of freight and passengers, as fully and effectually as the said Terre Haute and Logansport Railroad Company could do if operating said line.

"Article Ninth. It is further agreed that if, at any time, it becomes necessary to pay any sum or sums of money to perfect the title of the party of the first part in and to the property taken by the party of the second part under this contract, or to protect the party of the second part in its possession and use thereof, and the party of the first part has not the means to pay or adjust the same, then the party of the second part will advance the necessary sum or sums.

"Article Tenth. The party of the second part shall have the right at any time to retain out of any moneys in its possession, due to the party of the first part under this agreement, any and all sums advanced by it to the party of the first part; and, if the party of the second part takes up the first mortgage bonds aforesaid of the party of the first part at maturity thereof, the party of the second part agrees that it will not enforce payment thereof

for the period of six (6) months from and after the date it pays the money for said bonds.

"In testimony whereof, the Terre Haute and Logansport Railroad Company and the Terre Haute and Indianapolis Railroad Company have caused these presents to be executed by their respective presidents, and their corporate seals to be hereunto affixed by their respective secretaries, the day and year first above written.

"[Seal.] Terre Haute and Logansport Railroad Company,
By W. R. McKeen, President.

"Attest: Geo. E. Farrington, Secretary.

"[Seal.] Terre Haute and Indianapolis Railroad Company,
By W. R. McKeen, President.

"Attest: Geo. E. Farrington, Secretary."

Afterwards, and under date of June 21, 1883, the Terre Haute & Logansport Railroad Company, as party of the first part, made with appellant, as party of the second part, a second agreement, in words following:

"Contract between the Terre Haute and Logansport Railroad Company and Terre Haute and Indianapolis Railroad Company for Operating the Terre Haute and Logansport Railroad Company's Extension, under Date of June 21st, 1883.

"This indenture, made this 21st day of June, A. D. 1883, by and between the Terre Haute and Logansport Railroad Company, a corporation of the state of Indiana, as party of the first part, and the Terre Haute and Indianapolis Railroad Company, also a corporation of the state of Indiana, as party of the second part, witnesseth: Whereas, since the execution of the operating contract of November 22d, A. D. 1879, between the parties hereto, the party of the first part has determined to make an extension of the Terre Haute and Logansport Railroad from the city of Logansport, Cass county, Indiana, through the counties of Cass, Fulton, Marshall, and St. Joseph, in the state of Indiana, to the city of South Bend, Indiana, and for the purpose of constructing such extension, and in order to raise money to pay for additional equipment and permanent improvements and betterments to the railroad now operated by the party of the second part under said contract of November 22d, A. D. 1879, the party of the first part has decided to issue its bonds to an amount not exceeding one million dollars, dated January 1st, A. D. 1883, due January 1st, A. D. 1913, and designated as 'The Terre Haute and Logansport Railroad Company's Extension Mortgage Six per Cent. Bonds'; and whereas, to secure the payment of said bonds the party of the first part, under date of January 1st, A. D. 1883, has conveyed by its trust deed or mortgage to Benjamin Harrison, of Indianapolis, the railroad property and appurtenances now owned by the party of the first part between Rockville and Logansport, and also the said proposed extension of the Terre Haute and Logansport Railroad from Logansport to South Bend, Indiana; and whereas, the parties hereto desire that the said extension, when completed, shall be operated by the party of the second part, and the boards of directors of the parties hereto have respectively authorized the making of an operating contract for said extension upon the terms and conditions hereinafter specified: Now, therefore, it is mutually agreed between the parties hereto as follows, to wit:

"Article First. In consideration of the covenants and agreements to be performed by the party of the second part, as hereinafter specified, the party of the first part has agreed, and does hereby agree, to put said party of the second part, its agents, servants, and employes, into possession of the said extension of the Terre Haute and Logansport Railroad between Logansport and South Bend, a distance of about sixty-seven miles, together with all the property, real, personal, and mixed, and the franchises acquired or to be acquired for the use of said extension.

"Article Second. The party of the second part hereby agrees to take possession, from time to time, of so much of said extension as may be ready for operation, and operate the same, and finally take possession of the whole of said extension, and to operate the same until the first day of December, 1978, in connection with the Terre Haute and Logansport Railroad, and as one continuous line between the cities of Terre Haute and South Bend afore-

said; and after retaining seventy-five per cent. of the gross receipts from all traffic moved on said continuous line, or business done thereon, for its own separate use and exclusive benefit, the party of the second part agrees to appropriate the remaining twenty-five per cent. as follows, to wit: First. To the payment of all taxes assessed against the property held and operated under the said contract of November 22d, A. D. 1879, and this contract. Second. To the payment of the interest as it falls due upon the following mortgage bonds of the party of the first part, to wit: Its first mortgage bonds, amounting to five hundred thousand dollars, payable January 1st, A. D. 1910, with interest at the rate of six per cent. per annum, payable semiannually on the first days of January and July, and its said extension mortgage bonds amounting to one million dollars, payable January 1st, A. D. 1913, with interest at six per cent. per annum, payable on the first days of January and July in each year; each issue of said bonds being secured by a mortgage or deed of trust to Benjamin Harrison, Esq., of Indianapolis. Third. To the payment of the rental, as it accrues, to the Evansville and Terre Haute Railroad Company for the use of its line of railroad between Terre Haute and Rockville. Fourth. The surplus, if any, to be paid annually to the party of the first part.

"Article Third. The party of the second part agrees that if the said twenty-five per cent. shall be at any time insufficient to pay the taxes, interest, and rental aforesaid, and the proper cost of maintaining the corporate organization of the party of the first part, then the deficit shall be advanced by the party of the second part at such time or times as may be necessary to make prompt payment of said interest, taxes, rental, and cost as the same become due, and the amount so advanced shall be charged to and repaid by said party of the first part to the party of the second part.

"Article Fourth. The party of the second part further agrees that it will operate said extension for the term aforesaid upon the same terms, as to the maintenance, repair, and preservation thereof, and payment of damages and costs resulting from the operation thereof, as are now required of it in its operation of the line of railroad between Terre Haute and Logansport under the said contract of November 22d, A. D. 1879; and the party of the first part agrees that the provisions of said contract under which the party of the second part is entitled to make changes, additions, improvements, and replacements to said line between Terre Haute and Logansport, and to perfect titles thereto and purchase additional equipment, etc., etc., and retain any moneys due the party of the first part, shall be, and they are hereby, extended and made applicable to said extension, the same as if said extension had been included in and covered by said contract of November 22d, 1879.

"Article Fifth. It is agreed that the party of the first part may renew from time to time, if it so desires, its said extension mortgage bonds, at a rate of interest not exceeding six per cent. per annum; and if the party of the first part be unable to pay the principal of said extension bonds, or of any renewals thereof, when they become due, then the party of the second part agrees that it will advance the money to take up said bonds or renewals, as the case may be, and hold them as security for the replacement to it within six months of the advances made by it to take them up; and, if such advances be not paid within six months, then the party of the second part may enforce the collection thereof, the same as any original or other holder of said bonds or renewals could do upon default in payment thereof at maturity.

"Article Sixth. The party of the first part covenants and agrees that the party of the second part shall have quiet and uninterrupted use and exclusive enjoyment of said extension until December 1st, A. D. 1978, and shall enjoy peaceably and without interference all the powers, rights, and privileges of the party of the first part, so far as the same may be needful to maintain and operate said extension in the manner aforesaid, including the right to impose and collect tolls and rates for transportation of freight and passengers, as fully and effectually as the party of the first part could do if operating said extension; and the party of the second part agrees that if, at any time, it becomes necessary to pay any money to perfect the title of the party of the first part to any property taken under this contract, or to protect the party of

the second part in its possession and use thereof, and the party of the first part has not the means to pay or adjust the same, then the party of the second part will advance the necessary sum or sums.

"In testimony whereof, the Terre Haute and Logansport Railroad Company and the Terre Haute and Indianapolis Railroad Company have caused these presents to be executed by their respective presidents, and their corporate seals to be hereunto affixed by their respective secretaries, the day and year first above written.

"[Seal.]
By W. R. McKeen, President.
"Attest: Geo. E. Farrington, Secretary.

"[Seal.]
By W. R. McKeen, President.
"Attest: Geo. E. Farrington, Secretary."

The trust deed and mortgage of January 1, 1883, for the foreclosure of which the bill was filed, conveyed the road from Rockville to Logansport, with everything incidental thereto, the proposed extension to South Bend, and all after-acquired property becoming part of said line or of its equipment, and was otherwise in the usual form of such alienations. Each of the bonds—as well those secured by the first trust deed as those secured by the second—was guarantied in due form by this appellant. The extension spoken of in the second operating agreement was, prior to November 24, 1884, duly made and completed. Appellant took the custody of the railroad property under the first operating agreement, and so held said property until the second operating agreement, and thereafter took the custody of the extension as the same was completed, and so held and operated the entire property, including the leased line from Rockville to Terre Haute, until November 13, 1896, when a receiver was appointed for that company by the circuit court of the United States for the district of Indiana; and said property has since been in the custody of the said court, pursuant to said receivership.

The answer filed by appellant, as well as its cross bill, showed that appellant had received as gross earnings of the road from Terre Haute to South Bend \$8,550,159.04; that it had expended for operating purposes \$7,593,793.36; that it had expended for taxes on the property, in payment of interest on the bonds of the two series, and for rent on the short line from Rockville to Terre Haute, a total of \$1,752,462.86; and that from time to time during the period commencing with its custody of the road under the first operating agreement, and ending with the receivership, it had expended in betterments, apparently on that part of the line between Rockville and South Bend, and in operating equipment, \$781,979.59. A portion of the equipment added to the property by appellant in 1892 was 100 box cars, upon which it is said Blair & Co., the manufacturers, still have some claim for a balance yet unpaid, in the form of promissory notes made by appellant, and held by said Blair & Co. The answer and cross bill showed further that up to October 31, 1882, appellant had received as gross earnings of the road \$744,010.94; that the amount expended up to the date last mentioned for betterments and operating expenses was \$955,140.99; that, of the sum last named, \$59,388.80 was for betterments; that the amount expended up to the last-named date for rent of the line from Rockville to Terre Haute, for interest on the mortgage, and for taxes, was \$136,622.30; that the total gross earnings up to October 31, 1883, was \$1,087,923.19; that the total expended up to the date last mentioned for betterments and operating expenses was \$1,331,783.23; that the total expended for rent, interest, and taxes up to the same date was \$215,974.34; and that, assuming the contracts to be valid, there was on October 31, 1896, a large balance due from the Terre Haute & Logansport Railroad Company to appellant, of which, as computed by appellant, \$443,994.57 was for improvements, betterments, and additions to said property; "and, to that extent, defendant [appellant] says that diversions were made from gross earnings to pay taxes, interest, and rentals during the period" from December 1, 1879, to October 31, 1896. The theory favored in appellant's pleading is that its guaranties on the bonds and both the operating agreements were ultra vires and void. In either case,—that is, whether these guaranties and agreements be held void or valid,—appellant asserted a large balance as due

to it on an accounting with the Terre Haute & Logansport Railroad Company, and claimed a lien for such balance prior to appellee Harrison's extension mortgage, or that appellee Harrison, representing the extension bondholders, ought, in equity, to pay said balance, as a condition precedent to foreclosure.

John G. Williams, Lawrence Maxwell, Jr., and S. O. Pickens, for appellant.

W. H. H. Miller and John B. Elam, for appellee.

Before JENKINS and SHOWALTER, Circuit Judges, and SEAMAN, District Judge.

SHOWALTER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

When the second operating agreement is read in connection with the first, and with the guaranty engagement indorsed by appellant on each of the bonds of both issues, it becomes obvious—assuming the validity of both agreements—that no interest or estate vested in appellant which can be deemed prior to the extension mortgage. Appellant became bound for the payment of each bond of each series by its special contract indorsed thereon. That provision of the first agreement wherein the Terre Haute & Logansport Railroad Company engaged that it would not further mortgage the property is annulled by the second agreement. The debt secured by the extension mortgage is not only the debt of appellant by its contract with each bondholder, but appellant stipulated with the Terre Haute & Logansport Railroad Company, in the second agreement, that it would pay both the coupons and the bonds. Keeping its engagements as expressly made in the second agreement, no interest vested by either writing in appellant could have interfered with the lien of the extension mortgage. The sense of the second writing plainly is, in effect, that, as against any interest in appellant by force of either writing, the Terre Haute & Logansport Railroad Company had the right to make the extension mortgage a prior lien. This engagement, as between appellant and the Terre Haute & Logansport Railroad Company, would be available to Harrison, trustee, in foreclosing the extension mortgage, on the principle of equitable subrogation. Whatever the Terre Haute & Logansport Railroad Company could insist on in favor of the extension mortgage by its contract with appellant would be available to Harrison, trustee, in a foreclosure by him of that mortgage. Plainly, appellant could not—assuming the writings to be valid—resist the foreclosure, or claim priority over the extension mortgage as to any property otherwise subject to the same.

But it is now said that the guaranty agreements on the bonds and the two operating agreements are ultra vires and void, and that the court must look to the status, as thus denuded of all such enforceable special contract engagements, to determine the rights of the parties. Appellant cites the maxim that he who seeks equity shall do equity. That rule, as applied in strictness, meets the case of a defendant against whom action is sought on the chancery side, and who, by reason of his status as defendant, is enabled, as against complainant, to claim some advantage or benefit which on his own bill in a direct proceeding would not have been available. For instance, what is called

"the wife's equity to a settlement" was enforced as against a husband, or his creditors, who found it necessary to go into chancery to reach or reduce to possession her property. But here the insistence is that appellant's money has gone into the mortgaged property; that, in so putting it there, appellant was not a volunteer, nor a donor, nor a wrongdoer; and that neither the Terre Haute & Logansport Railroad Company, nor its grantee, Harrison, trustee, ought to hold the property without refunding to appellant at least the value added thereto by improvements made with appellant's money. We do not clearly see that the claim is separable from that class wherein a court of chancery is asked to declare an equitable lien or to construct a trust in the interest of one whose property is traceable, without his fault, and under circumstances where a gift could not have been intended, into, and has become an indistinguishable part of, a larger property belonging to another. Is there here a subject-matter for the application, as against appellee Harrison and the bondholders, of that remedial fiction known on the chancery side as an "equitable lien" or a "constructive trust"? Or, as counsel for appellant would probably state the case, is the position of appellee Harrison, as representing the bondholders, such that a decree of foreclosure ought not to have gone in his favor without exacting from him payment to appellant to the extent of whatever value had been added to the property by such betterments and equipment as were provided by appellant?

In reasoning about the case, we think a distinction may be made between betterments and equipment added by appellant to the railroad property prior to the extension mortgage, and such as were added subsequent to the execution of that instrument. The money advanced by the bondholders or mortgagees under the extension mortgage was at once expended, either by or at the instance of appellant, in building the extension of the road from Logansport to South Bend, and in improving that portion of the road from Rockville to Logansport. Appellant forthwith took, if not the \$1,000,000 itself, at least the property into which that money was converted, and retained and used the same, and appropriated the earnings thereof until the default which entitled appellee Harrison to enter by the terms of the extension mortgage: that is, for 12 years. Since appellant in fact made for its own benefit this use of the money of the mortgagees, or of what was bought with that money, it ought not to retake the special property, or any part thereof, which formed the consideration to the mortgagees for such advancement, without returning the money, or the appropriate portion thereof. In other words, the status of the case, as it remains when the operating contracts are deemed void, shows no equity in appellant, so far as concerns the betterments added prior to the extension mortgage, or prior to July, 1883, to prevent the foreclosure. If the first operating agreement is to be deemed void, then the custody by appellant at the time of the execution of the extension mortgage must be referred to an actual, legal possession then vested in the Terre Haute & Logansport Railroad Company. Assuming that appellant, while having the custody of the road, from 1879 to 1883, had spent, not some portion of the \$500,000 borrowed under the mortgage of 1879, nor a portion of the moneys yielded as earnings by the road itself, but

its own money, in adding to the road betterments and equipment, still, within the actual intent of both companies, such betterments and equipment were merely part of a single property, and the Terre Haute & Logansport Railroad Company, being in possession and having title to that property, alienated the same to Harrison, trustee, by the extension mortgage. Let it be supposed that appellee Harrison and the bondholders, when they took the extension bonds, had notice of such facts as would have been a sufficient basis for the declaration or construction by a court of chancery of a trust on the entire property to repay to appellant the money expended by it in added betterments and equipment, then possibly such trust might have been declared, if the \$1,000,000 paid by the bondholders had gone to and been used by the Terre Haute & Logansport Railroad Company for purposes of its own, and with which appellant was not, and never became, concerned. But the fact remains, as said, that the money paid by the bondholders was spent at the instance of, if not directly by, appellant itself, in building the extension to South Bend, and in improvements on that part of the road between Rockville and Logansport, and all this property into which the \$1,000,000 was converted went immediately into the custody of appellant, and appellant used the same, and took the earnings thereof, besides the incidental benefit to its road from Indianapolis to the state line, for many years, and until the right of entry vested in appellee Harrison for default in the conditions of the mortgage. To now construct a trust or lien whereby appellant must be paid out of the property the amount invested by it in betterments and equipment prior to 1883 would really mean that appellant, after enjoying for 13 years the benefit of the money advanced by the bondholders, could also retake the consideration for which that advance was made. The bondholders, in fact, and within the intent of all concerned, parted with their money for a mortgagee's interest in the railroad property with all betterments and equipment as extant in January, 1883. There can be no equity whereby appellant may take back a portion of the property free from the lien paid for by the bondholders with money which appellant has in effect since used for its own benefit.

Suppose the appellant, being still solvent, had chosen in 1896 to disregard the operating contracts, as ultra vires and void, and had abandoned the Terre Haute & Logansport Road, and that appellee Harrison had thereupon proceeded to foreclose the extension mortgage; could appellant, as against the foreclosure, have been entitled to a lien superior to the mortgage for the cost of betterments and equipment put in the property prior to 1883, after using for its own profit for a dozen years the additional betterments and improvements into which the \$1,000,000 paid by the bondholders was converted? Could a portion of that interest in the property for which the \$1,000,000 was advanced be taken from the bondholders, and given to one who in fact converted the \$1,000,000 so paid into betterments and improvements, and had had for so many years the exclusive use of that property, and then voluntarily abandoned the same? What we now speak of is the status as concerns the betterments put into the property prior to January 1, 1883. Betterments added subsequent to the extension mortgage will be considered later in this opinion. The fact that the ap-

pellant advanced the money with which the Terre Haute & Logansport Railroad Company for so long a period paid the coupons on the extension mortgage is only material upon the point now under discussion, as having served to prevent a foreclosure, and prolong appellant's use and control of the mortgaged property. Appellee Harrison has, as concerns betterments and improvements made prior to 1883, not only the better equity, arising out of the status as denuded of valid operating contracts, but, since condition broken, and by the terms of the extension mortgage, he would seem to have the right of entry or possession,—in other words, the legal title.

As betterments and equipments were added to the railway property after July, 1883, they became subject to the mortgage, and title thereto vested in the Terre Haute & Logansport Railway Company. Appellant had notice, in adding such betterments and equipment, that the mortgage would cover the same. A contract charging after-acquired property becomes, in equity, a lien from the time such property is acquired, as against volunteers and persons having notice. 3 Pom. Eq. Jur. § 1236; also, sections 1235 and 1234. Betterments and equipment added after January, 1883, came within the mortgage lien by an agreement for which value had been already paid. A lien or charge actually extant in favor of a vendor or third person when the Terre Haute & Logansport Company took proprietorship over a given property then added to its road could not, of course, be divested or made subject to the mortgage. But an equitable lien or a constructive trust, such as is proposed in favor of appellant, is a remedial measure. It attaches on a title initially clear and exclusive in the party who is to be declared a trustee. If the Terre Haute & Logansport Railroad Company could not, as against appellee Harrison and the bondholders represented by him, have voluntarily declared itself a trustee of the railroad property to the extent of betterments and equipment added by appellant, then a court of chancery cannot make that company such a trustee. This, in effect, was the ruling in *Thompson v. Railroad Co.*, 132 U. S. 68, 10 Sup. Ct. 29. In that case the additional seven miles of road had vested in the lessor company, free from any claim or lien to secure the contractor's certificates, as between the holders of those certificates and the bondholders. The mortgage made by the lessor company (apparently as a volunteer and without consideration) and the lessee company upon the seven miles of road to secure the contractor's certificates, and the resolution of the former company "to give effect to the [lessee company's] agreement for the lien on the earnings" to secure the payment of the contractor's certificates, and the subsequent engagement of the lessor company, on cancellation of the lease and assumption by that company of the custody of the road, to either pay the contractor's certificates, or surrender that portion of the road back to the lessee company, were so many attempts to do what the lessor company could not do, namely, make the contractor's certificates a lien on the after-acquired property prior to the original mortgage. As the seven miles of road was constructed, and became a part of the main line, the title thereto passed to the lessor company; and, being after-acquired property, said extension became subject to the original mortgage. The lessor company could not itself declare a

trust on that part of the road, or the earnings thereof, which would take priority over the original mortgage. Nor could a court of equity convert the lessor company into a trustee; that is, construct a lien or trust which would have such priority. Having notice of the prior mortgage, the contractors built the addition or extension. They did not—and this, possibly, they might have done—reserve any lien in their favor as a condition upon which they parted with their labor and material; but, being simply creditors of the lessee company, the lessor company attempted to fix in their favor a lien which should be prior to another lien long before contracted by the lessor company for value to the bondholders.

The proposition to charge the railroad property itself with the cost or present worth of improvements and equipment furnished by appellant during its custody of the road is doubtful on other grounds. For aught that appears, the money used by appellant in paying for such improvements and equipment may have been yielded by the road itself. Can a trust be fixed on the property, unless appellant's own money, as distinguished from the earnings of the road, be traceable into the same? If appellant's own money were used in providing the improvements and equipment added, for instance, prior to 1883, did appellee Harrison have notice of that fact when he took the extension mortgage? The cross bill and answer showed that he knew of the custody and use of the road by appellant, but this does not mean that he knew the state of the disbursements by appellant, and the special source from which the particular money used in paying for improvements and equipment, and which might thus be identified as present in the same, had been taken. Counsel for appellant state the proposition for which they contend in the following words:

"Appellant's right to compensation is measured by the enhancement in value of the Terre Haute & Logansport property caused by the improvements and additions made upon or to it by appellant,—not exceeding, however, the outlay of appellant on account thereof,—and for the amount thus ascertained equity gives appellant a first lien upon the property; for both contracts were made in good faith, and the improvements and additions to the property were made in good faith, whilst appellant was in possession under a contract which both parties believed to be valid."

They also quote from section 1241 of volume 3 of the second edition of Pomeroy's Equity Jurisprudence:

"Where a party lawfully in possession under a defective title makes permanent improvements, if relief is asked in equity by the true owner he will be compelled to allow for such improvements."

But suppose the party, having custody or enjoyment of the property for some purpose of his own by a contract with the general owner, who himself remains legally vested with possession, adds betterments which become part of the property; and suppose the general owner then, at the instance of said party, mortgages the property, and the money paid by the mortgagee is thereupon expended for further betterments, and the party first mentioned takes for a series of years the exclusive use and benefit of the improvements so paid for, and then, it being considered that his contract with the general owner was void, as beyond the power of either, abandons the property; shall he go

with the profits or benefits derived from the money of the mortgagee, and take with him a portion of what the mortgagee received in return for the money advanced? Shall the mortgagee, after entry for condition broken, be declared a trustee for the benefit of such party? Is the mortgagee in such case a purchaser for value and with notice of facts out of which a trust can be constructed as against him and in favor of such party?

Appellant has advanced money wherewith debts of the Terre Haute & Logansport Railroad Company, in the form of taxes, rent, and interest, have been paid. The rents were obligations for the use of the short line from Rockville to Terre Haute,—a piece of road apparently or possibly (as to the leasehold estate) not comprehended in the extension mortgage. The interest was part of the coupon indebtedness secured by the mortgage here in question and the prior mortgage. These coupons were extinguished by the payment, and with them, and as far as they were concerned, the mortgage lien securing their payment. The debt for taxes, and whatever lien could have been asserted in that behalf, were also extinguished. The Terre Haute & Logansport Railroad Company was bound to the mortgagee to pay the taxes and interest. But counsel for appellant rest their case upon the proposition before quoted from their argument. They contend for an equitable lien in favor of appellant for the value added to the property by the improvements and equipment provided by appellant. To this extent they would have appellee Harrison converted into a trustee for the benefit of appellant, as having a claim superior in equity to that of the bondholders. The theory that there has been a diversion—to the payment of interest—of income which ought to have been devoted to operating expenses does not seem to be insisted on. But the doctrine of *Fosdick v. Schall*, 99 U. S. 235, as further expounded by the chief justice in *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, is plainly excluded from the present case. Nothing has been said in the argument as distinguishing the 100 box cars made by Blair & Co., and put into the equipment of the road in 1892 from other equipment and improvements added while appellant was in custody of the property. It is, of course, for Blair & Co. to themselves assert any right remaining in them as against any portion of the mortgaged property. The decree is affirmed.

SWIFT et al. v. SHEEHY.

(Circuit Court, W. D. Missouri, W. D. June 27, 1893.)

No. 2,256.

LEASE—LIEN FOR IMPROVEMENTS.

Under a lease which provides that at the expiration of the term the lessor shall allow the lessees for improvements placed upon the premises, and that the lessor shall become the owner of such improvements "upon payment to the lessees of said sum," the lessees have an implied lien upon the premises, which may be enforced in a court of equity.

Frank Hagerman, for complainants.

Rozzelle & Walsh and W. R. Douglass, for defendant.

PHILIPS, District Judge. This is a bill in equity to enforce a lien upon certain real estate for the value of improvements placed thereon by complainants, as lessees, under a contract of lease with the defendant, as lessor. The lease ran for 10 years, expiring on the 1st day of April, 1898. The lease contained the following provision:

"At the expiration of said period of ten years for which this lease is made, the buildings and improvements placed on said lots by said lessees or their assigns shall be appraised by three disinterested parties, of whom each party to this lease shall select one, and the two thus selected shall choose a third, and the value of such improvements so fixed shall be paid to said lessees by the lessor; and the lessor shall thereupon become the owner of, and be entitled to the possession of, such buildings and improvements, upon payment to the lessees of said sum so fixed by said appraisers, which sum lessor agrees to pay within thirty days after such appraisal shall have been made."

The bill alleges that timely notice was given by the lessees to the lessor that the lease would not be renewed, and asking for the selection of the appraisers to value the improvements placed by the lessees upon the property, which is claimed to be of the value of \$25,000; that, conformably to said contract, each of the parties proceeded to and did select an appraiser, but that the two appraisers thus selected failed to either agree upon the valuation of the buildings placed by the lessees on the premises, or upon a third party to act as such third appraiser. The complainant then alleges that the defendant refused to make any payment for said buildings and improvements, and refuses to make any agreement as to their value, wrongfully claiming that he is not required, under said agreement, to make any purchase, or to make any payment, or in any wise carry out said agreement, "and refuses to take or accept the possession of the property, although tendered to him subject to the lien which the complainants may have, and wrongfully refuses to recognize that the complainants have a lien upon the real estate aforesaid for the value of the improvements." The prayer of the bill is that the court ascertain and decree the amount of compensation that they are entitled to for the buildings and improvements aforesaid, with interest thereon, and that the same be declared as a charge and lien upon the real estate aforesaid, and that said lien be enforced, and for all proper relief, etc. To this bill defendant has demurred on the principal ground that the complainants have an adequate and complete remedy at law on the contract, and have no standing in a court of equity for the relief prayed for.

The controversy between the respective counsel centers upon the question of law as to whether or not, under the terms of this contract, there is any implied lien in favor of the lessees for the value of the improvements placed by them upon the land. Both parties concede that, if there be any such implied lien, it is enforceable on the equity side of the court. Counsel for defendant has referred the court to a number of decisions holding that upon a simple contract of lease, authorizing the lessee to make certain improvements upon the leased premises, to be paid for by the lessor upon the termination of the lease, without any provision, express or implied, giving the lessee a lien for the value of such improvements,

the remedy for a breach of the contract on behalf of the lessee is only at law, as for damages for breach of covenant; citing *Speers v. Flack*, 34 Mo. 101; *Kutter v. Smith*, 2 Wall. 491; *The Confiscation Cases*, 1 Woods, 221, Fed. Cas. No. 3,097; *Whitlock v. Duffield*, 2 Edw. Ch. 366; *Allen v. Culver*, 3 Denio, 285; *Taylor v. Baldwin*, 10 Barb. 582; *Printing Establishment v. De Westenbergh*, 46 Hun, 281; *Hite v. Parks*, 2 Tenn. Ch. 373; *Gardner v. Samuels*, 47 Pac. 935, 116 Cal. 84; *Bream v. Dickerson*, 2 Humph. 126. On the other hand, complainants' counsel cites a number of authorities as taking a much broader view of this question; some of them holding that in all such contracts there is an implied understanding that the improvements made upon the premises under such contract shall attach to the property until the value thereof is paid to the lessee. *Railroad Co. v. Shortridge*, 86 Mo. 662-665; *Van Rensselaer v. Penniman*, 6 Wend. 569; *Bresler v. Darmstaetter*, 57 Mich. 311, 23 N. W. 825; *National Waterworks Co. v. Kansas City*, 10 C. C. A. 653, 62 Fed. 853-864; *Hopkins v. Gilman*, 22 Wis. 455; same case on second appeal, 47 Wis. 581, 3 N. W. 382; *Ecke v. Fetzer*, 65 Wis. 55, 26 N. W. 266; *Copper v. Wells*, 1 N. J. Eq. 10; *Berry v. Van Winkle*, 2 N. J. Eq. 269; *Conover v. Smith*, 17 N. J. Eq. 51; *Mullen v. Pugh* (Ind. App.) 45 N. E. 347; *Gray v. Cornwall's Assignee* (Ky.) 26 S. W. 1018; and *Fowler v. Insurance Co.*, 28 Hun, 195. The *National Waterworks Case* is valuable principally for the proposition that the party entitled to take the improvements on payment of the purchase money is not entitled to the possession thereof until the purchase price agreed upon, or fixed by the court, is paid. In my humble judgment, the case of *Speers v. Flack*, supra, is an apt illustration of what the conservative and safe rule in such cases ought to be. In that case the contract simply provided that if, at the expiration of the term, any buildings should remain on the premises, erected by the lessees, the same should be appraised by disinterested persons, two of whom should be elected by each of the parties, and the fifth by those first chosen; and "said parties of the first part [the lessors], or their representatives, are to allow and pay to the parties of the second part [the lessees], or their representatives, the appraised value of said buildings." The lessees holding over after the expiration of the term, the lessors brought an action of unlawful detainer. As the appraised value of the improvements had not been paid to the lessees at the time of the institution of the suit, the trial court held that the plaintiffs could not recover until they had paid or tendered to the defendants the appraised value of said improvements. It was of this state of the case that the supreme court said:

"The lease was for a fixed and determinate period of time, at the expiration of which the lessors became entitled, by operation of law, to the possession of the demised premises. There is nothing in the deed, expressed or implied, by which the right of the lessors to a return of the possession was made to depend upon the previous performance of the covenant to pay for the improvements. The agreement to pay is a covenant, the nonperformance of which entitled the lessees or their assignees to an action for damages, but nothing more."

But it is to be observed from the contract of lease in question that there is an express stipulation that "the value of such improve-

ments shall be paid to the said lessees by the lessor, and the lessor shall thereupon become the owner of, and be entitled to the possession of, such buildings and improvements upon the payment to the lessees of said sum so fixed," etc. So there is in this contract, distinguishing it from the cases principally relied upon by the defendant's counsel, an express provision that the lessor can only become the owner of, and be entitled to the possession of, the buildings and improvements, upon the payment to the lessees of the value thereof. And, when we arrive at the determination of the question as for what purpose this ownership and possession of the premises were to be withheld from the lessor until payment for the value thereof was made, it seems to me we have reached a proper solution of this controversy. At common law, under a contract of lease by which the lessee was permitted to make improvements upon the land during the existence of his lease, without further express reservation at the termination of the term, the improvements went with the land back to the lessor. The contract in question does not only require the lessor, at the termination of the lease, to pay the lessees the value of the improvements, but it, in effect, entitles the lessees to retain the ownership and possession until the lessor shall pay them therefor, giving them thereby an implied lien upon the improvements as security for the value thereof. The case at bar therefore differs in this material respect from the case of *Speers v. Flack*, supra, in that there is something expressed in the deed "by which the right of the lessor to a return of the possession was made to depend upon the previous performance of the covenant to pay for the improvements"; the clear intimation of the court being that, if there had been such a provision respecting the retention of possession until the performance of the covenant to pay for the improvements, there would have been an implied lien therefor. These observations are quite applicable likewise to *The Confiscation Cases*, supra, for the reason that the lease there did "not contain a word which looks like the creation or expectation of a lien on the property itself," because it contained no provision giving the lessee the right to retain the ownership and possession of the improvements until payment therefor was made by the lessor. And it will be found, on examination of the authorities pro and con upon this much-debated question, that the decisions turned largely upon the question of fact as to whether or not there was any express provision in the contract that the valuation of the improvements should constitute a lien upon the property, or whether it contained any terms from which such lien could be implied. Without taking the time or labor to review the authorities and make an analysis thereof, it seems to me that, wherever it affirmatively appears from the contract itself that the lessee is given the right to retain possession of the premises until the lessor compensates him for the value of his improvements, the very object of such retention is to give him an additional security for his protection. For what purpose was the possession of the premises, in effect, to be retained by the lessees until compensated for the value of their improvements? Certainly the effect of the provision was not to vest in the lessees the legal title to the lessor's real estate, but the manifest object was to

give them the right of possession, as a security for their claim; and as they could not continue the use of the property without accounting to the lessor for the rental, if they did not wish to continue the use, as they declared, at the end of the ten-years term, it seems to me that they have a right to go into a court of equity, and tender possession to the lessor, and have their equitable lien thereon enforced, as a means of making their security available. In this respect the right, in principle, differs little from that of a vendee in possession of real property, the legal title to which is in the vendor, in which case, on default of payment by the vendee, the vendor has several remedies. He may sue on the contract, at law, to recover judgment for the purchase money, and levy the execution on the property and sell it; or he may bring ejectment for possession, in which case the vendee within proper time may go onto the equity side of the court, and tender the contract money and demand a deed; or the vendor may in the first instance, notwithstanding he holds the legal title, go into a court of equity and demand that the vendee come forward with the money, or be forever foreclosed. The vendor holds the legal title as mere security for the payment of the purchase money; and as said by the court in *Hansbrough v. Peck*, 5 Wall. 506:

"In case of persistent default, his better remedy, and, under some circumstances, his only remedy, is to institute proceedings in the proper court to foreclose the equity, where partial payments or valuable improvements have been made. The court will usually give him a day to raise the money,—longer or shorter, depending upon the particular circumstances of the case,—and to perform his part of the agreement."

So here the lessees are entitled to retain possession of this property, as security for their claim against it, until the lessor complies; and they ought not to be required by an action at law to surrender the advantage of this additional security, but ought to be permitted to call the lessor into a court of equity, where the rights of the parties can be determined according to the very justice of the case, and their equitable lien preserved by *lis pendens* against the lessor and all the world. See *Allen v. Taylor*, 96 N. C. 37, 1 S. E. 462. The demurrer to the bill is overruled.

ALESSANDRO IRR. DIST. v. SAVINGS & TRUST CO. OF CLEVELAND, OHIO, et al.

(Circuit Court, S. D. California. June 29, 1898.)

LIEN ON INVALID CORPORATE BONDS—FORECLOSURE—CROSS BILL.

Where corporate bonds recite their issue under a certain valid statute, and in pursuance of its provisions, and nothing upon their face indicates their invalidity, a defendant to a bill, seeking their sale in part satisfaction of certain liens, may, by cross bill, show that they are in reality void, and thus prevent the court from decreeing a sale, whereby they may pass for value to innocent purchasers.

Wm. J. Hunsaker, for Savings & Trust Co. of Cleveland, Ohio, and others.

F. W. Gregg, Geo. J. Denis, and Charles Wellborn, for Alessandro Irr. Dist.

ROSS, Circuit Judge. This cross bill, to which a demurrer has been interposed, was filed by leave of the court, in the case of Savings & Trust Company of Cleveland, Ohio, against Bear Valley Irrigation Company and others, pending herein. It is conceded on behalf of the demurrants that the cross bill shows that the bonds thereby sought to be annulled are void, but it is contended that, as it shows upon its face that the bonds were sold or exchanged for purposes and pursuant to a pretended contract not authorized by law, they can be defended against in an action at law, and that, therefore, a court of equity will decline to give relief. It appears from the averments of the cross bill that the cross complainant is a corporation of the state of California, organized and existing under and by virtue of the act entitled "An act to provide for the organization and government of irrigation districts and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes," approved March 7, 1887 (St. Cal. 1887, p. 29). The validity of that statute was sustained by the supreme court of the United States in the case of *Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56. By that act, as amended by the acts of March 20, 1891 (St. Cal. 1891, pp. 142, 147), the cross complainant was, among other things, authorized to acquire, either by purchase or condemnation or other legal means, all lands, waters, water rights, and other property necessary for the construction, use, supply, maintenance, repair, and improvements of reservoirs, canals, and other waterworks, and, subject to certain prescribed conditions, was authorized to issue its bonds and to dispose of them in two ways: In case of the purchase of property necessary for the purposes of the district, to pay for the same in bonds at their par value; or to sell the bonds for not less than 90 per cent. of their face value, from time to time, and in such quantities as should be necessary and most advantageous, to raise money for the acquisition of the necessary property and water rights, and the construction, etc., of the necessary canals and waterworks.

While counsel for the demurrants, one of whom is the Savings & Trust Company of Cleveland, Ohio, concede that the cross bill alleges facts showing the invalidity of the bonds in question, it is not claimed that the bonds themselves show upon their face such invalidity. They recite upon their face that they were issued under and by virtue of the provisions of the state statute referred to, and in pursuance of its provisions. The cross bill shows that one of the purposes of the original bill is the sale of these bonds, therein alleged to be held, among other property, as security for the payment of certain receiver's certificates, alleged to be held and owned by the complainant Savings & Trust Company, and sought to be foreclosed, among other liens, by the original bill herein. As the bonds do not show upon their face that they are invalid, and the cross complainant is a party defendant to the bill which seeks their sale in part satisfaction of certain liens, it is, I think, entitled to show by cross bill the invalidity of the bonds, to the end that this court be not called upon to decree the sale of bonds fair upon their face, but in reality void, and which may thereby pass for value into the hands of many different

purchasers, and result in a multiplicity of suits to enforce their payment.

An order will therefore be entered overruling the demurrer, with leave to the defendants to answer within 20 days.

BOYLE v. FARMERS' LOAN & TRUST CO. (two cases).

HUNTINGTON v. SAME.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1898.)

Nos. 661, 662, 663.

RAILROADS—SALE ON FORECLOSURE—RIGHTS OF PURCHASER.

The purchaser of railroad property at foreclosure sale is not entitled to the earnings of the road after confirmation, where he has persistently delayed compliance with his bid, and has not paid the purchase money.

Appeals from the Circuit Court of the United States for the Eastern District of Texas.

No. 661.

J. A. Baker and R. S. Lovett, for appellant.

L. W. Campbell, M. F. Mott, and J. P. Blair, for appellee.

No. 662.

J. P. Blair, J. A. Baker, and R. S. Lovett, for appellant.

L. W. Campbell and M. F. Mott, for appellee.

No. 663.

J. P. Blair, for appellant.

L. W. Campbell and M. F. Mott, for appellee.

Before PARDEE, Circuit Judge, and SWAYNE and PARLANGE, District Judges.

PER CURIAM. The record shows that the Pacific Improvement Company is the real party in interest represented in these several appeals, that company being the purchaser represented by Wilbur F. Boyle, and the owner of the 614 bonds, which said Boyle represents, and the owner of the Lackawanna claim set up as a lien prior to that of the first mortgage bonds; that the purchaser at the sale under the decree, and as a part of the consideration, and in addition to the sum bid, took the property upon the express condition that he would pay off and satisfy, among others, the Lackawanna claim; and that the reservation of the sum of \$187,000 out of the earnings of the road to await the decision of the supreme court of the Lackawanna claim is in the direct interest of the appellants. Neither in law nor in equity is the purchaser under the foreclosure sale entitled to the earnings of the property since the decree of confirmation, because, among other things, he has persistently delayed complying with his bid. There is no merit in any of the above-entitled appeals. The effect of the appeals has been to pass the day within which the purchaser was ordered by the circuit court to comply with his bid. We notice, in the terms of the decree of foreclosure under which the sale was made, the court reserved the right to resell the property upon the failure of the

purchasers, or their successors or assigns, to comply within 20 days with the order of the court with regard to paying in the balance of the purchase price. The decree of November 12, 1897, requiring the purchaser to comply with his bid, is amended so as to insert in lieu of the 13th day of December, 1897, the 1st day of July, 1898, as the time within which the purchaser shall comply with his bid and pay in the balance of the purchase price, and, as amended, the said decree is in all respects affirmed; and the decree of November 12, 1897, denying the purchaser's right to the earnings of the railroad property since the confirmation of the sale, is also affirmed.

APIS et al. v. UNITED STATES

(District Court. S. D. California. February 21, 1898.)

No. 846.

1. GRANT OF LANDS UNDER JUDICIAL INVESTIGATION—POWER OF CONGRESS.

Act Jan. 12, 1891, and the patent issued in pursuance thereto, granting to the Mission Indians a portion of the lands embraced within the Mexican grant, "La Jolla Rancho," are valid, and withdrew the lands so granted from the operation of Act Jan. 28, 1879, permitting the legal representatives, successors, or assigns of José and Pablo Apis to litigate in the United States district court of California their claim to such lands.

2. MEXICAN LAND GRANT—RIGHTS GRANTED BY SPECIAL ACT—REVOCATION.

The permission accorded the legal representatives, successors, or assigns of José and Pablo Apis, by Act Jan. 28, 1879, to litigate their claim and title to "La Jolla Rancho" in the United States district court of California, was a gratuity on the part of the United States, and revocable at any time before final decree in such proceedings.

3. TITLE TO LANDS IN MEXICAN GRANT — SPECIAL ACT — ADVERSE CLAIMS — BURDEN OF PROOF.

Act Jan. 28, 1879, permitting the legal representatives, successors, or assigns of José and Pablo Apis to litigate their claim to "La Jolla Rancho" in California, provides, *inter alia*, that no lands shall be confirmed to said claimants to which there are valid adverse claims under any laws of the United States; that, before filing their claims, such claimants shall execute releases to persons in possession of any portion thereof under valid claim; and that the court, before rendering a decree of confirmation, shall ascertain that said releases have been duly executed. *Held*, that when such claimants fail to affirmatively show that no part of the land claimed by them was possessed by persons having valid claims thereto January 28, 1879, or, if so held, that claimants had, before bringing their suit, executed valid releases to such persons, their claim must be rejected.

Byron Waters and Max Loewenthal, for plaintiffs.

Frank P. Flint, U. S. Atty., and James R. Finlayson, Asst. U. S. Atty.

WELLBORN, District Judge. This action was instituted by plaintiffs, as heirs at law of José and Pablo Apis, against the United States, under a special act of congress approved January 28, 1879, as follows:

"An act for the adjudication of title to lands claimed by José and Pablo Apis, in the state of California.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the legal representatives, suc-

cessors, or assignees of José and Pablo Apis, or either of them, be, and they are hereby, permitted to file their claim and title to a certain tract of land in California known as 'La Iolla Rancho,' in and before the United States district court of California; and that said court shall have the same jurisdiction in all things, to be exercised originally to hear and determine upon the said claim and title, to confirm or reject the same, as the several district courts had, under the act of congress of March third, eighteen hundred and fifty-one, and acts amendatory thereunto. And the supreme court of the United States shall have jurisdiction to hear and determine said cause, upon appeal, as decided in said acts: provided, that no lands shall be confirmed to said claimants by said decree to which there are valid claims existing under the pre-emption, homestead or other laws of the United States at the date of the passage of this act; nor shall any decree of confirmation affect any valid adverse right of any other person or persons, or give to the confirmees, or any of them, any claim upon the United States for compensation for any land such confirmees may lose by reason of pre-emption or homestead claims or adverse rights as aforesaid; and that no decree shall be rendered for more than two square leagues: provided, further, that said claimants before filing their claim and title, shall execute releases to any persons who may be in possession of any portion of said lands under valid claims under the pre-emption, homestead or other laws of the United States at the date of the passage of this act, to the portions of said lands so held respectively, and, before rendering a decree in confirmation the said court shall ascertain that said releases have been duly executed."

20 Stat. 593.

The petition was filed July 22, 1884, and the case transferred from the Northern to the Southern district of California, February 24, 1896. Plaintiffs' claim rests upon a Mexican grant, made November 7, 1845, by Pio Pico, governor of California. The genuineness and due execution of the grant are satisfactorily established. The grant on its face shows, among other things, that Indians were established on, and occupying, some of the lands at the date of the grant, and provides that the grant is made without prejudice to such Indians. Plaintiffs have not shown, nor undertaken to show, that Indians are not now in the occupancy of some of the lands; nor have they shown, nor undertaken to show, what particular lands Indians do occupy. The evidence, however, does show affirmatively that one, at least, of the Indians who were upon said lands at the date of the grant to plaintiffs, were occupying them as late as two or three years ago; and the map introduced by plaintiffs also shows an Indian village on said lands. That Indians were in possession of some of these lands in 1845 appears, as already stated, on the face of the expediente itself. In his report upon the petition of the claimants, Arguello, the prefect, states that the land is "occupied with some small summer crops and a few fruit trees that they have there in their style some natives, for which reason, if the petitioners will engage themselves not to molest them, there is no obstacle against granting their petition." The concession of Gov. Pico declares "that the grantees shall not molest the Indians that will have previously established their residence there, and occupied some small tracts of land." And the formal grant declares: "But they shall not in any manner molest the Indians who are at present established in it, and occupy some lands that they can go on cultivating and possessing notwithstanding this grant."

One of plaintiffs' witnesses, H. G. Stephens, testified that some of the sections claimed by plaintiffs, and which the witness specified, were included within an Indian reservation, created by an executive

order, December 27, 1875. That order, so far as material here, was as follows:

"Executive Mansion, December 27th, 1875.

"It is hereby ordered that the following described lands, in the county of San Diego, California, viz. [San Bernardino Base and Meridian], including Rincon, Gapich, and La Jova Potrero:

"T. 10 S., R. 1 E.

"Sections 16, 23, 25, 26, 30, 31, 32, 33, 34, 35, 36, and fractional sections 17, 18, 19, 20, 21, 22, 27, 28, and 29. * * *

—Be, and the same are hereby, withdrawn from sale, and set apart as reservations for the permanent use and occupancy of the Mission Indians, in Lower California.
U. S. Grant."

Although said order was not introduced in evidence, the court takes judicial notice of it. *Jenkins v. Collard*, 145 U. S. 546, 12 Sup. Ct. 868; *Jones v. U. S.*, 137 U. S. 202, 11 Sup. Ct. 80; *Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513; Code Civ. Proc. Cal. § 1875, subd. 3. Of the sections reserved by that part of the order above quoted, sections 16 and 23, and parts of sections 17, 21, 22, 25, 26, 27, 34, and 35, are included in the lands claimed by plaintiffs.

On January 12, 1891, congress passed an act entitled "An act for the relief of the Mission Indians in the state of California" (26 Stat. 712), which contains, among others, the following provisions:

"That immediately after the passage of this act the secretary of the interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the state of California, upon reservations which shall be secured to them as hereinafter provided.

"Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said state, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the president and secretary of the interior. * * * In cases where the Indians are now in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. * * *

"Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the secretary of the interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever."

On December 29, 1891, by executive order, and pursuant to the aforesaid act of congress of January 12, 1891, all the sections embraced in the executive order of December 27, 1875, except section 16, were reserved for Mission Indians. These sections, as already stated, are parts of the land claimed by plaintiffs.

On the 13th day of September, 1892, the following patent was issued:

"The United States of America.

"To All to Whom These Presents shall Come—Greeting:

"Whereas, it is provided by the act of congress entitled 'An act for the relief of the Mission Indians in the state of California,' approved January twelfth, Anno Domini one thousand eight hundred and ninety-one (26 Stat. 712), that 'the secretary of the interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the state of California, upon reservations which shall be secured to them. * * *

"Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said state, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the president and secretary of the interior. * * *

"Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the secretary of the interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charges or incumbrance whatsoever.'

"And whereas, it appears by a copy of a letter dated August 30, 1892, from the acting commissioner of Indian affairs, to the secretary of the interior on file in the general land office, that a selection has been made by the commissioners appointed and acting under said act of congress of January 12, 1891, for the La Piche and La Jolla bands or villages of Mission Indians in California, and such other Mission Indians as are now, or may hereafter become, legal residents thereof, covering fractional sections seventeen, nineteen, twenty, twenty-one, twenty-two, twenty-seven, twenty-eight, and twenty-nine, and sections twenty-three, twenty-five, twenty-six, thirty, thirty-one, thirty-two, thirty-three, thirty-four, and thirty-five, in township ten south, of range one east, of the San Bernardino Meridian, in the state of California, said tracts being (including fractional section eighteen) designated upon the official plat of survey of township ten south, range one east, San Bernardino Meridian, approved March 25, 1885, by W. H. Brown, United States surveyor general for California, as 'Lot No. 39 Potrero Indian Reservation,' and containing an estimated area of (excluding said fractional section eighteen) eight thousand three hundred and twenty-nine acres and twelve-hundredths of an acre:

"Now, know ye, that the United States of America, in consideration of the premises and in accordance with the provisions of the third section of the said act of congress approved January 12, 1891, hereby declares that it does and will hold the said tracts of land selected as aforesaid (subject to all the restrictions and conditions contained in the said act of congress of January 12, 1891) for the period of twenty-five years, in trust for the sole use and benefit of the said La Piche and La Jolla bands or villages of Mission Indians in California, and such other Mission Indians as are now or may hereafter become legal residents thereof, according to the laws of California; and at the expiration of said period the United States will convey the same or the remaining portion not patented to individuals by patent to said La Piche and La Jolla bands or villages of Mission Indians in California, and such other Mission Indians as are now or may hereafter become legal residents thereof, as aforesaid, in fee discharged of said trust, and free of all charge or incumbrance whatsoever: provided, that when patents are issued under the fifth section of said act of January 12, 1891, in favor of individual Indians, for lands covered by this patent, they will override (to the extent of the land covered thereby) this patent, and will separate the individual allotment from

the lands held in common; and there is reserved from the lands hereby held in trust for said La Piche and La Jolla bands or villages of Mission Indians in California, and such other Mission Indians as are now or may hereafter become legal residents thereof, a right of way thereon for ditches or canals constructed by the authority of the United States.

"In testimony whereof, I, Benjamin Harrison, president of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

"Given under my hand, at the city of Washington, this thirteenth day of September, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

"By the President.

Benjamin Harrison.

"[Seal U. S. General Land Office.] By E. Macfarland, Asst. Secretary."

Recorded in the general land office, by D. P. Roberts, recorder thereof, in Vol. 20, pp. 262 to 265, inclusive.

This document, like the executive order of December 27, 1875, is a matter of which the court takes judicial notice. The lands described in said document are embraced in the executive orders before mentioned.

Besides the brief filed by the United States district attorney on behalf of the government, Messrs. Shirley C. Ward and Frank D. Lewis, as amici curiæ, have also submitted a brief in the case. Among the grounds of opposition to plaintiffs' claim urged in these briefs are the following: First, that the government, by the act of congress of January 12, 1891, and the patent issued pursuant thereto, granting to the Mission Indians a large portion of the lands claimed by plaintiffs, withdrew the lands so granted from the operation of the act of January 28, 1879, which authorized the institution of this action by plaintiffs; second, that plaintiffs have not only failed to show affirmatively that at the time of the passage of the act last aforesaid, January 28, 1879, there were no adverse valid claims to any of the lands now in controversy, but, on the contrary, they have shown that Indians were at said date in possession of portions of said lands, with valid claims thereto, under the laws of the United States, and that plaintiffs did not "before filing their claim and title," which was the institution of this action, execute releases to said Indians for the portions of said lands so held by them; third, that plaintiffs' claim is barred by various statutes of limitation; fourth, that, since the institution of this action, plaintiffs have been guilty of such laches as precludes them from a recovery.

If the act of January 12, 1891, and patent issued pursuant thereto, were valid, they, of course, withdrew the lands described in the patent from the operation of the act of January 28, 1879. Plaintiffs, however, assail the validity of the act of 1891, on the ground that congress had no power to make any disposition of said lands, contrary to the provisions of the act of 1879, during the pendency of proceedings authorized by the last-named act; citing *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228; *Newhall v. Sanger*, 92 U. S. 761; and *U. S. v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. 1177. These cases do not support the contention to which they are invoked. In *Doolan v. Carr*, supra, there was no denial by the court of power in congress to dispose of land embraced within a Mexican claim, under judicial consideration; but the court simply held that such land was not "public land," within

the meaning of the acts of congress making grants to railroads, and was reserved from the granting clause of those statutes. The same is true of the other two cases last above cited, namely, *Newhall v. Sanger*, and *U. S. v. McLaughlin*. In the last-mentioned case, the court, referring to the opinion in *Newhall v. Sanger*, say:

"The opinion, however, examined somewhat at large the grounds on which it should be held that Mexican grants (whether valid or invalid), while under judicial consideration, should be treated as reserved lands. The principal reason was that they were not 'public lands,' in the sense of congressional legislation; those terms being habitually used to describe such lands as are subject to sale or other disposal under general laws. The Pacific Railroad acts of 1862 and 1864 only granted, in aid of the railroads to be constructed under them, 'every alternate section of public land * * * not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.' The lands comprised in a Mexican grant, it was held, must be regarded, not as 'public lands,' but as 'reserved lands,' because, by the treaty with Mexico, all private property was to be respected. And when the act of March 3, 1851, created a board of commissioners to examine all claims to Mexican grants, the thirteenth section declared 'that all lands the claims to which have been finally rejected by the commissioners in the manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all lands the claims to which shall not have been presented to the commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States (§ Stat. 633)'; implying that until then they were not part of the public domain."

I remark, in passing, that the reference in the above excerpt to treaty obligations has no application to the case at bar, because whatever rights plaintiffs may have originally had under the treaty lapsed long before the passage of the act of 1879.

Recurring to the main question, I repeat that none of the cases cited by plaintiffs deny to congress power of disposition over lands embraced within the boundaries of an unconfirmed Mexican grant, while the supreme court has repeatedly asserted that a clear exercise of the power cannot be restrained or interfered with by the judiciary. *Grisar v. McDowell*, 6 Wall. 363; *Whitney v. Robertson*, 124 U. S. 190, 8 Sup. Ct. 456; and *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. 525.

In *Grisar v. McDowell*, supra, the court says:

"By this act the government has expressed its precise will with respect to the claim of the city of San Francisco to her lands, as it was then recognized by the circuit court of the United States. In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and, having the plenary power of confirmation, it may annex any conditions to the confirmation of a claim resting upon an imperfect right which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts; and it may arrest the action of the board or courts at any stage."

In *Whitney v. Robertson*, supra, the court says:

"In *Taylor v. Morton*, 2 Curt. 454, 459, Fed. Cas. No. 13,799, this subject was very elaborately considered at the circuit by Mr. Justice Curtis, of this court; and he held that whether a treaty with a foreign sovereign had been violated by him, whether the consideration of a particular stipulation of the

treaty had been voluntarily withdrawn by one party, so that it was no longer obligatory on the other, whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he justly observed, as a necessary consequence of these views, that, if the power to determine these matters is vested in congress, it is wholly immaterial to inquire whether, by the act assailed, it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad. In these views we fully concur. It follows, therefore, that, when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, it was objected to an act of congress that it violated provisions contained in treaties with foreign nations; but the court replied that, so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that, "so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."

In *Botiller v. Dominguez*, *supra*, the court says:

"Two propositions under this statute are presented by counsel in support of the decision of the supreme court of California. The first of these is that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guarantied by it to the property of Mexican citizens owned by them at the date of the treaty, and also in conflict with the rights of property under the constitution and laws of the United States so far as it may affect titles perfected under Mexico. * * * With regard to the first of these propositions it may be said that, so far as the act of congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. The *Cherokee Tobacco*, 11 Wall. 618; *Taylor v. Morton*, 2 Curt. 454, Fed. Cas. No. 13,799; *Head Money Cases*, 112 U. S. 580, 588, 5 Sup. Ct. 247; *Whitney v. Robertson*, 124 U. S. 190, 195, 8 Sup. Ct. 456."

It should be remembered, however, that the power of congress to dispose of lands embraced within a Mexican claim, while under judicial investigation, pursuant to the general law of March 3, 1851, and protected by treaty stipulation, is not involved in the case at bar. The permission accorded plaintiffs, by the act of 1879, to present their claim for confirmation or rejection, was a gratuity on the part of the United States, revocable at any time before final decree in the proceeding thus authorized.

Plaintiffs further contend that the act of 1879, allowing them to present to this court, for confirmation or rejection, their claim to

La Jolla, is a special act, relating only to their title, and hence not affected by the later act of 1891, which provides generally for allotment of lands to Mission Indians, citing *Ex parte Crow Dog*, 109 U. S. 570, 3 Sup. Ct. 396; and, further, that, by the act of 1879, La Jolla was appropriated to a particular purpose, and is not within the scope of any subsequent grant by congress, which does not expressly include it, citing *Iron Co. v. Cunningham*, 155 U. S. 373, 15 Sup. Ct. 103.

It is true that said act does not mention "La Jolla," by name, but it does direct the commissioners to include, as far as practicable, in the contemplated reservation, such lands as had been in the actual possession of the Indians for whom the reservation was to be created. Now, since the commissioners, who are presumed to have done their duty,—i. e. to have followed the directions of the statute under which they were acting,—included a part of La Jolla in the reservation selected by them, it follows, nothing being shown to the contrary, that the Indians had been in the actual possession of the part so selected,—and therefore it was among the lands intended by congress for the proposed reservation. This conclusion is strengthened by the fact that the only lands which the commissioners were not to select are specified in the proviso to section 3 of said act, as follows:

"Provided, that no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section," etc.

The appraisal provided for in the preceding section is as follows:

"They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the secretary of the interior."

If it be conceded that the act of 1879 was a law "providing for the disposition of the public domain," still, since the privilege accorded plaintiffs by said act was not contractual, as already indicated, it can hardly be contended that any valid rights have yet attached in favor of plaintiffs to La Jolla, or can attach before a final decree of confirmation. Furthermore, it should be observed, in construing the act of 1891, that the cases cited by plaintiffs, and hereinbefore noticed, of *Doolan v. Carr*, *Newhall v. Sanger*, and *U. S. v. McLaughlin*, are inapplicable, for the reason that the words "public lands," which were determinative in said cases, are not employed in the act of 1891 to designate the lands from which the reservations were to be selected.

For the foregoing reasons, I think that plaintiffs' claim, so far as concerns the lands which have been granted to the Mission Indians pursuant to the act of January 12, 1891, must be rejected. There are other reasons, equally as satisfactory, why there should not be a decree of confirmation as to any of the lands embraced in plaintiffs' claim.

The act of January 28, 1879, devolves upon the court a peculiar duty. The genuineness and due execution of the grant are not the only matters submitted to the court's decision. Congress, while recognizing

the possibility that there were adverse claims, did not ascertain and except from the operation of the act such adverse claims, but devolved that duty upon the court, and, as shown by the provisos of said act, was unusually careful to protect all valid claims arising under any laws of the United States. Said provisos require—First, that no lands shall be confirmed to said claimants to which there are valid claims existing under any law of the United States at the date of the passage of the act; second, that a decree of confirmation shall not affect any valid adverse right of any other person or persons, thus leaving open for further consideration the question of the existence of adverse rights, even though the land should be confirmed to the claimants; third, that claimants, before filing their claim and title, shall execute releases to any persons who may be in possession of any portion of said lands, under valid claims, and that, before rendering a decree of confirmation, the court shall ascertain that said releases have been duly executed. This duty the court can discharge only by holding that it is incumbent on plaintiffs to show affirmatively that, at the date of the act, no person was in possession of any part of the land in controversy, under a valid claim under any law of the United States, or, if any person was so in possession, that, before filing their claim and title, plaintiffs released to such person the land so possessed by him. This plaintiffs have failed to do. On the contrary, their evidence shows that, of the Indians who were upon the land in 1845, there was at least one of them occupying the lands as late as two or three years ago. A map introduced in evidence by plaintiffs also shows that there is on a part of the lands in controversy an Indian village. Since the original grant to plaintiffs itself shows that there were residing on these lands at the date of the grant, in 1845, certain Indians, it is not unreasonable to assume, in the absence of proof to the contrary, that the present inhabitants of said Indian village are descendants of the Indians referred to in said grant. This assumption is strengthened by the facts that the act of January 12, 1891, provided that the reservation to be selected by the commissioners for any band of Mission Indians should include, as far as practicable, the lands and villages which had been in the actual occupation of said Indians; and the reservation so selected and patented does include a large part of the lands in controversy. Besides, if the Indians who now inhabit said village are without possessory or other rights, because of their not being descendants of the Indians who occupied said lands in 1845, this is one of the matters which plaintiffs, by the act of 1879, are required to show as a prerequisite to any decree of confirmation.

That the Indians who were thus occupying the land in 1845, and their descendants, then had, and now have, valid rights, has been settled by the supreme court of California (*Byrne v. Alas*, 74 Cal. 628, 16 Pac. 523); and this interpretation of the law is binding upon the federal courts (*Christy v. Pridgeon*, 4 Wall. 196). In *Byrne v. Alas*, supra, it is true that the rights of the Indians were preserved under the patent which was issued on the decree of confirmation. In the case at bar, it is argued by plaintiffs that, since there has been no decree of confirmation nor patent, the rights of the Indians have

lapsed, and that the act of congress of 1879, under which plaintiffs are now proceeding, gives permission only to José and Pablo Apia, and their representatives, to file their claim to the property in controversy. This argument of plaintiffs leaves out of view the executive order of December 27, 1875, which the president was authorized to make (*Grisar v. McDowell*, 6 Wall. 363, 382), reserving to the Mission Indians certain parts of the land in controversy. When the executive order of December 27, 1875, was issued, the lands in question were a part of the public domain. Section 13 of the act of March 3, 1851, provides:

"That all lands, * * * the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain." 9 Stat. 633.

If, therefore, it be conceded that the possessory rights of the Indians lapsed with plaintiffs' original grant, because said grant was not presented to the commissioners under the act of March 3, 1851, still the executive order above mentioned gave, or, in effect, restored to, said Indians their rights of permanent use and occupancy.

Plaintiffs further insist that these possessory rights are not "valid claims," within the meaning of the act of January 28, 1879, for the reason that the reservation created by said executive order was the property of the government solely, and, if the object of the proviso to said act had been the protection of the rights of the government, different phraseology would have been employed. In this view I cannot concur. While the government undoubtedly was interested in the reservation created by said executive order, the substance of that order was a dedication to the Indians of the lands therein described. *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733. Nor was this use of the land "a temporary use," as urged by plaintiffs. On the contrary, it was declared to be, and has since in fact become, a permanent use, through the operation of the subsequent act of January 12, 1891 (26 Stat. 712), and the grant of September 13, 1892, made pursuant to said act.

In the case of *Railroad Co. v. Roberts*, 152 U. S. 117, 14 Sup. Ct. 498, cited by plaintiffs, the court uses this language:

"And the setting apart, by statute or treaty with them, of lands for their occupancy, is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and pre-emption. * * * As early as 1839 it was held, in *Wilcox v. Jackson*, 13 Pet. 498, 'that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it.' The reservation referred to there was of land for military purposes; and in *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733, it was said that this doctrine 'applies with more force to Indian than to military reservations. The latter,' the court observed, 'are the absolute property of the government. In the former other rights are vested. Congress cannot be supposed to grant them in a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such purpose.'"

Again, the supreme court has said:

"That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a

possible grant, is a proposition which will command universal assent." *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733.

Plaintiffs further claim that the reservation of 1875 was not contractual, and that congress had the power to subject the lands embraced within said reservation to the operation of the act of 1879, under the constitutional provision: "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Const. U. S. art. 4, § 3, subd. 2. Conceding that congress possessed the power here asserted, still, as I have already shown, the power has not been exercised. Plaintiffs have not only failed to show that no part of the lands they claim were possessed by persons having valid claims thereto under the laws of the United States on January 28, 1879, but, on the contrary, have shown that at said date there were Indians occupying portions of said lands, under valid claims, and no releases of said lands to said Indians have been made by plaintiffs. The act of 1879 expressly provides, as already shown, that such releases shall be executed before plaintiffs file their claim and title, and further requires the court, before rendering any decree of confirmation, to ascertain that said releases have been duly executed. This requirement not having been complied with, plaintiffs' claim must be rejected.

The foregoing views render unnecessary further mention of the other grounds upon which said claim is resisted. A decree conformable to this opinion will be entered.

CHICAGO GENERAL ST. RY. CO. v. ELLICOTT et al.

(Circuit Court, N. D. Illinois, N. D. July 5, 1898.)

STREET RAILROADS—PERMIT TO STRING ELECTRIC WIRES IN STREET—MUNICIPAL CORPORATIONS.

A permit from a city to a street-car company to string electric wires along a street does not give any right to use such wires to distribute power to private consumers.

In Equity.

Suit for injunction by the Chicago General Street-Railway Company against Edward B. Ellicott, Carter H. Harrison, the city of Chicago, and the Chicago General Railway Company.

Glenn E. Plumb, for complainant.

Samuel A. Tyande, Asst. Corp. Counsel, for defendants.

GROSSCUP, District Judge (orally). The bill in this case is to restrain the defendants the city of Chicago, Carter H. Harrison, its mayor, and E. B. Ellicott, its electrician, from cutting the wires of the complainant carrying the electrical current from the complainant's generator to private motors in the lumber district of the city of Chicago. The facts essential to the determination of the motion for an injunction may be stated as follows:

The Chicago General Street-Railway Company is organized under the laws of Illinois for the purpose of constructing and operating

a heating, lighting, and power-supply system within the present or future limits of the city of Chicago. The Chicago General Railway Company, a corporation organized to construct, maintain, and operate a street railway, came into possession of the property and the franchises of the West Chicago Railway Company, among which franchises was a permit from the city to construct and maintain overhead wires for the purpose of the operation of said road. On or about the 25th of October, 1897, the said Chicago General Railway Company applied to Hon. L. E. McGann, commissioner of public works, for a permit supplemental to the permit by which it was already operating, which application is, in part, as follows:

"This company, as successor to the rights of the West Chicago Street-Railway Company, hereby makes a formal application for a permit to suspend two necessary feed wires from the line of poles now constructed and on the route below described. Such wires to be constructed and maintained for the purpose of supplying electric current to be used for power and heat and light purposes, and with the right to connect the wires herein authorized with the general or power station of said company at Kedzie avenue and 30th street, along the following route."

Thereupon the city of Chicago issued, upon this application, the following permit:

"In pursuance of an ordinance passed by the city council February 14, 1896, granting certain rights and privileges to the West Chicago Street-Railway Company on the streets mentioned below, permission is hereby granted to the Chicago General Railway Company (it having succeeded to the said rights and privileges on the streets mentioned) to suspend two feed wires from the line of poles now constructed on Morgan street. * * * This permit is issued and accepted on the condition that the said wires shall be strung in accordance with, and shall be maintained subject to, all the conditions, stipulations, and requirements of the ordinance hereinbefore mentioned, to all orders and ordinances which may be passed by the city council of the city of Chicago pertaining to the same, and to all orders of the said commissioner; and upon the further condition that the said wires shall be used only for the supply, and not for return, current. * * * This permit is revocable by the commissioner of public works at any time for cause."

Prior to this time the complainant had entered into a contract with the Chicago General Railway Company, whereby the latter leased to the former, for the purpose and to the intent that the former might carry on the business provided for in its articles of incorporation,—that is, the business of constructing and operating a heating, lighting, and power-supply system,—the joint use of the poles, feed wires, and electrical appliances along the lines of the former's railway. It does not appear that the foregoing contract was called to the attention of the city at the time the permit was issued, or that the city issued the permit with any reference to the contract between the complainant and the Chicago General Railway Company. After the issuance of the permit, the Chicago General Railway Company suspended the feed wires mentioned in the permit, and thereupon, under its contract with the complainant, these feed wires were used to supply the electric current to the complainant's patrons in the lumber district. Under the arrangement between the complainant and the Chicago General Railway Company, the former furnished the latter the necessary electrical power for the operation of its railway. It appears that both the trolley wires proper and the feed wires are

connected to the generator, but that, to supply to the trolley wire sufficient current at a distance from the generator, these feed wires are used, the complainant utilizing them as well for the purpose of furnishing power to its private patrons, by tapping them at given places along the line. Subsequent to all these things, the city council of the city of Chicago passed an ordinance creating a department of electricity, in which ordinance it was provided, among other things, that no electrical current should be supplied from any trolley line for any purpose whatever to any building, except for lighting the power stations from which current is supplied to such trolley lines. Under the authority colorably vested in the city electrician by this clause of the ordinance, he purposes to cut the complainant's wires, unless it desists from using the feed wires along the trolley lines for the double purpose of furnishing electrical current to the trolley street-car lines and to the private patrons of the complainant. The complainant alleges that this ordinance is invalid—First, because it impairs the obligation of complainant's contract with the state; second, because it deprives the complainant of its property without due process of law; third, that it denies to the complainant the equal protection of the laws; fourth, that as a police regulation the ordinance is void.

The jurisdiction of this court, of course, depends upon whether the conduct threatened by the city is in virtue of an ordinance that contravenes some portion of the laws of the United States. The court has no jurisdiction to restrain a simple trespass upon the complainant's rights, unless the trespass threatened violates one of his rights under the constitution and the laws of the United States. It may be assumed that the city has no power by ordinance to prevent the complainant from engaging in or carrying on the business of furnishing power, heat, and light, as its charter provides, or from furnishing such power, heat, and light, both to street-railway companies and to private consumers. It may also be assumed that any usual, lawful, and authorized means of attaining the benefit of this general power is within complainant's general charter rights, and is constitutionally free from impairment or attack upon the part of the city. A power to furnish heat, power, and light implies the power to adopt the usual and lawful means of attaining that end. But the complainant has no right, under its charter, in the absence of a grant from the city, to erect its poles or string its wires along the streets of the city. The general charter from the state does not carry with it a grant to the use of the streets. The power to give or withhold that grant lies in the city government. I can by no fair interpretation of the transactions between the complainant and the city find any permit to the complainant to go upon the city's streets for any purpose outside of the erection, maintenance, and operation of a railway line. The application for a permit was made by a company operating a street railway only. The language of the application is for a permit to suspend two necessary feed wires from the line of the poles now constructed, and on the route described, to be maintained for the purpose of supplying electrical current to be used for operating, heating, and lighting purposes. The permit granted on this application was

to the Chicago General Railway Company, a company operating only a street railway, and included simply the right to suspend the two wires asked for. I cannot assume, from this correspondence, that the city understood that these additional wires were to be used for the conveyance of the electrical current to private consumers. The applicant was a street-railway company, not a company generally furnishing electrical power. The privilege asked made no mention of anything other than the heat, light, and power needed in the operation of the street railway. An application for a permit to string wires to distribute electrical power to private consumers could have been so easily framed in apt language to cover the purpose required that the absence of such language implies the absence of such purpose. It is not at all certain that the city would have granted these additional rights to the complainant, had they been specifically asked for. It would have implied either larger voltage upon the wires, or a larger number of wires than the operation of a street-railway line demanded. Either increased voltage or increased number of wires are objections, and might, on that account, have been refused. Upon this view of the case, the complainant is without any permit from the city to use these feed wires for the purpose of distributing power to private consumers. The city may, therefore, by ordinance, or any other action, refuse the right of such a use, and may, if necessary, enforce that refusal; at least it is clear that the complainant has no right founded on the constitution or laws of the United States to compel the use of the city's streets for the purposes named, without a permit having theretofore, for that purpose, been granted. For these reasons the motion for an injunction must be denied.

ANDERSEN v. BERLIN MILLS CO.

(Circuit Court of Appeals, First Circuit. July 19, 1898.)

No. 209.

MASTER AND SERVANT—DANGEROUS MACHINERY—NOTICE.

A boy 20 years old, employed in a sawmill, went on a personal errand to a part of the mill where his duties did not require him to be. While there he attempted to step over a revolving shaft, whose top was 28½ inches from the floor, when his apron caught in the roughened and projecting head of a spline key, which held a small pulley on the shaft, and he was drawn upon the shaft and injured. He testified that he knew of the danger from the shaft, and lifted his apron to avoid it, but did not know nor think of the spline key. *Held*, that as the injury occurred under conditions not created by the mill owner, who had no reason to anticipate the presence of the boy near the shaft, or his conduct in lifting his apron high enough to avoid the shaft, but not the spline key, there could be no recovery.

In Error to the Circuit Court of the United States for the District of New Hampshire.

This was an action at law by Peter Andersen, by his next friend, Hans Haakensen, against the Berlin Mills Company, to recover damages for personal injuries. In the circuit court a verdict was direct-

ed for defendant, and judgment entered accordingly, to review which the plaintiff sued out this writ of error.

Edward C. Niles (Harry G. Sargent, Daniel J. Daley, and Herbert L. Goss, on brief), for plaintiff in error.

Robert N. Chamberlin and Irving W. Drew, for defendant in error.

Before PUTNAM, Circuit Judge, and WEBB and BROWN, District Judges.

BROWN, District Judge. This is an action of the case for personal injuries received by Peter Andersen from a revolving shaft in the defendant's sawmill. The plaintiff at the time of the injury was a minor about 20 years of age, and was employed by the defendant in its sawmill. The shaft that inflicted the injury was at a place in the sawmill where the plaintiff was not required to go by any duty of his employment, or for any reason connected therewith, or for ingress or egress. The plaintiff, wearing an apron of bagging coming about to his knees, was in the act of stepping over the moving shaft, the top of which was at a height of 28½ inches from the floor, when his apron caught, and he was drawn upon the shaft, where he received serious injuries. At the close of the plaintiff's evidence, a verdict for the defendant was directed by the circuit court. The present writ of error raises the question, was there error in the direction of a verdict?

It appears in evidence that the plaintiff was fully aware of the general danger from stepping over the revolving shaft, and of the risk that his apron might be caught. He testifies as follows:

"Q. Before your clothes were caught on the shaft did you put your hands onto the posts? A. I took hold of that apron, and holsted that up, because I saw the shaft was running around. Q. Did you see the shaft running, and then lift up your apron? A. Yes, sir. Q. What did you do that for? A. I knew if it took hold of my clothes I might get hurt. Q. You knew if it caught you it was likely to kill you? A. Yes, sir. I didn't know if there was a pulley on it or not. But it didn't make any odds; I thought it could take hold. Q. You knew if that shaft caught your clothing it would hurt you? A. I knew I would lose my clothes. Q. And you took hold of it and pulled it up so it would not catch? A. Yes, sir. Q. And you knew if it caught you, you were liable to get hurt? A. I think I did. Q. And then you passed along towards the shaft? A. Yes, sir. Q. Did you know it was running? A. Yes, sir; I saw it was running. Q. Did you think whether it was dangerous to go over there? A. I didn't think of that. I thought so much of it that I lifted up my apron. Q. Why did you lift up the apron? A. Because I was afraid the shaft would take hold of it. Q. And you decided on the whole, after lifting up your apron, you would go over; that is, you thought with your apron lifted it would be safe? A. Yes, sir. Q. Did you think of that at the time? A. Yes, sir; because I had been over there before. Q. The question is whether you thought of it there on the spot. A. That is pretty hard to tell, so I can't say anything about it. Q. But you remember of lifting the apron? A. Yes, sir. Q. Did you think the pulley might catch your apron? A. I didn't think of the pulley, but I thought of the shaft. I had so much common sense that I was afraid it would catch my apron."

It is contended, however, that besides the danger known to the plaintiff was another unknown to him, namely, a "spline key," or small bar of steel used to fasten a pulley to the shaft. This spline key, instead of fitting closely into a slot in the hub of the pulley and into a slot in the side of the shaft, projected somewhat above the

shaft, and its head, by pounding, had become rough and feathered. The plaintiff testified that this spline key caught his apron, and drew him upon the shaft. For our present inquiry we must assume this to be the fact.

Since the danger of the situation, other than the particular danger from the spline key, was fully known and appreciated by the plaintiff, and since a failure to give warning of dangers, fully known and appreciated, cannot be a ground for liability, it follows that the sole question in the case is, did the defendant, by allowing the spline key to remain upon the shaft in the condition disclosed by the evidence, and by failing to give warning thereof, violate any duty owed to the plaintiff? The plaintiff's counsel quote *Railroad Co. v. Jones*, 95 U. S. 442, "The duty is dictated and measured by the exigencies of the occasion;" and from *Roth v. Depot Co.* (Wash.) 43 Pac. 641, "Precaution is a duty only so far as there is any reason for apprehension." We are of the opinion that, even should we concede to the plaintiff, for the purposes of this case, the broad and unqualified statement "that, so far as there exist reasonable grounds for apprehending danger, a duty arises to take precaution against it," this would not avail the plaintiff. Upon the facts of the present case, we think it clear that the court would feel compelled to reverse the verdict of a jury holding that the circumstances prior to the accident gave rise to a reasonable apprehension of the occurrence from which the plaintiff suffered.

Recurring to the evidence, we find, first, that none of the duties for which the plaintiff was employed required him to be near the shaft. As was said by the circuit court in granting the motion to direct a verdict:

"No duty involved in the employment required the plaintiff to go to the place where he was injured. The plaintiff voluntarily left the place of duty, and went to another part of the mill, some ninety odd feet distant. He went for private purposes, and private purposes not incident to the employment. * * * The plaintiff's evidence shows that he voluntarily journeyed away from the place of employment to borrow money on his own account."

Such departure from the place and purposes of the employment has in many cases been held to absolve the master from liability. But even should we hold that, in the exercise of reasonable care, a master is bound to anticipate a certain amount of visiting among his employes, and should we say that the master ought to have foreseen that men were likely to be in the vicinity of the shaft for their own purposes, this would be insufficient to hold the defendant liable.

To complete a case for the plaintiff, it would next be necessary to hold that the master should have foreseen that one who knew the general danger from the moving shaft and pulley might undertake to step over a shaft 28½ inches high, wearing an apron, which he would lift only just high enough to narrowly clear the shaft, unless he were warned that, to pass over safely, he must lift it an inch or two higher. It should also be observed that the pulley which was attached to the shaft by the spline key was six inches in diameter. Unless the apron were dropped below the circumference of the

pulley, and within a very short distance from the side of the pulley, it could not be caught by the spline key.

We are of the opinion that, even if the defendant had reason to suppose that the plaintiff might possibly undertake to step over the shaft, there was no reason to suppose that knowledge of the condition of the spline key would influence his method of doing it, or that, knowing the general danger, the plaintiff would avoid it by so narrow a margin as to encounter the special danger which, if not comprehended within the general danger, was at least so closely connected thereto as not to become a special object of consideration.

In *Rooney v. Cordage Co.*, 161 Mass. 153, 36 N. E. 789, where the plaintiff was caught by a set screw, the court said:

"The collar and set screw did not project much beyond the pulley and belt, but were almost in their line of motion. Although the plaintiff says he did not know of the set screw, his testimony shows that he was well aware of the danger from the moving pulleys, belt, and shaft," etc.

As was said by this court in *Keats v. Machine Co.*, 13 C. C. A. 221, 65 Fed. 940:

"The rule laid down in cases where employes are set at work in positions of unusual and concealed danger is not applicable to the present case."

Further, as stated in *Pollock on Torts* (Ed. 1887, p. 572):

"In estimating the probability of danger to others we are entitled to assume, in the absence of anything to show to the contrary, that they have the full use of the common faculties, and are capable of exercising ordinary caution."

As the injury was received under conditions not brought about by the defendant, who had no reason to anticipate the presence of the plaintiff near the shaft, save that possibly he might go there for his own purposes, and as a consequence of conduct on the part of the plaintiff in stepping over the shaft which could not reasonably be anticipated, we are of the opinion that the plaintiff failed entirely to show the breach of any duty of the defendant, owed to the plaintiff in consequence of the relation of master and servant, or in consequence of any obvious peril to persons occupying the position of bare licensees.

The judgment of the circuit court is affirmed, and the defendant in error will recover its costs in this court.

STATE OF NEBRASKA V. FIRST NAT. BANK OF ORLEANS et al.

(Circuit Court, D. Nebraska. August 8, 1898.)

1. DEPOSIT OF STATE FUNDS—GIVING SECURITY AND PAYING INTEREST—LOAN.

Where a state treasurer places state funds in a national bank, subject to check, the bank giving security therefor, and agreeing to pay interest on daily balances, the transaction is a deposit, and not a loan to the bank.

2. SAME—POWERS OF NATIONAL BANKS—BOND TO SECURE DEPOSIT.

Giving bond to secure funds deposited with it is within the power of a national bank, and sureties on such bond are liable.

This was an action at law by the state of Nebraska against the First National Bank of Orleans, P. O. Hedlund, receiver, and John W.

Burton et al., sureties, to recover deposits of state funds secured by a bond executed by the bank and such sureties. The ruling is on the demurrer of the sureties to the petition.

C. J. Smyth, Atty. Gen., and Ed. P. Smith, Dep. Atty. Gen., for State of Nebraska.

Cobb & Harvey, for defendants.

MUNGER, District Judge. This action was commenced in the district court of Harlan county, and removed into this court. By the pleadings it is shown: That the First National Bank of Orleans is a corporation organized under the laws of the United States. That in September, 1895, said bank, for the purpose of becoming a state depository under the laws of the state of Nebraska, and for the purpose of enabling it to receive on deposit from the state treasurer of the state of Nebraska certain public moneys belonging to the state, and which said treasurer was authorized to deposit in depository banks, made, executed, and delivered to the state of Nebraska its obligation in writing, a copy of which is attached to the petition. Said bond was executed by the said bank as principal, and by the defendants, John M. Burton, George W. Burton, Pat Gibbons, John O. Hoffman, and M. F. Burton, as sureties, which bond was duly approved and filed by the proper officers of the state. The said bond was in the penal sum of \$25,000, and provided that, in consideration of the depositing of the moneys of the state of Nebraska for safe-keeping in said bank by the state treasurer, said bank, in consideration of said deposit and for the privilege of keeping the same, agreed to pay 3 per cent. per annum, the same to be computed and paid quarterly upon the daily average of the sum of such amount as the bank should have deposited to the credit of the state for the quarter, or any fraction thereof, next preceding the payment of said per centum. Said bond contained a condition that if said bank "shall well and truly keep sums of money so deposited or to be deposited as aforesaid, subject to the check and order of the state treasurer as aforesaid, and shall pay over the same, and each and every part thereof, upon the written demand of the state treasurer, and shall estimate, calculate, and pay said per centum as aforesaid, and to his successor in said office as shall be by him demanded, and shall in all respects save and keep the people of the state of Nebraska and the said treasurer harmless and indemnified for, and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect; otherwise, to be and remain in full force and virtue." After the execution and delivery of said bond, the treasurer deposited in said bank certain moneys of said state, and there was at the time of the commencement of the action so on deposit in said bank the sum of \$20,000, the moneys of the state of Nebraska. That said bank became insolvent, and P. O. Hedlund, one of the defendants, was appointed, by the comptroller of the currency, receiver thereof. Of said defendants, the bank and receiver have answered in said action. The other defendants, the sureties, have filed a general demurrer to plaintiff's petition, which is now to be disposed of.

In support of the demurrer it is contended that the transaction was one of borrowing money on the part of the bank, not in the usual and ordinary course of banking business; that such borrowing was in violation of the national banking act, and not within any of the powers conferred upon the bank, and illegal, the bond or obligation given void, and for such reason the sureties are not liable. It is not claimed in support of the demurrer that every borrowing of money on the part of a national bank is prohibited; but it is contended the fact that, under the depository law of Nebraska, the bank is required to make a bid for the deposit, agreeing to pay interest on the daily balances at a rate of not less than 3 per cent. per annum, and to execute a bond with sureties for the faithful payment of the amount of such deposit, with the interest thereon, that such a transaction is not a deposit in the ordinary sense, but a borrowing of money in a manner not in the usual and ordinary course of the business of banking. In support of their contention, counsel cite *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572; *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831; *Armstrong v. Bank*, 27 C. C. A. 601, 83 Fed. 556; *Id.*, 31 U. S. App. 75, 13 C. C. A. 47, and 65 Fed. 573.

Bank v. Armstrong was an action brought by the Western National Bank of New York against *Armstrong*, as receiver of the Fidelity National Bank of Cincinnati, Ohio, to recover the sum of \$207,290, on account of a loan made by the New York bank to the Ohio bank. There was no evidence that the vice president of the Ohio bank, who acted for said bank in the transaction, had received special authority from the board of directors to borrow the money. Justice Shiras, speaking for the court, said:

"It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the national bank act (Rev. St. § 5136, par. 7): A national bank can 'exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes.' The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court, in the case of *First Nat. Bank v. National Exchange Bank*, 92 U. S. 122, 127: 'Authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.' Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow \$200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do; and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

For the reason that there was no evidence of any authorization upon the part of the board of directors for the vice president to borrow the money, and the further fact that the money so borrowed in the name of the bank never came into its possession, but was appropriated by the vice president and assistant cashier, and no ratification on the part of the directors, it was held that no recovery could be had. *Bank v. Kennedy* was an action to hold the bank liable under the statute of California as a shareholder in a savings bank. The questions involved were whether a national bank could acquire the stock of another corporation by purchase, not having taken the same to secure an indebtedness to it, and whether, having purchased such stock and enjoyed the benefits of a shareholder, the bank was estopped from setting up the illegality of the transaction. *Armstrong v. Bank* was an action to recover for money borrowed. A recovery was had, for the reason that, while there was no evidence of special authority having been given the vice president by the board of directors, it was shown that a long-established usage existed between corresponding banks in both cities, where the lending and borrowing banks were respectively situated, of lending and borrowing through the executive officers of the banks, and, further, that the transaction had been ratified by the board of directors, the case being distinguished from that of *Bank v. Armstrong*.

The foregoing cases do not establish the fact that the borrowing of money on the part of a national bank is illegal, but that, when the transaction is not one in the usual course of banking business, authority must be shown to have been given by the board of directors, or a ratification by the board. Was, however, the transaction in question a borrowing of money, or a mere general deposit? Among the enumerated powers of a national bank is "receiving deposits." The depositing of money in a bank has been held in some cases to be a loaning by the depositor, and a borrowing by the bank, for the reason that the relation of creditor and debtor was thereby established. It is to be kept in mind that in the transaction in question, and according to the terms of the obligation sued on, the money deposited with the bank was not deposited for any fixed period of time, but was subject to withdrawal at any time on the check or order of the treasurer. In *Laws' Estate*, 144 Pa. St. 499, 22 Atl. 831, a guardian deposited the moneys of his ward in a bank to his account as guardian, the bank agreeing to pay 3 per cent. interest. On a failure of the bank it was sought to hold the guardian and his sureties liable for the loss. The question turned upon the fact as to whether the deposit by the guardian was a loan or investment of such money, the court saying:

"Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. While the relation between the depositor and his banker is that of debtor and creditor simply, the transaction cannot in any sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan. * * * In the present case the money was placed in the bank, not as an investment for any fixed period, but merely for safe-keeping and at a small rate of interest

* * * It is true that two weeks' notice was to be given of the withdrawal of the deposit; but this was a reasonable provision, and not inconsistent with a bank deposit. Almost all savings institutions stipulate for notice of withdrawals with their depositors, and such a stipulation is for the benefit, not only of the bank, but also of its depositors."

Allibone v. Ames (S. D.) 68 N. W. 165, was an action founded upon a bond given by a bank, with sureties to secure the payment of public funds deposited by Allibone as county treasurer. The defendants denied liability, for the reason that the deposit was, in effect, a loan to the bank; that by a law of the state it was a crime for the treasurer to lend public money. For that reason, the contract or bond was unlawful, and the defendants not liable thereon. In the opinion holding defendants liable, it is said:

"When the personal property involved is money, it may be difficult under some circumstances to determine whether the transaction should be called a 'deposit' or a 'loan'; but the two are not the same, and are never so regarded by any one in business or the ordinary affairs of life. Certainly, the thousands who daily deliver money to banks for safe-keeping and return in corresponding currency do not regard the transaction as a loan, nor do they so speak of it. A deposit is for the benefit of the depositor; a loan, for the benefit of the borrower. It is true, a deposit may also benefit the depository, but such is not the primary object of the transaction. When the deposit is made for a fixed period, during which the depositor has no right to demand the return of the money, the transaction may be regarded as in all substantial respects a loan; but herein lies an essential distinction between a loan and a general deposit."

In the light of the foregoing authorities, I think the transaction in question to have been one of a deposit of public moneys, not a borrowing of money on the part of the bank. The fact that the bank bid for the money does not change the character of the transaction. Certainly, there can be no objection urged against a bank soliciting business. The state, through its legislative enactment, said to all banks and bankers it desired to place the public funds on deposit (not to loan), subject to withdrawal at any time on the check or order of its treasurer, and at a rate of interest not less than 3 per cent. per annum. The defendant bank accepted the deposit on the conditions offered. To my mind, the transaction was a deposit of money; but, whether regarded as a loan or deposit, I do not think it in violation of the authority conferred on a national bank. Certainly, the giving of the security to do what in law it was obligated to do was not a void act. The demurrer is overruled.

LIPSE'S EX'R v. SPEARS' EX'R.¹

(Circuit Court, W. D. Virginia. March, 1882.)

1. EXECUTORS—DEVASTAVIT—ACCEPTANCE OF CONFEDERATE MONEY.

An executor who during the war of the Rebellion received Confederate currency in payment of a specie debt well secured on valuable real estate, without proof of the necessity thereof, was guilty of a devastavit, and the devisees were not divested of their liens upon the estate of their testator for their legacies.

2. SAME—CO-EXECUTORS—SETTLEMENT OF ACCOUNTS.

A settlement of the accounts of one of two executors who resided in Virginia during the war of the Rebellion was not binding on his co-executor, residing in a loyal state.

3. SAME—EXECUTOR'S DEED.

The Virginia statute of March 5, 1863, providing that, whenever any fiduciary residing in that state was authorized to do any act jointly with one or more fiduciaries residing in the loyal states, it should be lawful for the resident fiduciary to perform the act alone, was a nullity; and a deed by an executor residing in Virginia was without effect, as against his co-executor, who resided in Indiana.

In 1859, at his home, in Botetourt county, Va., Moses Lipse died, leaving a will, 12 children, and 391 acres of land. His sons David H. and Samuel were named as executors, and directed to sell the land and divide the proceeds among the children. Both qualified, and in 1860 sold the land to C. C. Spears for \$14,858, and received cash \$4,952.66, and two bonds of the purchaser, dated 3d October, 1860, each for \$4,952.66, with interest from the maturity of each, payable to the executors in one and two years.

From 1850 continuously to the present, David H. Lipse resided in Indiana. He was present at the land sale in 1860, but shortly returned to Indiana, and was never again in Botetourt until 1874. In 1879 the other executor, Samuel Lipse, died in Botetourt, where he always lived, and was during the Rebellion. In 1862 C. C. Spears died, leaving a widow, a child, and a will, and William A. Glasgow qualified as his executor. When the bonds fell due, David H. Lipse and about half the legatees, or their representatives, resided outside the state of Virginia, then under the control of "the organized rebellion called the 'Confederate States Government.'" The only currency then there in circulation was Confederate notes, commonly called "Confederate money," or Virginia bank notes, of about equal value with it. Samuel Lipse was known as a "Union man," put no value on Confederate money, refused to take it, and did not willingly receive it in payment of debts due the estate of his testator or himself. The situation of the estate did not require the collection of the purchase money of the land to pay the debts of the estate, for there were none; nor to make distribution, for half of the distributees were outside of Virginia, within the loyal states, and beyond the reach of the resident executor, Samuel Lipse. Half of the resident distributees refused to accept Confederate money, and there is no proof that any of them were desirous to accept it. In the meantime the bonds of Spears, due the estate, were perfectly solvent, being secured on valuable real estate. Yet Spears' executor went of his own accord in October, 1862, to the house of Samuel Lipse, took with him a large bundle of Confederate money, counted out a sum equal to the unpaid balance due on the land, and insisted on Samuel Lipse receiving it. But the latter refused, saying "it was of no value, and that he had no use

¹ This case has been heretofore reported in 4 Hughes, 535, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

for it." Spears' executor took the Confederate money away with him, after having asked Samuel Lipse if he would take a check on the Bank of Fincastle, which check the latter said he would accept, expecting to receive Fincastle money on it. No check was then given. Spears' executor was a lawyer, and then the president of that bank, and well knew that nothing but Confederate money, or its equivalent in value—Virginia bank notes—was paid out at its counter. See ordinances of the Virginia convention passed June 28, 1861, and July 1, 1861, respectively. Afterwards Samuel Lipse was induced to receive the check of Spears' executor on the Fincastle Bank for the balance of the said purchase money, and surrender the bonds. How induced, the record shows. Two of the legatees (Custer and Hoff) presented the checks of Lipse's resident executor on that bank for their portions, but refused to receive the Confederate money, but afterwards did receive it, under, as they testified, "a compulsion of threats." A part of the Confederate notes so received by Samuel Lipse was sequestered by the Confederate government. Having thus induced Samuel Lipse to receive the Confederate notes and surrender the bonds, Spears' executor induced Samuel Lipse to execute a deed, without the concurrence or knowledge of his co-executor, David H. Lipse, then in the state of Indiana, conveying the said land, with general warranty, to said Spears' executor. To an objection of Samuel that his conveyance without David's concurrence would be of no effect, he was told by Spears' executor that the general assembly of Virginia had passed an act which met the case. It may be appropriately added that said act was passed March 5, 1863, and that the patron thereof was Green James, then delegate to said assembly from Botetourt. The deed itself recited that it was executed under an act passed March 5, 1863, by the general assembly of Virginia, providing that, whenever any fiduciary residing in this state has been authorized to do any act jointly with one or more fiduciaries residing within the limits of the United States, it shall be lawful for the fiduciary residing in this state to do any such act without the concurrence of the nonresident fiduciary. This act of the general assembly was in contravention of the previous law, and was to remain in force only during the war. This deed was executed 7th April, 1863, and was with general warranty. By deed executed the same day, with special warranty, Spears' executor conveyed the same land to one McCue for \$15,000, whereof \$3,000 was paid cash in hand, and for the balance, "payable on the 18th August, 1882, in gold coin, of the value of the alloy of the United States in the year 1861, and also for the interest thereon at the rate of six per cent. per annum, payable on the 1st day of January, 1864, and annually thereafter in such funds as may be current in the state of Virginia, or in merchantable corn or flour, at two dollars a bushel for corn and fifteen dollars a barrel for flour, as the said Spears' executor, or his successor, may from time to time elect to receive it, or in gold coin or its equivalent, if the said McCue prefer to pay the interest in such mediums," the said purchaser executed a deed of trust on the same land. Subsequently, by deed dated 2d November, 1863, McCue conveyed the said land to one McCulloch for \$23,500, whereof \$11,500 was paid cash in hand, and for the balance, payable by McCue to Spears' executor, a deed of trust was again executed on the land. The whole of the \$12,000, payable as aforesaid in gold or its equivalent, remains unpaid by McCue to Spears' executor, and to McCue by McCulloch, who has remained in possession of the land from his purchase until the present. The evidence clearly shows that David H. Lipse, the surviving executor, never at any time authorized or sanctioned the receipt by his co-executor of the said purchase money, or of any part of it, in the currency of the Confederate government or in said Virginia bank notes, nor the conveyance of the land. The evidence also shows that in 1862 and 1863, and in fact all during the war, the public sentiment in Botetourt was much excited against persons of Union proclivities, and that persons refusing to take Confederate notes were threatened and denounced as enemies in a public speech delivered in the court house by a member of the general assembly, who had privately advised Samuel Lipse to receive the Confederate notes from Spears' executor.

In January, 1879, David H. Lipse, as surviving executor of Moses Lipse, deceased, instituted this suit in the United States circuit court at Lynchburg,

Va., in order to procure the cancellation of the deeds of conveyance and trust aforesaid, and the enforcement of his vendor's lien on the said land for the unpaid purchase money. In October, 1864, while the war was flagrant, and his co-executor was at his residence in Indiana, a settlement of the accounts of Samuel and David Lipse, executors of Moses Lipse, deceased, was made by James T. Logan, one of the commissioners of the county court of Botetourt county, and in November of that year confirmed by said county court, and ordered to be recorded. Spears' executor and others answered the bill, and numerous depositions were taken on both sides. In his answer, Spears' executor pleaded said settlement of the executorial accounts as an absolute bar to any recovery by the complainants upon their bill.

G. W. Hansbrough and R. F. Mays, for plaintiffs.

T. J. Kirkpatrick and Glasgow & Glasgow, for defendants.

RIVES, District Judge. The leading and decisive inquiry in this case is whether the devisees of Moses Lipse, deceased, are concluded by the facts proven in this case from further prosecution of their claim against the estate of their testator. If that estate has been legally administered, and their rights to the same conclusively and legally settled and barred by the acts of the executor, Samuel Lipse, then their remedy in the premises must be remitted to the official responsibilities of said acting executor. But if, on the other hand, the corpus of that estate still subsists, and is in a situation to be pursued by those interested in its distribution, then the plaintiff in this case, and especially the surviving executor, for himself and other legatees, may be properly heard in the assertion of the lien on the land of Spears, which he bought of Lipse's executors in 1860. Whether a bar in law or in equity exists to the recovery of the plaintiff's rights depends upon the legal effect of the act of Samuel Lipse as executor of his testator, Moses Lipse. If he had the right to receive Confederate money for a confessedly specie demand, and did go willingly and demand the same, and thereby satisfy the claims of the legatees, to that extent, and that extent alone, he may be held exempt from responsibility; but if, on the contrary, he received worthless currency in payment of a specie debt well secured on valuable real estate, without proof of the necessity thereof, he is guilty of a devastavit, and there is nothing in such act to divest the devisees of Moses Lipse, deceased, of their interest in or lien upon the estate of their testator for their legacies. So far as the complainant, David H. Lipse, as the surviving executor, and suing in behalf of his co-legatees, is concerned, there is scarcely a pretense that his suit is barred by the settlement of the accounts of Samuel Lipse, his co-executor. These accounts are wholly ex parte as to him, without notice of any kind, and in his absence in another state during the Rebellion, when all intercourse and correspondence were prohibited by law. I do not suppose, under the proofs in this cause, any pretension can be rightfully made to the privity, actual or implied, of the chief complainant to this settlement made by Samuel Lipse in his own name and that of his co-executor. The whole interest of this complainant in his father's estate was promptly subjected to sequestration through Samuel Lipse, the acting executor; and, if this illegal act is validated in this case, I may safely say that it will be the first one in which this act of the insurgent states has been countenanced and enforced in a court of the

United States. The lien of the devisees on the testator's lands for the purchase money can only be divested by strict proofs of its payment, or by deed conveying the legal title. Touching the first, I do not understand that any claim is or can be advanced for the validity of a payment in Confederate money for an ante-bellum debt. It is conceded in the argument by defendant's counsel that it may be regarded as a devastavit on the part of Samuel Lipse, but the defendant, Glasgow, denies his complicity in or responsibility for it. But in the second point it is alleged that the deed of Samuel Lipse as executor, dated the 7th of April, 1863, conveying said Moses Lipse's lands to Spears' executor, passed the legal title, and divested the interest of Moses Lipse's heirs and devisees. It is not pretended that this deed could have this effect, apart from the act of March 5, 1863, of the general assembly of Virginia. Such an act, however, has been pronounced invalid so far as investments in Confederate money under sanction of state courts are concerned; and, for a stronger and more cogent reason, it is invalid so far as it militates against the remedies and rights of loyal citizens of other states. The act is one emphatically of belligerency and of legislative spoliation upon claimants in this state who chanced to be found by the war on the loyal side. It would be a reflection upon the victory of the Federal arms if such a legislative contrivance could avail, after the cessation of war, to override and defeat the remedies and interests of loyal citizens of other states. I have no hesitation, therefore, in pronouncing this act of assembly a nullity, and that the defendant can claim nothing under this deed. I hold, therefore, that the transaction stands as if no deed had been made by Moses Lipse's executor; that the legal title is still outstanding in the surviving executor, David H. Lipse; that no valid payment has been made by Spears' executor; and that a lien still subsists in behalf of the complainant upon the lands purchased of Samuel Lipse, executor of Moses Lipse, by said C. C. Spears in his lifetime.

It is the duty of this court to uphold and enforce the will of Moses Lipse. It was made upon the eve, and doubtless in view of the probability of, war. The testator had a large family, scattered in the different states of the Union. To secure their interests in case of a civil conflict, he took the precaution of making a son in Indiana and one in Virginia jointly executors of his will, with power to sell his real and personal estate, and distribute the proceeds among his children, subject to the advancements enumerated in his will. Doubtless, he presumed he could in this way guard and protect the interests of his nonresident descendants from the violence and antagonism of the threatened war of sections. His resort to this precaution was wise and reasonable. Be this, however, as it may,—whether designed or accidental,—his will must prevail; and nothing can be better settled than that both of these executors must concur in the execution of a joint power, and that it cannot be executed by one alone. The knowledge of this act is brought distinctly to the notice and acknowledgment of the defendant, Glasgow, by the recitals in the deed he took of Moses Lipse's executor. That deed is the leading title paper of the derivative purchase from said Glasgow, and nec-

essarily put subsequent purchasers on inquiry into the effect of their deeds. If there was an infirmity in Samuel Lipse's deed to Glasgow as executor, they took subject to that infirmity, under the familiar doctrine of caveat emptor. If Glasgow got no title, neither did the purchasers from him; nor can they complain of this, because the recitals of their title paper call their attention especially to the fact how and why they claimed, to wit, the validity of a deed from one alone of two parties charged with the execution of a joint power. If they made a mistake, however grievous, they must bear the consequences of it. For these reasons the court will hold all the purchasers under Glasgow subject to the outstanding liens of Moses Lipse's devisees.

But it is urged that this lien has been extinguished by Glasgow's payment to Samuel Lipse. I have heretofore announced the general principle that a fiduciary, whether executor, trustee, or agent, cannot take worthless currency in payment of a specie debt, unless he is prepared to justify it by extraneous circumstances; that giving a credit therefor amounts, in an executor, to a devastavit on his part, and a debtor unfairly imposing such payment upon him shall be held liable therefor. Under the light of these adjudications, let us look at the transactions between Glasgow, Spears' executor, and Samuel Lipse, Moses Lipse's executor. Under the facts and proofs of this cause, I should do injustice to Mr. Glasgow's intelligence if I should call in question his full knowledge that his testator's debt to Lipse was not payable in Confederate money, and that the receipt of it by the latter would be a devastavit on his part. I readily concede it was a venial zeal on his part for his deceased friend, Spears, to propose once the liquidation of his debt in Confederate money; but when that was once refused, as is clearly proven in the case, on the express ground that such currency "was of no value," it ceased to be a virtue, or even excusable, when renewed, and a check upon the Fincastle Bank was tendered and received in lieu of Confederate money. This court is bound to take notice judicially of the fact that in 1862 the banks traded only in Confederate money, and that a check upon one of them was payable generally in such currency; hence there was no substantial difference between the bank check and Confederate notes as a medium of payment. The testimony in this case by the receivers of these checks demonstrated this fact, if, indeed, any corroboration be needed. It is very manifest, Mr. Glasgow saw in this transaction a profitable speculation for his deceased friend's estate. It would have been a handsome thing to acquire \$10,000 worth of good Bote-tourt land for about \$2,000 in a depreciating currency; but, to accomplish this, he must abide the responsibilities cast upon him by the proofs of his activity in pressing his payment, and the state of terrorism and denunciation against those refusing this currency. He doubtless has failed in this speculation; but how stands it with the surviving executor, D. H. Lipse? His whole patrimony is dispersed to the winds, and has gone to swell the fisc of the insurgent government that he was opposing, and which is now no more. There can therefore be no comparison between the hardships of the two cases.

The court is constrained, therefore, in this view of the case, to

decree the nullity of the deed from Moses Lipse, executor, to Glasgow, and the cancellation of the same; and unless the said Glasgow, as executor, or some one for him, shall in a reasonable time (say 90 days) pay D. H. Lipse, surviving executor of Moses Lipse, deceased, the amount of the two deferred payments of 1861 and 1862, with interest from date of maturity, then said D. H. Lipse, as executor, or some one for him, shall proceed to sell the tract of land formerly belonging to Moses Lipse, on the usual terms, and hold the proceeds for distribution according to the rights of the parties, as may hereafter be ascertained by reference to a commissioner. If the said Glasgow so elects, proof can be taken as to who voluntarily received their legacies in Confederate money, and the amounts so paid. While this reservation is made for the defendant, Glasgow, so that he may not be prejudiced in any claim he may be advised to assert in the state courts against such of the parties as may have voluntarily received their legacies, or any portion of them, in a depreciated currency, he cannot now, or at any time hereafter, be entitled to a credit for any such payment to Samuel Lipse, the resident executor, in Confederate money, already disallowed by this court.

Decree: That complainant, D. H. Lipse, surviving executor of Moses Lipse, deceased, recover of William A. Glasgow, executor of O. C. Spears, deceased, the sum of \$9,905.32, with interest thereon from the 3d day of March, 1862, and costs, and that unless said debt, interest, and costs be paid within 60 days, the lands in the bill mentioned be sold.

From this decree an appeal was taken to the supreme court of the United States.

LEETE v. PACIFIC MILL & MINING CO.

(Circuit Court, D. Nevada. July 5, 1898.)

No. 651.

1. MONEY HAD AND RECEIVED—PROMISE IMPLIED FROM LEGAL DUTY.

If one receives a payment from the government, to which another is legally entitled, as between themselves a promise to pay it over is implied, and an action for money had and received will lie for its recovery.

2. PUBLIC LANDS—CANCELLATION OF ENTRY—RIGHT TO MONEY REFUNDED.

As between an entryman and a subsequent grantee, who is in possession, claiming through him, at the time the entry is canceled, the grantee is entitled to the purchase money refunded by the government.

3. SAME—RESERVATION IN DEED.

Plaintiff conveyed his interest in the property of a partnership in the hands of a receiver, reserving any interest he might have in any money or accounts in the hands of the receiver. The property consisted in part of land which had been entered at the land office, and the purchase price paid. Several years after, when the land was in the possession of a subsequent grantee, the entry was canceled by the government, and the purchase money returned to the grantee. *Held*, that the reservation in plaintiff's deed did not apply to such purchase money.

4. CONTRACT—CONSTRUCTION BY PARTIES.

Where a contract for the sale of property, made by correspondence, was ambiguous as to whether the seller's interest in a claim against the government in relation to the property was to pass, the conduct of the

parties in relation to the claim immediately following the making of the contract is admissible to show their understanding.

6. SAME—ESTOPPEL.

Where the understanding of the meaning and effect of a contract, with which it was executed by one of the parties, was known to the other, who made no objection thereto, the latter is estopped to afterwards claim a different construction, to his own advantage, and the detriment of the other party.

This is an action for money had and received. The allegation in the complaint is "that on or about the 1st day of May, 1896, the defendant received from the government of the United States the sum of \$3,200, to and for the use and benefit of the plaintiff." The answer of the defendant admits the collection of the sum of \$3,200 from the government, but denies that the money, or any part of it, was received "to or for the use or benefit of said plaintiff," and denies "that the whole or any part thereof is now, or ever was, due to said plaintiff." The action is based upon certain negotiations between the respective parties concerning the sale and purchase of the land and property situate in Churchill county, Nev., known as the "Eagle Salt Works," containing 1,280 acres of land, and including all the salt and all other personal property and improvements upon said premises.

The facts elicited at the trial are substantially as follows: In 1877 the plaintiff and C. H. Van Gorder, having previously acquired the possessory right to the land in question, applied, through the proper land office, for a patent thereto from the United States, and paid to the proper officers the sum of \$3,200 for said land. Thereafter, in January, 1878,—the property in the meantime having been placed in the possession of a receiver,—the plaintiff conveyed his undivided one-half interest therein to W. N. Leete. The deed contained this reservation: "But it is not intended hereby to convey or transfer any interest which party of the first part has or may have to any moneys or accounts in the hands of such receiver, as receiver." On the same day W. N. Leete conveyed the property to the defendant herein, with the same reservation. In March, 1880, the defendant acquired, by deed, the interest in the property of the estate of C. H. Van Gorder, deceased. The application for a patent to the land was canceled by the land department in 1890. In the fall of 1894 negotiations were commenced between the parties hereto with reference to the plaintiff purchasing the property. All of the negotiations were by correspondence. The first was a letter from plaintiff to John W. Mackay, the president of the defendant corporation. D. B. Lyman was at the time of the correspondence the superintendent and managing agent of defendant in the state of Nevada. In February, 1895, plaintiff addressed a letter to Mr. Lyman, saying: "In December my son * * * wrote me that you wished to sell your Eagle Salt Works property for cash; also, that you wished to engage salt for your own mills. Kindly please state your price." On the same day Mr. Lyman sent a reply stating: "Whilst I am not prepared to give you a positive answer, as the matter must be submitted to Mr. Mackay for his approval, I think you can purchase the property, with all salt on hand, etc., and all personal property at the works, for \$6,000; we reserving the right, and you guarantying to furnish us with salt for our own use, f. o. b. cars at works, for \$4 per ton. We could not agree to take any stated number of tons, as our present consumption amounts to very little, but we do want reserved rights for mill salt at the stated price. We have on hand: Mill salt, 803 tons; table, 96; stock, 46 tons." On February 21, 1896, the plaintiff wrote to Mr. Lyman, stating that he did not consider the property a desirable investment at the price of \$6,000, but said: "If we can agree on a price, I will buy." On February 23d Mr. Lyman answered: "I would suggest that you write me, or address Mr. Mackay through me, stating the price you are willing to give for the Eagle Salt Works property. I will forward your paper to him, and await his decision. I have advised

Messrs. Mackay and Flood to sell the property for \$8,000; knowing the money paid the government for the land can be recovered, and assuming that the Eagle Salt Works property, with its supplies, salt on hand, etc., is worth at least \$3,000." On February 26th the plaintiff wrote to Mr. Lyman as follows: "Replying to yours of the 21st, as to the value of the Eagle Salt Works property depending on the recovery of the purchase money from the government, who recovers from the government must deed to the government, and abandon all claim to the land, and surrender the receiver's receipt. It is not likely that any person desirous of claiming and holding title to land would solemnly file and record an abandonment. Besides, when I deeded to W. N. Leete I reserved all moneys of account. If I ever owned one-half of that money, I own it now. As you suggest, I will address Mr. Mackay through you." On March 28th plaintiff wrote to Mr. Mackay, reciting the substance of the former letters between himself and Lyman, and then made the following offer: "For a bargain and sale deed and possession of your Eagle Salt Works property, as it stands, I will give you, in gold coin, \$3,500; also, at my expense and charge, furnish and load to your order at any time within five years, without charge to you, f. o. b. cars, in car-load lots, in bulk, at Eagle Salt Works, 945 tons of mining salt, of like quality to that now on hand. This agreement to bind myself, heirs, and assigns. You put deed in escrow, Bank of Nevada, and I will meet it with \$3,500, and agreement to load as above. You put me in possession of the property." This letter was sent to Mr. Lyman, and plaintiff received a reply stating that he had forwarded the letter "to Mr. J. L. Flood, S. F., and he will then forward the letter to Mr. Mackay, or make known to him by wire the contents of your letter. When I know whether they accept or decline your offer, I will advise you further in the matter." On April 4th Mr. Lyman addressed the following letter to the plaintiff: "Your letter to Mr. Mackay, dated 28th of March, has been received, and its contents have been fully noted and considered. Your proposition is fully understood and satisfactory, with the exception of one point, which is open to doubt, and liable to be construed in more than one way, viz. the matter of your furnishing salt to us after sale of the property. I will condense the terms of the proposition as we understand them, in this way: In consideration of the sum of \$3 500, gold coin, we will give you a bargain and sale deed of the land as described in the deed from Mr. W. N. Leete to the Pacific Mill & Mining Company, together with all the improvements thereon, including all the salt and other personal property of whatsoever character upon and connected with the Eagle Salt Works (there is now, by estimate, 875 tons of salt on the premises, more or less): provided, that you will furnish and load, at your own expense and charge, to the order of the Pacific Mill & Mining Company, or the Comstock Mill & Mining Company, in car-load lots, in bulk, at Eagle Salt Works, mill salt of like quality of that now on hand, from time to time, not to exceed 875 tons in all, within five years from date, at four dollars per ton. We do not obligate ourselves to order or to take any stated quantity of such salt. If these terms are satisfactory to you, please let me know, and immediate steps will be taken to have the deed and agreement made out, and to complete the transaction." On April 5th, Mr. Leete addressed a letter to Mr. Lyman, accepting his offer, in words as follows: "Replying to yours of the 4th inst., the terms as stated in your letter are entirely satisfactory, and accepted by me. I am ready. As soon as you have your deed and agreement ready, advise me, and I will come up and complete the transaction." This ended the negotiations between the parties as to the sale. The deed from the corporation to Leete was executed April 9th, in pursuance of a resolution of the board of directors. It recites a consideration of \$3,500, which was paid, and the further consideration as to the delivery of the salt as specified in the letter of Mr. Lyman. The deed is a quitclaim, instead of a bargain and sale. deed, but in all other respects it complies in terms with the result of the negotiations above expressed.

The plaintiff offered evidence to show what action had been taken by him to recover the money from the government that had been paid into the land office upon the application for a patent, and what steps were taken by the corporation, and the transactions and correspondence between the parties

in that regard. The defendant admitted that it had applied to the government for the sum of \$3,200, and had received the money; that plaintiff had demanded the money from it, and payment had been refused; but interposed objections to all this class of testimony, upon the grounds that it was irrelevant and immaterial unless some new consideration was shown; the contention on the part of defendant being that the rights of the parties were fixed by the correspondence with reference to the sale. The plaintiff admitted that there was no new consideration, but contended that the subsequent transactions corroborated and made clear the fact that the parties dealt with each other on the basis that the money in the United States treasury was an element of consideration in the sale of the Eagle Salt Works to the plaintiff by the defendant. The court declined to pass upon the admissibility of this evidence, but admitted it subject to the objections which would be considered and disposed of in the determination of the case.

Mr. Leete employed Britton & Gray, at Washington, to collect this money from the government, and was informed by them that there was a law which prohibited the assignment of an account against the United States treasury, and that it would be necessary for him to proceed in the name of the corporation defendant, as the title to the property was in it at the time of the cancellation of the entry, in 1890, and requested him to get a power of attorney from the corporation authorizing them to act for it in obtaining the money for him. There was considerable correspondence and several interviews between the parties on this subject. The first was a letter from Mr. Leete to Mr. Lyman, dated July 31, 1895, as follows: "I want to try and collect from the government the money I paid on application to enter the Eagle Salt Mine claim in February, 1877. To that end I have employed Britton & Gray, attorneys, who did my business in 1877. They advise me that, under the law and usages of the land department, it is desirable to have a power of attorney from the Pacific Mill & Mining Company; also, our joint application from them for repayment of the Van Gorder interest, as they held that interest from about 1879 to cancellation of the entry, 1890, and until conveyed to me. I inclose you the papers that Messrs. Britton & Gray have sent me, to be executed by the Pacific Mill & Mining Company. Kindly please have them executed, and return to me. I will file with the papers a correct abstract of title from the county recorder of Churchill county." Some time after this, Mr. Leete discussed the matter with Mr. Lyman, in San Francisco. From their conversation, Mr. Leete understood that Mr. George R. Wells was the attorney for the corporation; but, as a matter of fact, he was only the vice president of the corporation. Lyman accompanied Mr. Leete to Wells' office, and introduced him, and then retired. Mr. Leete testified that Mr. Wells then said to him: "Our company has not a cent's interest in this matter, and, if we execute a power of attorney to Britton & Gray to proceed in our name, they will presume that we are involved in an obligation to pay their attorney's fees. If you will get Britton & Gray to address us a letter disavowing any claim on us for their services as attorneys, we will execute the power of attorney asked for." Mr. Wells testified that this statement was substantially correct, except it leaves out the word "if"; that what he said was, "If our company has not a cent's interest," etc. Mr. Leete wrote to Britton & Gray, and they returned a letter to the secretary of the defendant, that "we have no present or prospective claim upon the Pacific Mill & Mining Company for payment for our services in this matter." Upon receipt of this communication, Mr. Leete forwarded the same to George R. Wells, in a letter dated August 27, 1895: "I am this day in receipt of the inclosure from Britton & Gray, addressed to L. O. Fraser, secretary of the Pacific Mill & Mining Company, disclaiming any claim on you for services in the case. I send it to you, as I have never met Mr. Fraser. Please have the two papers executed properly, and sent to me, to wit, the power of attorney; also, the application for repayment of purchase money. Under the statutes of the United States, in such cases as this we have to proceed in this manner. * * * P. S. If you pay out any money for notary services, I will refund it." Thereafter the corporation, at a meeting of the board of directors, regularly authorized the power of attorney as prepared by Britton & Gray to be executed; and it was duly executed and sent to Mr. Leete, who for-

warded the same to Britton & Gray; also, the application for repayment of the money. On August 29, 1895, the secretary, in reply, wrote Mr. Leete as follows: "Inclosed please find power of attorney (signed and acknowledged), Pacific Mill & Mining Company to Britton & Gray; also, an application, &c., signed by the company. Please send me your check for \$5.00, expenses incurred,—notary fees and recopying power of attorney, &c." The plaintiff paid the bill for expenses.

The following letter from Leete to Britton & Gray, dated September 5, 1895, shows the steps that were taken by Mr. Leete: "In the matter of application for repayment of purchase money paid on entry of Eagle Salt mine (also called 'Eagle Salt Works'), certificate No. 170, Carson City, Nevada, bearing date 26th February, 1877: I have this day filed with the register United States land office, Carson City, Nevada, the following papers, to wit: Abstract title Eagle Salt Works; certificate certified by recorder Churchill county, Nevada; affidavit of B. F. Leete, loss of the receiver's duplicate receipt; power of attorney Pacific Mill & Mining Company to Britton & Gray; power of attorney Benjamin F. Leete to Britton & Gray; application for repayment of the purchase money by Pacific Mill & Mining Company; application for repayment of the purchase money by Benjamin F. Leete." In connection with this matter, Mr. Leete on February 6, 1896, addressed the following letter to "Pacific Mill & Mining Company—John W. Mackay, President: 19 years ago I applied to enter the Eagle Salt Works land, and paid for the land. The Pacific Mill & Mining Company owned the property in 1890. The land department canceled the entry. Last April I purchased the property from the Pacific Mill & Mining Company. There is a law of the United States prohibiting the assignment of a claim against the treasury. It is therefore necessary to present a claim for the repayment of this land money in the name of Pacific Mill & Mining Company. The department wants a quitclaim deed to the government, and the warrant on the treasury will issue in the name of Pacific Mill & Mining Company. I want the warrant indorsed to me by the Pacific Mill & Mining Company. Please order these papers executed and sent to me." No reply to this letter was ever received. Thereafter the power of attorney executed by the defendant to Britton & Gray was revoked by the order of the board of directors, and an order passed for the execution of power of attorney to H. C. King; and under that power King collected the money from the government, and paid it over to the defendant.

The following letters from the commissioner of the general land office to the register and receiver at Carson City were offered in evidence by the defendant: The first dated September 17, 1895: "Referring to your letter of the 5th inst., transmitting the application of B. F. Leete for repayment of purchase money paid on mineral entry No. 170 for the Eagle Salt Works, * * * I have to inform you that this entry was canceled by office letter M, November 7, 1890. The abstract of title submitted with said application shows that at date of cancellation the title to this land, under mineral entry No. 170, was in the Pacific Mill & Mining Company, and hence Mr. Leete was not the proper party to make application for repayment. In re Craven, 14 Land Dec. Dep. Int. 140. The application is accordingly denied." The second letter, dated December 7, 1895, reads as follows: "Referring to letter N, September 17, 1895, denying the application of B. F. Leete for repayment of purchase money paid on mineral entry No. 170, you are advised that, as no appeal was taken from said decision within the period allowed, the case has this day been closed." Testimony was offered on behalf of defendant that Mr. Wells, the vice president, Mr. Fraser, the secretary, and Mr. Walsh, a director, of the defendant, did not have knowledge of all the facts at the time defendant gave the power of attorney to Britton & Gray. The general character of this testimony is to the effect that the board of directors did not have before them at the time they authorized the power of attorney to be executed to Britton & Gray any of the correspondence "between Mr. Lyman and Mr. Leete that led to the sale of this property," and acted upon the representation made by the vice president. The vice president, Mr. Wells, with reference to the conversation between himself and the plaintiff, and as to what was considered at the time the power of attorney

to Britton & Gray was authorized, testified that Mr. Lyman brought Mr. Leete to him, and introduced him, "and, as addressing me in the absence of Mr. Mackay, he said, 'You are the vice president of this company, and Mr. Leete wants to get some money,' or 'Mr. Leete will explain to you what he wants.' He only stayed a minute, * * * and left Mr. Leete and I together. * * * Mr. Leete said there was some amount of money—\$3,200 (I did not burden my mind with the amount)—that was coming to him, because he had paid it in on some land for which the application had been canceled, and he would like to have the company assist him to get what belonged to him. I said I would be glad to do anything I could. He explained what his claim was,—by reason of a purchase made some years ago. It was money coming from the United States. Q. Did you at that time, or had you ever before at any time, seen a correspondence between Mr. Lyman and Mr. Leete with reference to this? A. I never had. * * * It was a California corporation,—held property in the state of Nevada,—and most all the business was transacted through its officers. I knew very little about the affairs of the company. Q. Were you present at the meeting of the board of directors in which those resolutions were passed, making a power of attorney to Britton & Gray? A. Yes. Q. Upon whose representation, if any one's, was that action taken? A. I acted principally in the matter, because I took it for granted what Mr. Leete told me was true. That was a corporation that had been a big corporation years and years ago, but had done very little lately,—a sort of winding it up,—and I had lost most all interest in it. Q. Did Mr. Leete present to you any papers at all in connection with the negotiations he had with Mr. Lyman? A. No. The only thing that I was emphatic about was this: He said he wanted to get a power of attorney, and produced a letter [from Britton & Gray], * * * in which they said, in order to act, it would be necessary to get a power of attorney from the Pacific Mill & Mining Company, because at the time the entry was canceled the owner must receive the money. That was the ground upon which he explained it to me, and was the ground upon which action was called for by the Pacific Mill & Mining Company. The only thing I recall, * * * and which I heard Mr. Leete use my words (and he used almost the words I used), * * * I said, 'If we have no interest in this property, and are going to help you, it must be distinctly understood we will incur no obligation by reason of their work as attorneys;' and he said, 'Well, I will see to that, and get a letter from them.' I did not say, 'We have no interest,' because I did not know it. I was taking his statement to me as true. We must be protected from any claim, because I did not want the company to pay a bill for Mr. Leete's work." Upon cross-examination he stated that he knew the transaction between Mr. Leete and the Pacific Mill & Mining Company had resulted in the purchase of the Eagle Salt Works property by Mr. Leete, and knew that that transaction had been negotiated between Mr. Lyman and Mr. Leete; that Mr. Lyman was the executive officer in the state of Nevada, and attended to that business, and he always accepted what Mr. Lyman said as conclusive in regard to it; that when Mr. Lyman brought Mr. Leete into the office he thought it was perfectly satisfactory that he should carry out Mr. Leete's desire; that he supposed that Mr. Leete was the owner of the money, and entitled to get it, and that he was perfectly willing to help him get it, provided the company would not incur indebtedness; that Mr. Leete told him he had paid the money in a transaction long ago, and since then had bought the property, and was entitled to the same.

J. D. Goodwin, for plaintiff.

W. E. F. Deal, for defendant.

HAWLEY, District Judge (after stating the facts as above). From the foregoing facts the question arises, which of the parties is entitled to the money repaid by the government after the cancellation of the entry for the Eagle Salt Works, and after the purchase of the property by the plaintiff from the defendant? The case is unique. It is *sui generis*. It stands alone, without any direct precedent or guide.

The general principles of law, as announced in the authorities cited by the respective counsel, do not reach the pivot of the scales by which the case is to be weighed and determined. Each party is confident, but neither has been able to make the case clear. The court enters upon the discussion with a mind free from any impression as to the merits of the case,—with the hope, however, that some beacon light as to the facts, or recognized principle of law, will be found to guide it to a correct conclusion.

The plaintiff seems to have been of the impression that he was entitled to at least one-half of the money paid to the land office of the government on account of the reservation in his deed to his brother. But it is apparent that this reservation cannot possibly be construed as having any relation whatever to that money. It had reference solely to the money and accounts in the hands of the receiver of the property, who had been appointed in a suit in the state court concerning the partnership between the plaintiff and Van Gorder. The application for the patent had not been canceled at that time, and it was not then known or suspected that it would be. If a patent had been issued after the plaintiff had conveyed his interest in the property, it would have inured to the benefit of his grantee. The cancellation of the entry was not made until 1890. At the time of the cancellation the defendant had the possessory title to the property. The plaintiff had no interest therein, or any claim thereto.

The statute authorizing the money, upon cancellation of the entry, to be repaid, provides as follows:

"Sec. 2. In all cases where homestead or timber-culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the secretary of the interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the commissioner of the general land office." 1 Supp. Rev. St. 1874-81, p. 565.

If application had then been made by the defendant for the repayment of the money, it would doubtless have been paid to it, as will fully appear by reference to the letters of the commissioner of the general land office. If application had been made by the plaintiff at that time, payment would have been refused. Secretary Noble, in a letter to Comptroller Matthews in the Case of Adolph Emert, held that the only person qualified to apply for repayment under section 2 of the act of June 16, 1880, is the one in whom the title to the land is vested at the date of the cancellation of the entry, or the heirs of such party. He said:

"It is clear that after the cancellation of the entry the entryman has no right to the land that he can sell or dispose of. It is equally clear that, on the cancellation of an entry under the conditions prescribed in the statute, a claim against the government for the repayment of the purchase money and fees and commissions is created, and the statute declares that said payment shall be made to the entryman, or his heirs or assigns; but it is clear that the statute contemplated as assigns only those who became such while the entryman had an interest in the land, or, in other words, assigns prior

to the date of the cancellation of the entry." In re Emert, 14 Land Dec. Dep. Int. 101.

There is nothing in the language of the deed to furnish any light upon the transaction. There can be no question as to the legal right of the plaintiff to recover herein if from the facts it appears, either by operation of law, or by contract or agreement of the parties, that the money was to be collected by him, or by the defendant for his use and benefit. He would be entitled, if the money belonged to him, to recover it, regardless of the question whether any privity of contract existed between the parties or not, under the general principle that, in order to support an action of this character, there need be no privity of contract, except that which results from one man having another's money, which he has no right to keep. In such cases the law implies a promise that he will pay it over. *Bank v. Sadler*, 19 Nev. 98, 103, 6 Pac. 941, and authorities there cited; *Bank of Metropolis v. First Nat. Bank of Jersey City*, 19 Fed. 301, 303; *Gaines v. Miller*, 111 U. S. 395, 397, 4 Sup. Ct. 426; *Wilson v. Turner*, 164 Ill. 398, 403, 45 N. E. 820; 2 Enc. Pl. & Prac. 1017, and authorities there cited. If, however, the money did not in law belong to the plaintiff, from the mere fact that he had, in an effort to procure the title to the Eagle Salt Works, paid the same under his application for the patent, then he can only recover by showing that there is a privity of contract between him and the defendant, and that by virtue of such contract he is entitled to the money collected by the defendant. It appears from the facts that the conveyance made by the plaintiff to his brother, and by his brother to the corporation, after the money had been paid to the government, was absolute, except as to such moneys and accounts as were then in the hands of the receiver. It cannot, therefore, be legally said that the money paid to the government in the event of the cancellation of the entry should have been paid to him, simply by virtue of the fact that he had originally paid the money to the government, because, as before stated, he had in the meantime conveyed his interest in the land, without any reservation of his claim or right to this money. To enable him to recover it from the defendant, the duty devolves upon him to show that there was an agreement or contract with the defendant that he should have the money if it could be recovered from the government. What was the understanding or agreement of the respective parties in regard thereto at the time of the execution of the deed by the defendant to the plaintiff, in 1895? Was the right to the recovery of this money an element of the consideration of the sale and purchase of the land? These questions must be answered by a construction of the language of the correspondence between the parties. The correspondence commenced in the fall of 1894. In the spring of 1895 the plaintiff asked that the price for which the defendant was willing to sell the property should be named. Mr. Lyman stated generally that he thought the property could be purchased for \$6,000, with certain conditions as to the delivery of salt at a certain price. This was not considered by the plaintiff as a desirable investment, at the price named, and resulted in the suggestion that the plaintiff should name the price he was willing to give, and

then for the first time a reference is made by Mr. Lyman to the money which is the subject-matter of this action:

"I have advised Messrs. Mackay and Flood [who were the principal stockholders of the defendant corporation] to sell the property for six thousand dollars; knowing the money paid the government for the land can be recovered, and assuming that the Eagle Salt Works property, with its supplies, salt on hand, etc., is worth at least three thousand dollars."

Here is a clear statement that the defendant's agent and officer knew that the money could be collected. According to Mr. Lyman's judgment, the Eagle Salt Works, with its supplies and salt on hand, was worth at least \$3,000. The plaintiff, in reply, with reference to the value of the Eagle Salt Works property "depending on the recovery of the purchase money," said "that whoever recovers from the government must deed to the government, and abandon all claim to the land," and intimated that no one would be likely to do that. He then said that when he deeded the land to his brother he reserved all moneys and accounts. "If I ever owned one-half of that money, I own it now." The defendant was then put upon notice that the plaintiff claimed to be the owner and entitled to one-half of that money whether he bought the property or not. This is all that was ever said, in the correspondence, about the money. The offer that was thereafter made, and the acceptance thereof, which was satisfactory to both parties, did not make any mention of this money. The terms of the contract, in so far as this money was involved as an element of the consideration, are therefore left in an uncertain and unsatisfactory condition. Both parties had equal knowledge in regard thereto. The plaintiff claimed it, or at least one-half of it. The defendant did not deny his claim. It kept silent upon the subject. There was no specific agreement, in writing or otherwise, in regard thereto. It is apparent, however, that the plaintiff, when he made the offer of \$3,500, must have understood that there was some other element of consideration besides the real value of the Eagle Salt Works and the personal property connected therewith, because he offered more than the price placed upon the property by defendant's superintendent and agent. When a man states to a prospective purchaser that certain property is worth at least \$3,000, he does not expect that such person is going to offer him any more for it. The inference would seem to be that it might be purchased for a less sum. What legitimate conclusion, then, can the court draw with reference to this other element of consideration which the correspondence suggests? When Mr. Lyman explained why he advised Mackay and Flood to sell the property for \$6,000, he must have meant that whoever bought the property would be entitled to receive this money from the government. This was the reason he advised the defendant to sell the property at that price. It was also an inducement to the plaintiff to offer a larger sum than the mere value of the land, and salt on hand, etc. The plaintiff, in reply, in effect said: "You are mistaken about this money. One-half of it belongs to me, whether I purchase the Eagle Salt Works property or not." This was the reason that he was unwilling to give \$6,000, but was willing to give \$3,500. With this understanding between the parties, the recovery of the \$3,200 from the

government must have been in the minds of the parties as an element of consideration which induced the plaintiff to make the purchase. But it may be said that the difference in the price first asked and the price actually accepted tends to show that such was not the understanding of the parties. If, as suggested by Mr. Lyman, all this money would go to the purchaser, the price would reach \$6,200. But he had previously offered to sell it for \$6,000. If only one-half of it was to be considered, as suggested by the plaintiff, this would reduce the amount to \$4,400. The collection of this money would doubtless involve expense in the employment of counsel, which would materially reduce the amount to be received. As the attorneys asked 20 per cent. to collect the money, this must be considered as a reasonable price, and would reduce the amount to \$4,080. This, after deducting other expenses that had to be incurred in order to get the money from the government, would leave but a slight margin between the price first asked by Mr. Lyman and the price offered and paid by the plaintiff.

Now, with reference to the value of the Eagle Salt Works property: It appears from the testimony that the defendant was principally interested in securing for itself the delivery of salt at special rates. If this could be done, it would be willing to dispose of the property on reasonable terms, as it "had done very little" business lately, and had commenced winding up its affairs, as its officers "had lost most all interest in it." In connection with the negotiations as expressed in the correspondence, it is not difficult to see that about the only advantage to the defendant which the Eagle Salt Works property was, was that by its ownership therein it was enabled to procure salt for its own mills at four dollars per ton. True, there were "875 tons of salt on the premises, more or less"; but to realize any money from the sale and delivery of this salt by the plaintiff involved the expense of employing men to load the salt "free on board the cars," and the money was to be received in dribblets, at odd times, whenever needed, within five years. The defendant, through its superintendent, said, "We do not obligate ourselves to order or to take any stated quantity of such salt." It needs no mathematical calculation to figure out the real value of this part of the contract to the plaintiff. It was more valuable to the defendant than to the plaintiff. It really constituted, as before stated, the principal value of the property to the defendant. If there was any demand for salt by other parties, it would have been of value to the plaintiff.

Take all the testimony, sift it, weigh it, test it in all of its legitimate bearings, and it becomes evident that the \$3,500 was not paid by plaintiff or received by the defendant upon the understanding of either party that all that was to be received by the plaintiff was the land and salt on hand. So far as the plaintiff was concerned, he claimed one half of the money; and it must have been his understanding that, if he purchased the property from the defendant, he would be entitled to the other half. But did the other party so understand it? Did their minds meet on this proposition? So far as the express language of the letters can be construed, it is evident that both parties were trying to drive the best bargain they could. The

defendant wanted to get the highest price obtainable. The plaintiff was figuring to get the property at the lowest notch possible. From all the evidence it may be urged that neither party fully understood their respective legal rights in the premises as to the money. It is true that the court is not authorized to construe the contract so as in any manner to do violence to the language used by the parties, or to the principles of law applicable thereto; but it can and ought to give such a construction to all the negotiations as will bring the contract as near to the intention and actual meaning of the parties at the time of its execution as the words which they saw fit to employ, and rules of law, will permit. It is the duty of the court, where the language used is not clear, positive, and certain, to consult the conditions, situation, and motives of the respective parties, for the purpose of ascertaining their intention. In *Rockefeller v. Merritt*, 22 C. C. A. 613, 76 Fed. 909, 915, the court said:

"One of the most satisfactory tests to ascertain the true meaning of a contract is made by putting ourselves in the place of the contracting parties when it was made, and then considering, in view of all the facts and circumstances surrounding them at the time of its execution, what the parties intended by the terms of their agreement."

It has always been deemed permissible for the court to consider the conduct and acts of the contracting parties, and the interpretation which they placed upon their agreement, at the time of, or contemporaneously with, its execution, as an aid to ascertain its meaning. In *Chicago v. Sheldon*, 9 Wall. 50, 54, the court said:

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law."

See, also, *Topliff v. Topliff*, 122 U. S. 121, 131, 7 Sup. Ct. 1057; *Thomas v. Railway Co.*, 81 Fed. 911, 919; *Lumber Co. v. Stump*, 30 C. C. A. 260, 86 Fed. 574, 578; *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo. 121, 127; *Mathews v. Danahy*, 26 Mo. App. 660, 662; *Vermont St. Church of Quincy v. Brose*, 104 Ill. 208; *Coal Co. v. Schneider*, 163 Ill. 393, 396, 45 N. E. 126.

In *Sanders v. Munson*, 20 C. C. A. 581, 583, 74 Fed. 649, 651, the court said:

"Ambiguities in the terms of a contract are often dispelled by the construction which the parties themselves have placed upon the terms before controversy has arisen, and courts frequently give effect to this construction, and adopt the meaning which the parties have assumed to be correct."

As the references made to this money in the correspondence are to some extent uncertain, indefinite, and doubtful, I am of opinion that the subsequent acts and conduct of both parties, in so far as the same tend to shed light upon the transaction leading up to, and culminating in, the execution of the deed, is admissible in evidence, and should be considered by the court,—not as creating a new contract, but as tending to show what the contract and understanding

of the parties were at the time of the delivery of the deed. From the subsequent acts and conduct of the parties, it is made perfectly clear that at the time of the execution of the deed the defendant did not assert any claim to this money. Moreover, the defendant, acting through its directors, at a regular meeting authorized the execution of a power of attorney in favor of plaintiff's attorneys for the express purpose of aiding the plaintiff to get this money for himself. And it was not until it was advised from the correspondence from the land department that the plaintiff could not collect, and was not entitled to, the money, that it made any claim thereto. Upon being advised as to the rulings of the land department, it revoked its power of attorney to Britton & Gray, and authorized another attorney to act for it, who obtained the money for the defendant. The law undoubtedly protects parties acting in ignorance of their rights from imposition and deceit. But the question constantly presents itself, from all the facts herein, whether this claim thus made is one that would justify the court in holding that the defendant acted in ignorance of the facts. It seems to me that under the testimony the defendant had such knowledge of the facts before the deed was executed as required it to make inquiry as to its legal rights in the premises, and that it ought to be considered as acquiescing in the claim made by the plaintiff that he was entitled to the money, and that such was its understanding at the time the deed was executed; otherwise it would have refused to execute the power of attorney in favor of plaintiff's attorney for the purpose of enabling him to get the money. Having executed and delivered the deed to the plaintiff, and accepted the \$3,500 from him, with the understanding that the plaintiff could collect, and was entitled to, this money, it ought not now be allowed to keep it on the ground that it believed at that time that the statement of the plaintiff as to his legal rights was true. In other words, while it might have been entitled to avoid the contract if there had been any misrepresentations by the plaintiff as to the material facts, by which it had been misled to its injury, it should not be permitted to do so upon the ground that it was not at the time of the execution of the deed fully advised as to the law, but acted under the belief that the plaintiff's understanding thereof was correct, especially in view of the undisputed testimony that he notified it of all the facts upon which he based his claim. It did not, after this correspondence, at any time before the execution of the deed, claim that all or any part of this money, if it made the sale, belonged to it. There was no fraud in the transaction. There was a misrepresentation as to the legal rights of the plaintiff, which the defendant accepted as true without investigation. Under these circumstances, the parties must be bound by their understanding at the time the contract was executed. The *modus operandi* by which the money from the government was to be obtained cannot control the transaction. It has nothing to do with it. When the sale was made, it was the understanding of the parties that the plaintiff was entitled to this money, as between the plaintiff and the defendant. The fact that it afterwards transpired—what the parties ought to have known before—that the money could only be obtained upon the application of the

defendant does not have the effect to in any manner change the contract made by the parties.

But, if it should be conceded that the defendant did not understand the contract as above interpreted, there is still another view of the case which would perhaps be binding upon the defendant, and reach the same result. It is evident from all the facts that plaintiff did so understand it. His claim to the money was not based on legal grounds; but he claimed it, and his conduct shows he was acting on the belief that he would get not only one-half of it, but, if he purchased the property mentioned in the deed, he would get it all. That was his understanding, and was a part of the consideration that induced him to offer, and, upon the acceptance of his offer, to pay, to the defendant the sum of \$3,500 upon the execution and delivery of the deed to him. The defendant knew that this was his understanding, and, having accepted the \$3,500 without any denial of the plaintiff's right to recover the money then in the hands of the government, it ought not to be allowed now to retain this money because the government declined to pay the money upon the application of the plaintiff, and did pay the money to it upon its own application therefor. In *Cunningham v. Patrick*, 136 Mo. 621, 632, 37 S. W. 817, which involved the construction of certain letters, as to whether or not the parties had adjusted the accounts between them, and agreed upon a certain sum which was to be paid by the defendant to the plaintiffs in settlement of the same, the court, instead of confining itself to the proposition that the correspondence clearly showed that both parties fully understood that the amount sued for upon the adjustment was the amount agreed upon by them as expressed in their letters, as it might well have done, treated the language of defendant's reply to plaintiffs' letters as being so qualified or indefinite as not to justify the statement that the minds of the parties met, discussed the effect of all the negotiations, and came to the conclusion that all the evidence clearly manifested what the plaintiffs' understanding of the agreement of settlement was, and that defendant having induced the plaintiffs to forbear bringing suit, upon having, as understood by them, a contract for a fixed and definite sum, the defendant should not be allowed to say that there was no such contract. In the course of the opinion the court said:

"The books abound with authority that when one of two parties has a perfect understanding of the understanding of the other as to the meaning of the terms of a contract or proposition of settlement that may be doubtful, the one knowing the understanding of the other, * * * and allowing that other to act on that understanding to his loss or injury, will be estopped from denying there was such an understanding or agreement between them, or that the minds of the two did not meet. In such cases the understanding of one, with the knowledge of that understanding by the other, will be treated as the understanding of both."

See, also, *Goulding v. Hammond*, 49 Fed. 443, 446; *Garrison v. U. S.*, 7 Wall. 688.

In view of all the facts, the situation and knowledge of the parties, their surrounding circumstances, the objects which they had in view, their conduct and acts immediately after as well as before the execution of the deed, as herein interpreted, it follows that the doubts

existing in my mind as to the true meaning of the contract as exhibited by the correspondence have been solved; and my conclusion is that the money collected by the defendant from the government belongs, by virtue of the contract between the parties, to the plaintiff. Let judgment be entered in his favor, with costs.

PULESTON v. UNITED STATES.

(District Court, N. D. Florida. July 7, 1898.)

1. MARSHAL'S FEES—MILEAGE.

In the service of a writ, the only statutory requirement is that travel shall be actual, to be computed from the place where the process is returned to the place of service; and the circumstance that an interval of several days occurred after a portion of the distance had been traveled, and before its service, cannot defeat the marshal's claim for mileage.

2. SAME.

The marshal is entitled to mileage from the limits of his district to the commissioner having jurisdiction of a case, where, through mistake or ignorance, his deputy, acting under a warrant legal on its face, has taken custody of a person therein named, outside of his district, on the theory that a legal arrest, so far as the government is concerned, was effected immediately upon entry into the district in which the deputy could legally act.

3. SAME.

The proviso in the appropriation act of August 18, 1894, whereby no mileage is allowed to any officer violating the provisions thereof relative to the taking of prisoners before the commissioner or nearest judicial officer having jurisdiction under existing laws, affects only the appropriation thereby made, and does not have the effect of a general restriction.

4. SAME.

Without a certified copy of a complaint attached to a warrant issued by a commissioner, a commissioner or magistrate nearer the place of arrest than the commissioner issuing the warrant would be without jurisdiction to hear the case.

5. SAME.

The marshal is entitled to mileage computed according to paragraph 25, § 829, Rev. St., without regard to the question as to whether the arrest was effected by the deputy nearest the place where the prisoner was apprehended.

6. SAME—SERVICE OF COMMITMENT.

The marshal cannot disregard the lawful process or orders of the court, even though they are superfluous, but must execute such as are issued to him in the ordinary practice, for which he is entitled to the ordinary fee.

7. SAME — PER DIEM BEFORE COURT AND A COMMISSIONER ON THE SAME DAY.

A marshal is entitled to charge a per diem for services before a commissioner upon the same day that he was allowed a per diem for attendance upon the court.

8. SAME—PER DIEM OF DEPUTY.

The marshal is entitled to the per diem of his deputy where a case was set for hearing before a commissioner, and the deputy attended, but the defendant failed to appear, and his bond was estreated, and an attachment or alias warrant issued.

9. SAME—DISCHARGE OF DEFENDANT ON TEMPORARY RECOGNIZANCE.

The marshal is entitled to charge for the release of a defendant on bail before the commissioner, where such release involves the taking of a bail bond.

10. SAME—UNNECESSARY AND EXCESSIVE SERVICES.

In the absence of any showing of bad faith, the mere fact that after the issuance of a warrant, and before arrest, the defendant attended before the commissioner as a witness, but neither the commissioner nor the deputy had at that time any process for his arrest in their actual possession, would not be sufficient to justify the accounting officers of the treasury in disallowing all fees earned in the subsequent arrest, as unnecessary and excessive, especially where the account has been duly approved by a court in accordance with law.

11. SAME—EMPLOYMENT OF BAILIFFS.

The marshal is entitled to be reimbursed for sums disbursed to bailiffs in excess of three, and not exceeding five, allowed to be employed under section 715, Rev. St., employed by him under the order of a circuit or district court; and the appropriation act of August 18, 1894, and the proviso thereto attached, do not have the effect of general legislation, so as to repeal said section 715.

12. SAME.

The proviso above referred to authorizes the employment of not exceeding three bailiffs in each court; and where, incidentally, the business of the circuit and district courts for any district are both conducted in the same room, and presided over by the same judge, it does not follow that this proviso restricts the number of bailiffs in both courts to three, but, on the contrary, the court has the power to order the marshal to employ a double set of bailiffs,—one for each court.

(Syllabus by the Court.)

Buckner Chipley, for petitioner.
John Eagan, U. S. Atty.

SWAYNE, District Judge. The respective parties, by their attorneys, have filed a stipulation covering all the facts relied on in the case, leaving only to the court such questions of law as have not already been passed upon on the demurrer.

In items 3, 4, 5, and 22 of Schedule A, the question is presented as to whether mileage, under paragraph 25, § 829, Rev. St., should be continuous, or if the deputy can claim actual mileage traveled, when a part of the trip is made at one time, and after the lapse of several days the trip is completed. Said paragraph reads as follows: "For travel in going only, to serve any process, * * * six cents a mile, to be computed from the place where the process is returned to the place of service." Also, the act of August 18, 1894, which requires that the mileage of any deputy shall be actual and necessary. All that is required by these provisions of law is that the deputy to whom the writ was delivered actually and necessarily traveled the distance for which the marshal claims the mileage, which is clearly shown to be the case by the stipulation filed in this case.

Item 9, Schedule A: This item represents fees earned in a case where the defendant at the time of the issuance of the warrant was out of the Northern district of Florida. The deputy went out of the state, and induced the defendant, either by showing the warrant or otherwise,—it does not appear,—to go back into the district. No arrest could have been made on this process outside of the limits of the district, but as soon as the state line was crossed the defendant was in the Northern district of Florida; and the petitioner contends that an arrest was effected in the Northern

district of Florida, and that the marshal was entitled to mileage from the state line, to the commissioner in Florida, who in this instance proved to be the nearest to the place of entrance into the state. The comptroller has decided this question in favor of this contention. In re Account of D. T. Guyton (Sept. 26, 1894) Cousar's Dig. p. 76, item 23. It appears proper to regard the matter of this arrest in this light; for, otherwise, to disallow this item would have the effect of rendering the arrest entirely illegal, so far as concerns the acts of the deputy after he passed the state line, and came into the Northern district of Florida.

Items 11, 12, 13, and 16, Schedule A: It is admitted that the fees in all of these cases were earned where the prisoner was not taken before the commissioner nearest the place of arrest, but was taken before the commissioner who issued the warrant. In no instance was there a copy of the affidavit attached to the warrant as issued by the commissioner. The appropriation act of August 18, 1894, in which it was declared that no mileage was to be allowed a marshal for transportation of deputy and prisoner, etc., when not taken before the commissioner nearest the place of arrest, reads as follows:

"It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the commissioner or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint; and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof."

This act, in words and effect, only applies to money thereby set aside for certain expenses of the government, but does not place any general restriction upon the commissioners and marshals, but refers to the allowance of their fees at the treasury department out of this appropriation. The concluding phrase means, of course, "And no mileage [out of the money hereby appropriated] shall be allowed any officer violating the provisions hereof." It is usual and customary, where the witnesses are more convenient to the commissioner who issued the warrant, to take the prisoner before him, and especially where no copy of the affidavit is attached; thus saving the government large sums yearly in mileage of four witnesses or less, as the case might be; and, as there is no general restriction on the marshal, it lies in his discretion, especially where no bad faith, or inordinate desire to increase his fees, is shown. In *U. S. v. Ewing*, 140 U. S. 148, 11 Sup. Ct. 745, the court says:

"The cases of *U. S. v. Dickson*, 15 Pet. 141, and *Minis v. U. S.*, Id. 423, are cited in support of this view. The limitation and effect of provisos in enacting clauses of a statute are considered in these cases, and the rule declared, in the first of them, 'that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms.' In the case of *Minis v. U. S.* it is said by Mr. Justice Story (page 445): 'It would be somewhat unusual to find ingrafted upon an act making special and temporary appropriations any provision which was to have a general and permanent application to all future appropriations.

Nor ought such an intention on the part of the legislature be presumed, unless it is expressed in the most clear and positive terms, and wherever the language admits of no other reasonable interpretation. The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought into its purview. A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment. * * * In the case under consideration, if the proviso had been simply that commissioners should not be entitled to any docket fee, we should have had little doubt that it would be held as applying only to the \$50,000 appropriated in the bill; but as the proviso contains a substantial re-enactment of the clause of the Revised Statutes (section 847) fixing the fees for similar services, with the prohibition against docket fees tacked thereto as an amendment, we find it impossible to give effect to the whole proviso without construing it as expressing the intention of congress to amend that clause of section 847."

It therefore clearly appears, under these rules of construction, that this proviso only applies to the money thereby appropriated. These items represent a meritorious case of an effort to save the government expense in mileage of witnesses.

It further appears from admissions herein, in the evidence, that there was no copy of the complaint or affidavit attached to the warrant issued in these cases. In the case of *U. S. v. Donahower*, 29 C. C. A. 342, 85 Fed. 547, the circuit court of appeals for the Eighth circuit, in construing this act, says:

"The circuit court finds as a fact that in each case included in this finding the warrant was not issued or made returnable before the circuit court commissioner before whom it was returnable by the connivance, at the request, or with the knowledge of the petitioner, but came into his hands in the regular course of the business of his office, and was served and executed by him in obedience to its mandate; that it did not appear from the testimony that a certified copy of the complaint upon which each of the warrants was based was attached to the warrant; that in each case the mileage charged was actually and necessarily traveled by the plaintiff; and the several items included in the finding, amounting to \$188.70, were therefore allowed. We think the items of this account were properly allowed by the circuit court. The finding of fact shows that in none of the cases included in the finding, for which charges have been made, was there attached to the warrant a certified copy of the complaint, which, under this statute, would be necessary to confer jurisdiction upon any commissioner or magistrate before whom the marshal might take the person arrested. Without the certified copy of the complaint attached to the warrant, a commissioner or magistrate nearer the place of arrest than the commissioner issuing the warrant would be without jurisdiction to hear the case. As stated by the circuit court, the marshal would have to obey the warrant in its legal effect; and, if no certified copy of the complaint was attached, to give jurisdiction to any other commissioner or magistrate he would—the warrant so directing—be obliged to take the arrested person before the commissioner who issued the warrant."

There can be no presumption that in any of these cases the certified copy of the complaint was not attached by the commissioner through the connivance or at the request of the marshal, and there has been no attempt to prove this, or even a suggestion on behalf of the government; and, with as well-considered authority as the foregoing, nothing could be added.

Item 15, Schedule A: In addition to the above, it may be suggested that United States officials, including United States district attorney, were instrumental in preferring charges against the de-

fendant in the case before the commissioner at Pensacola, and specially directed the marshal, after arresting the defendant, to bring him before the commissioner at Pensacola. The charge was of such a serious nature that no one anticipated the ability of the defendant to give bond, which in fact he never did. The Marianna jail was not in condition to accommodate the defendant in a suitable manner; and, as the defendant would be required to be brought to Pensacola for trial in any event, the government was in fact a gainer by the transaction. The marshal had no discretion in the premises, nor is it suggested that he connived at this method of prosecuting the defendant. He had nothing to gain, and, under the circumstances, should certainly be recompensed for the large expense he has been to in the premises.

Item 17, Schedule A: This item represents fees earned by a deputy to whom a warrant was delivered by the commissioner, and who effected the arrest of the defendant at a place which was nearer to the residence of another deputy; the department contending that the warrant should have been mailed to the other deputy. This contention seems frivolous and unfounded in law. The deputy was handed the warrant by the commissioner. He is not presumed to have had at that time any knowledge of the exact whereabouts of the defendant, and, if he effects an arrest, under the warrant, he is entitled, under paragraph 25, § 829, Rev. St., to his mileage, computed according to the language of said paragraph, which reads, "For travel in going only, to serve any process, * * * six cents a mile, to be computed from the place where the process is returned to the place of service." Thus it will appear that it was immaterial to the government, so far as concerns the amount of fees earned, what deputy effected the service.

Item 18, Schedule A: The same facts exist relative to this item as in item 15, and the same rule of law applies.

Schedule B: Nothing is developed by the facts in these items that calls for the further consideration of the court. This question was fully decided in the opinion on the demurrer. *Puleston v. U. S.*, 85 Fed. 570.

Items 1, 6 to 14, inclusive, Schedule C, have been fully decided on the demurrer.

Items 2 to 5, inclusive, Schedule C: These items represent fees for committing defendants in instances where the clerk had issued a commitment under an order entered in the minutes to that effect, and was delivered to the marshal for service. The defendants had been committed previously, to await trial, but these commitments were issued after conviction, but before sentence. It is no defense that the writs may not have been necessary. The marshal cannot disregard the process or order of the court, even though they are superfluous, but must execute such as are issued to him in the ordinary practice, for which he is entitled to the ordinary fee. *Opinion of May 16, 1840, 3 Op. 536; Cousar's Dig. p. 78, item 2.* In *U. S. v. Donahower*, 29 C. C. A. 342, 85 Fed. 547, the court says:

"The seventh assignment of errors covers finding 11 of the findings of the circuit court, and is for the service of a bench warrant on a person then in the

custody of the United States marshal. The allowance of this item, amounting to \$2, by the circuit court, we think should be sustained. The warrant was issued by the court. The marshal was bound to serve it, and was entitled to the fee charged for the service."

All items in Schedule D have been fully passed upon on demurrer.

Schedule E, item 1, arose through a mistake of the accounting officer of the treasury, and hence should be allowed.

Item 2, Schedule E: This item is for a per diem before a commissioner on a hearing on criminal charge. Disallowed because, the marshal had charged a per diem in the circuit court on the same day. In *U. S. v. McMahon*, 164 U. S. 81, 17 Sup. Ct. 28, the court says:

"But, where a marshal attends examination before two different commissioners on the same day, we think he is entitled to his fee of \$2 for the attendance before each commissioner. In the case of *U. S. v. Erwin*, 147 U. S. 685, 13 Sup. Ct. 443, we held that a district attorney was entitled to charge a per diem for services before a commissioner upon the same day that he was allowed a per diem for attendance upon the court, and the argument controlling our opinion in that case is equally applicable here. It is true that in that case the charge was for attending before the court and before a single commissioner upon the same day; but where the officer attends before two or more commissioners, who may hold their sessions at a distance from each other, we see no reason why he should not be entitled to his fee in the case of each commissioner."

The court in this case held that the principle applicable to the allowance of double per diem to district attorneys is "equally applicable" to the allowance of a double per diem to the marshal; and in this case the court went even further than the contention here, in allowing the marshal not only a per diem for attendance on court and a commissioner, but that he was entitled to a per diem in two commissioners' courts on the same day. This decision has been rendered since this disallowance, and the department did not have this authority to follow. There can be no question, under this decision, as to its propriety.

Item 3, Schedule E: This item involves the question as to whether a deputy is entitled to a per diem for attendance before a commissioner as for a hearing, when the case was set for trial on that day, but the defendant failed to appear, and his bond was estreated, and an attachment issued. "A hearing on a question of admission to bail, or on a motion to adjourn, or on arraignment or commitment, constitutes a 'hearing and deciding,' for the attendance upon which the marshal is entitled to a fee." *Kinney v. U. S.*, 54 Fed. 313. The circumstance that the accused did not appear, and was in default, did not defeat the right to charge this fee. The deputy was required to attend, supposing, as he had a right to, that the defendant would appear as he had obligated himself to do; and the commissioner's court was open in order to determine the question of default. This was necessary, and thereupon, and by virtue of such determination, the case was continued, and an attachment issued. This seems such a hearing as the statute contemplates.

Schedule F: The questions here involved have been fully passed upon on the demurrer.

Schedule G: For discharging defendants on temporary bond. "The marshal is entitled to charge for release on bail before the com-

missioner, where such release involves the taking of a bail bond." *Kinney v. U. S.*, 54 Fed. 313. Paragraph 19, § 829, Rev. St., allows the marshal, "for every commitment or discharge of a prisoner, fifty cents." It appears in this schedule that each discharge was upon a new and separate bail bond, and hence a correct charge.

Schedule H: The questions here involved have been fully passed upon on the demurrer.

Schedule I: The questions here involved have been fully passed upon on the demurrer.

Schedule J: This schedule includes a number of items representing all the fees earned in four criminal prosecutions, and were disallowed by the accounting officers as unnecessary and excessive. It is shown by the evidence that after the issuance of the warrants, and before the arrest, the defendants attended before the same commissioner as witnesses in other cases; but the deputy to whom the warrants had been issued did not have the same in his possession at the time the said persons attended as witnesses, and hence no legal arrest could have been effected. The mere fact that after the issuance of the warrants the defendants attended before the commissioner as witnesses would not authorize either the commissioner or the deputy to arrest them without duly-issued process, which the deputy did not then have. It seems clear that this fact alone, without the showing of some bad faith on the part of the marshal or his deputy, would not defeat this claim for fees. There is no legal right for the accounting officers to determine in such a summary manner whether services are unnecessary and excessive. The services were actually rendered, at a large expense to the marshal, and the court has approved his accounts therefor.

Schedule K: This schedule represents items which were suspended for explanations, but after full explanation by the marshal they were neglected by the treasury, and have never been paid. Under paragraph 20, § 829, Rev. St., the marshal is entitled to 10 cents per mile for transportation of guard. The items therefor appear correct.

Schedule L: The questions here involved have been fully passed upon on demurrer. The same is true of Schedule M.

Schedule N: This schedule represents certain sums disbursed to bailiffs employed under specific order of the circuit and district courts, sitting in the same room, and presided over by the same judge. All amounts in excess of that paid to three bailiffs were disallowed. Section 715, Rev. St., reads:

"The circuit and district courts may appoint criers for their court, * * * and the marshals may appoint such number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation shall be paid only for actual attendance, and, when both courts are in session at the same time, only for attendance on one court."

The sundry civil appropriation act (August 18, 1894) provides, "For pay of bailiffs and criers, not exceeding three bailiffs and one

crier in each court, * * * \$150,000;" and the acts of March 2, 1895, and June 11, 1896 (sundry civil appropriation acts), have exactly the same wording relative to the employment of bailiffs. It thus appears that this proviso is attached to each appropriation bill. Does this lead to the conclusion that congress intended to give this the general effect of a law? If so, then why the yearly repetition? Its insertion in these acts only gives it the effect of a proviso, and it clearly can have no effect as general legislation, within the meaning of the language of the court in *U. S. v. Ewing*, supra:

"In the case under consideration, if the proviso had been simply that commissioners should not be entitled to any docket fee, we should have little doubt that it would be held as applying only to the \$50,000 appropriated in the bill."

The general provision of law, which stands unrepealed by this proviso in the appropriation bill, makes the employment of five bailiffs legal. There is a concluding fact relative to this item which has been overlooked by the government. The language of the act refers "each court," and when, incidentally, the business of both courts is crowded upon one judge, it does not follow that the work is therefore thrown upon one set of three bailiffs. The marshal is entitled in such instances to three bailiffs in each court, and, as there were only five for which he claims compensation in his account, he has confined himself to the number prescribed by this proviso. There is no contention that he did not comply with the law relative to their appointment. But, on the other hand, the employment was under the express order of the court, requiring this number, and was made only after the court had found that the business then before it could not be dispatched economically or satisfactorily without the assistance of five bailiffs, distributed with regard to the relative business of the two courts.

The answer admits that this court approved each of the said items in the current quarterly accounts as presented, and which now form part of the files and records of this court; and, as such order is prima facie evidence of their correctness, in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive. *U. S. v. Jones*, 134 U. S. 483, 10 Sup. Ct. 615; *Kinney v. U. S.*, 54 Fed. 313.

A further finding of facts is, in my judgment, deemed unnecessary, owing to the complete stipulation, covering all matters relative to the items in controversy; and a judgment for the petitioner may be entered for the amount claimed, after deducting the several amounts admitted in the replication to have been paid.

DREYER v. PEASE.

(Circuit Court, N. D. Illinois. July 26, 1898.)

1. HABEAS CORPUS—CONSTITUTIONALITY OF STATUTE.

When the constitutionality of a state statute has already been sustained by the state courts, a prisoner arrested by virtue of such statute has a right to have its validity under the federal constitution passed upon by the federal courts in a habeas corpus proceeding.

2. INSOLVENT BANKS—RECEIVING DEPOSITS—EMBEZZLEMENT.

The act of Illinois, providing that any banker receiving a deposit after insolvency shall be guilty of embezzlement, does not deprive any person of liberty or property without due process of law, or deny any person the equal protection of the law, in violation of Fourteenth Const. Amend. U. S. § 1.

Moran, Kraus & Mayer, for petitioner.

C. S. Deneen and A. C. Barnes, for respondent.

SHOWALTER, Circuit Judge. The petitioner, Edward S. Dreyer, together with one Robert Berger, was formerly engaged in the business of banking in Chicago. He is produced here by the respondent, the sheriff of the county, in obedience to a writ of habeas corpus. He was held by the sheriff to answer an indictment against himself and said Berger framed on the following statute of the state:

"Be it enacted by the people of the state of Illinois, represented in the general assembly, that if any banker or broker or person or persons doing a banking business, or any officer of any banking company or incorporated bank doing business in this state, shall receive from any person or persons, firm, company or corporation, or from any agent thereof, not indebted to said banker, broker, banking company or incorporated bank, any money, check, draft, bill of exchange, stocks, bonds or other valuable thing which is transferable by delivery, when, at the time of receiving such deposit, said banker, broker, banking company or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, said banker, broker or officer so receiving said deposit shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto may be imprisoned in the state penitentiary not less than one nor more than three years. The failure, suspension or involuntary liquidation of the banker, broker, banking company or incorporated bank within thirty days from and after the time of receiving such deposit shall be prima facie evidence of an intent to defraud, on the part of such banker, broker or officer of such banking company or incorporated bank." Laws 1879, p. 113.

It is insisted on behalf of the petitioner that this statute is void, as against that portion of the first section of the fourteenth amendment, to the national constitution which declares that no state shall "deprive any person of * * * liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is contended by the state that the proceeding in this court is premature, and that the petitioner should be remanded without inquiry here into the validity of the statute. Clearly, if the statute be unconstitutional, as claimed, the petitioner is unlawfully held, and should be discharged. If the validity of the statute were an open question in the courts of Illinois, then this court would, under the rul-

ings of the supreme court of the United States, be excused from consideration of the question at this time. But the supreme court of Illinois in *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, declared this law constitutional and valid. The question in the courts of the state is therefore foreclosed. In *Crowley v. Christenson*, 137 U. S. 86, 11 Sup. Ct. 13, Christenson had been arrested by the chief of police of San Francisco on a warrant issued by the police court of that municipality for violation of an ordinance with respect to the sale of liquors. He applied to the supreme court of California to be discharged from imprisonment, on the ground that said ordinance was unconstitutional and void. That court ruled against him, declaring the ordinance constitutional and valid. He was again arrested upon a similar complaint for a violation of the same ordinance. After the decision by the supreme court of California, and as a means of relief from the second arrest, he applied for a writ of habeas corpus to the circuit court of the United States for the Northern District of California. The judge holding that court granted the writ, and, being of opinion that the ordinance in question was in violation of the constitution of the United States, discharged the prisoner. From this order of discharge an appeal was taken to the supreme court of the United States, and that court entertained the appeal, and passed upon the question as to the constitutionality of the ordinance. *Baker v. Grice*, 169 U. S. 285, 18 Sup. Ct. 323, was also an appeal in a habeas corpus case, but there the supreme court of the United States refused to consider the constitutionality of the statute upon which Grice had been indicted, on the ground that this question was still open in the courts of Texas, from one of the districts of which state the appeal had been taken. In other words, the ruling of the district judge in Texas was reversed, with the direction that the prisoner be remanded, merely because, in the judgment of the supreme court of the United States, the consideration of the question was premature in the federal courts. I understand the California case to be a precedent for the position taken by this petitioner that this court cannot be excused from considering the constitutionality of the statute here in question, since the supreme court of the state has already passed upon the point. In view of *Crowley v. Christenson*, and of the absence of any holding by the supreme court of the United States that a federal judge may decline to entertain a proceeding of this kind under such circumstances, I think the merits of the present application must be considered.

Where a banker, being in fact insolvent, but still pretending solvency, receives money as a deposit from one who, in making such deposit, is misled by the pretense of solvency, and such banker is afterwards prevented by such insolvency from repayment on demand, and fails or suspends, so that repayment on demand is lost to the depositor,—where, in other words, a banker obtains money on the false pretense of solvency, and by the want of such solvency repayment on demand is lost to the depositor,—the offense appears to be complete. Failure or inability, through insolvency to pay on demand, does not make the offense. Such default must result from the undisclosed insolvency. The depositor must be deprived of something of value as

the consequence of the false pretense of solvency, in order to make out the offense. Nor does this false pretense, as a means efficient to secure the deposit, constitute the offense. The loss must result. Both the pretense, as the efficient antecedent to the deposit, and resultant loss, must concur. No banker who heeds this law can be thereby deprived either of any liberty or any property right which was necessary or incidental to his business as a banker. But for this law he, being insolvent, might have taken deposits with impunity, so far as concerned any criminal sanction, but not as a matter of personal prerogative or property right. He had no such right or liberty. What a man may do as of right inherent in himself, or as a property owner, or as one free to contract or carry on business, is one thing; what he may do as being unrestricted by any inhibitory punitive law is another. A statute which forbids a banker, being insolvent, from taking a deposit on the pretense of solvency, does not, in my judgment, deprive him of any liberty or property right guaranteed by the national constitution.

The cases cited on the argument concern laws which could be valid only as referred to the police power of the legislature. They were cases in which a liberty or property right, otherwise clearly appertaining to individuals constituting a particular class, is annulled or extinguished by legislative enactment, in the interest of the public. The right, for instance, to build or maintain a wooden house on a city lot, to keep fires going continuously night and day in certain industries, to store materials possibly dangerous within specified territory, to make unrestricted sales of certain kinds of merchandise, etc.,—these rights exist affirmatively and of course, until annulled by positive law pursuant to the police power. The question for a court in such cases is whether or not the enactment, in view of its subject-matter and the uniformity of its operation by force of a classification which is germane and appropriate, has that relation to the public welfare which brings it within the police power of the legislature. What may be called, in strictness, a police enactment, may be thought of, on the one hand, as supplanting constitutional guaranties, or, on the other, as a limitation on liberty or property right first promulgated by the legislature in making said enactment, but latent up to that time. In other words, personal liberty and the rights of property are, in a certain measure, subject to the police power of the state. But why refer to or discuss the police power in connection with a statute which prohibits conduct in itself essentially unfair and fraudulent,—conduct which could not be justified as within the prerogative of any man, either in his character as property owner or as man of business free to deal fairly with others in his own interests?

Counsel argue that conduct such as that set forth in this indictment would not be deemed even tortious in a civil action. *American Trust & Sav. Bank v. Gueder & Paeschke Mfg. Co.*, 150 Ill. 336, 37 N. E. 227, seems to imply the contrary. But, whatever may be the sense of this decision, if the taking of a deposit by an insolvent banker from an unwary depositor, and a subsequent loss resulting from such insolvency, be not actionable as a tort, the reason would be the want of care on the part of the depositor himself. No commendation

or approval of the conduct of such insolvent is to be implied. Holding such a transaction by a civil court to be a mere contract of loan, not procured by actionable fraud, would not mean that the insolvent banker had a right guaranteed by the national constitution, and proof against inhibitory state legislation, to take deposits, on the pretense of solvency, from any person too negligent of his own interest to make careful and specific inquiry.

It is suggested that a banker who did not know himself to be insolvent might be convicted under this act. I do not see how the right of an insolvent banker to take money as a deposit can be grounded on his ignorance of his own insolvency, so that such right will fall within the guaranty of the fourteenth amendment touching liberty or property as against inhibitory state legislation. On the other hand, cases such as *Com. v. White*, 11 Allen, 264, are against the proposition that what may be called positive guilty knowledge is necessary to make the criminal offense. The pretense of solvency, or, putting it in another way, the appearance or seeming to the depositor that the banker knows himself to be solvent, is the efficient cause of the deposit. A banking business, in strictness, cannot be carried on if the banker be insolvent. The assumption of solvency seems a necessary antecedent to any deposit in the usual course of business. A depositor merely in his character as depositor parts with his money, not for profit in the way of interest, but simply upon the assurance that he can have it again on demand, in portions and at times to suit his convenience or inclination. From the standpoint of a depositor, the banking business is *sui generis*. A depositor in making a deposit does not think of himself as a lender driving a bargain in the way of interest with a borrower, or as a merchant selling on credit, or as one making a deal or contract of some sort for profit. Without inquiry and as a matter of course he assumes the solvency of his bank, leaves his money, and goes his way. The proposition that the insolvent banker who takes a deposit is discriminated against, since any other insolvent may borrow with impunity, is hardly sound. The legislature might, so far as I can see, prohibit by punitive enactment any insolvent from borrowing money, to the loss or injury of the lender, by using for that purpose the false pretense of solvency. The legislature could hardly prevent any insolvent from borrowing money when neither the false pretense of solvency nor any other false pretense is made use of. The present statute is applicable to persons engaged in the business of banking,—a business which, from the standpoint of one about to deposit money, seems to make on its own behalf the direct assertion of solvency.

The law here in question is applicable to any person whose conduct falls within the definition of the offense. How wide or how narrow that definition shall be is a question for the legislature. So far as the legislative power of a state is concerned, constitutions are not grants, but limitations. So long as no constitutional limitation is invaded, the legislature may make whatever law it pleases. I am not able to say that taking money as a deposit by an insolvent bank-

er under pretense of solvency is a right guarantied by the fourteenth amendment. A law which makes the obtaining money by false pretenses a crime would hardly be invalid on the ground that a person using the same pretenses, but failing to obtain and appropriate money or property thereby, would not be punishable. The circumstance that, by the terms of the statute in question, the repayment on demand must be lost to the depositor in order to make the offense, is not a valid objection. Nor as long as any person whose conduct falls within the definition of the offense is liable to the penalty prescribed do I see that the equal protection of the laws is denied. The entire act is entitled an "Act for the protection of bank depositors." The offense in question is created by the first section. It is a limitation on this offense that the depositor must not at the time be himself indebted to the bank. The offense is against the state. The section gives no right of any kind to, nor does it create any liability on the part of, any depositor, whether he be indebted to the bank or otherwise. But, as it seems to me, the question whether or not a criminal statute denies the equal protection of the laws is properly available to one who finds himself amenable to such statute (*Budd v. State*, 3 *Humph.* 492), and who himself, as he conceives, is thereby denied the equal protection of the laws. The penalty of the statute here in question goes without discrimination against any person whose conduct falls within the definition of the offense.

As concerns the last sentence of the section, I do not think any question can properly arise in this proceeding. The state is not obliged to make use of—and may not choose or be able to use—the rule of evidence there defined. That it will be able to make out a case, or what evidence the prosecuting attorney will introduce, cannot now be known. So far as is shown here, there may have been no suspension of the banking business by this petitioner and his partner until after the 30 days, or such suspension may have occurred on the same day when the deposit alleged in the indictment was made. At all events, it does not appear that the rule of evidence in question has anything to do with the detention now complained of. I think the writ should be discharged, and the petitioner remanded to the custody of the sheriff; and it is so ordered.

THE CARRIE.¹

(District Court, E. D. Virginia. January 25, 1883.)

SALVAGE—COMPENSATION.

A steamer, heavily laden, suddenly sprung a leak, and quickly filled, in the narrow channel of the James river. She was hastily abandoned by her master and crew, without casting anchor or setting lights, and settled lightly on the bottom, where she was liable to be run into by several large ocean steamers which were due to pass the following night. At her master's request, a steam yacht went to her rescue, and in the course of two or three hours towed her to a wharf. *Held*, that this was a salvage service, for which \$600 should be awarded on a salved value of \$2,400.

This was a libel in rem filed by J. L. Schoolcraft against the steamer *Carrie* and cargo, to recover salvage. On the afternoon of December 15, 1882, the *Carrie*, which was coming up the James river heavily laden, bound for Petersburg, sprung a leak, and suddenly began to sink while in the vicinity of Blair's wharf. Her master and crew hurriedly left her in a small boat, and, some time later, wet, chilled, and exhausted, reached a schooner in the river. They had had no time to cast an anchor or put up anchor lights. The boat sank in the channel, grounding slightly in deep water, where she was liable to be run into by large steamers, several of which were due to pass during the night. Soon after the disaster, the yacht *Mary* arrived in the vicinity, and, in answer to a signal, went alongside the schooner on which the master and crew of the *Carrie* had taken refuge. At the master's request, she first put himself and the crew ashore at Blair's wharf, and then went to the *Carrie*, which she succeeded in towing to the same point in the course of two or three hours. The master then resumed control of her.

Jackson & Sands, for libellant.

Chas. S. Stringfellow, for respondent.

HUGHES, District Judge. This is plainly a case of salvage, and a case for a liberal salvage reward. The *Carrie* was in a helpless condition; her own crew powerless to save her, and hopeless of doing so. Her master called upon the owner of the *Mary* to undertake the rescue of his vessel, and spoke of 50 or 75 per cent. of the value raised as the probable reward. The fact that no anchor was thrown out, and no light put up, conclusively evidenced abandonment. It can hardly be said that in a case of abandonment in a river, with the land of each shore in sight, there was no *animus recuperandi*. But, if this like abandonment had occurred on the high seas, the case would have been one of absolute derelict. The vessel was in imminent peril. She was likely either to sink, and to be crushed on the bottom by the powerful steamers soon to pass up and down, or, if she had continued afloat, she was liable to be collided with and sunk by the same great

¹ This case has been heretofore reported in 5 Hughes, 445, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

vessels. The mere fact that the work of saving occupied the *Mary* only two or three hours does not materially affect the case. In the case of *The Blackwall*, 10 Wall. 1, where fire engines from San Francisco put out a fire on the steamer in the harbor in 30 minutes, the supreme court of the United States sanctioned an award of many thousands of dollars salvage. Really, the only open question in the case is, what shall be the amount of award? I consider the value of the *Carrie* after she was delivered at Blair's wharf was \$2,400. I will give a decree for a fourth of this value; that is to say, for \$600. As to the portion of the cargo that was saved, I will give a decree for half its net value.

TWO HUNDRED AND SIXTEEN LOADS AND SIX HUNDRED AND SEVENTY-EIGHT BARRELS OF FERTILIZER.¹

(District Court, E. D. Virginia. July 13, 1881.)

DEMURRAGE—LIEN ON CARGO—EFFECT OF DELIVERY.

When cargo has been absolutely delivered to the consignee before service of process thereon, the lien for demurrage is lost.

This was a libel for demurrage filed by Thomas K. Jones, master of a schooner, against her cargo of fertilizer. The libel was filed on the day on which the delivery of the cargo to the consignee was completed, and process was not served thereon until the following day.

HUGHES, District Judge. There is no doubt that a cargo may be libeled for freight so long as it is on the vessel or in custody of a wharfinger or warehouseman, holding either actually or constructively for the owner of the vessel. But, when the cargo has been absolutely delivered to the consignee against whom the freight is claimed, the maritime lien is lost, and the jurisdiction of the admiralty court to enforce it is lost with it; for it is settled law that "the lien of a ship-owner for freight, being but a right to retain the goods until payment of freight, is inseparably associated with the possession of the goods, and is lost by an unconditional delivery to the consignee." See the opinion of Chief Justice Taney in *Bags of Linseed*, 1 Black, 108. The libel must be dismissed at the libellant's costs; and the clerk may check upon the fund in bank for the costs, and, after deducting these, then in favor of the master for the residue of the sum.

¹ This case has been heretofore reported in 5 Hughes, 310, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

MEMORANDUM DECISIONS.

ABILENE v. FOLEY. (Circuit Court of Appeals, Fifth Circuit. February 25, 1897.) No. 510. In Error to the Circuit Court of the United States for the Northern District of Texas. T. J. Freeman, Wm. Alexander, W. H. Clark, and W. L. Hall, for plaintiff in error. W. L. McDonald, for defendant in error. Dismissed pursuant to the twentieth rule.

ALABAMA G. S. R. CO. v. CARROLL. (Circuit Court of Appeals, Fifth Circuit. June 7, 1897.) No. 516. In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama. A. G. Smith and James Weatherly, for plaintiff in error. Sam. Will John and Richard L. Brooks, for defendant in error. Reversed and remanded, with directions to dismiss for want of jurisdiction. A petition for a rehearing having been allowed, the opinion was on June 7, 1897, withdrawn by order of the court. See 28 C. C. A. 207, 84 Fed. 772.

AMERICAN CONST. CO. v. PENNSYLVANIA CO. FOR INS. ON LIVES AND GRANTING ANNUITIES. (Circuit Court of Appeals, Fifth Circuit. April 20, 1897.) No. 520. Appeal from the Circuit Court of the United States for the Southern District of Florida. H. Bisbee and C. D. Rinehart, for appellant. J. C. Cooper, for appellee. Dismissed pursuant to the twentieth rule.

PRESIDENT, ETC., OF BANK OF KENTUCKY v. CITY OF LOUISVILLE.

(Circuit Court, D. Kentucky. June 4, 1898.)

No. 6,556.

RES JUDICATA.

Humphrey & Davie, for complainant.
Henry L. Stone, for defendant.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. The bill filed herein presents the same questions as those already considered in the case of Bank v. Stone, 88 Fed. 383; but it relates to the taxes for 1893-94, which were certified down by the state board of valuation and assessment to the city of Louisville for collection. We do not think that the questions differ in any respect from those already considered, and must therefore hold that the city of Louisville is estopped by the former judgment between the bank of Kentucky and it, in which it was held by the court of appeals of Kentucky that the Bank of Kentucky had an irrevocable contract under the Hewitt act (Act Ky. May 17, 1886) for the exemption of the property and franchise of the Bank of Kentucky from any other taxation than as therein imposed; and therefore that the bank is entitled to the preliminary injunction against the collection by the city of Louisville and its agents of the taxes provided in the revenue act of November, 1892. The demurrer to the bill is overruled, and the motion for an injunction granted.

CITY OF CLEVELAND v. HAWGOOD & AVERY TRANSIT CO. (Circuit Court of Appeals, Sixth Circuit. May 5, 1898.) No. 544. Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio. George L. Phillips and Miner G. Norton, for plaintiff in error. Harvey D. Goulder, for defendant in error. No opinion. Judgment affirmed.

CITY OF WABASHA v. CHICAGO, M. & ST. P. RY. CO. (Circuit Court of Appeals, Eighth Circuit. May 4, 1896.) No. 760. In Error to the Circuit Court of the United States for the District of Minnesota. A. H. Young and Daniel Fish, for plaintiff in error. H. H. Field and W. H. Norris, for defendant in error. Dismissed for want of jurisdiction, with costs.

CUYLER & WOODBURN R. CO. v. ANNISTON NAT. BANK. (Circuit Court of Appeals, Fifth Circuit. November 23, 1896.) No. 548. Appeal from the Circuit Court of the United States for the Southern District of Georgia. Docketed and dismissed pursuant to the sixteenth rule on motion of W. K. Miller, for appellees.

DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO. (Circuit Court of Appeals, Eighth Circuit.) Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 895.

DEPOSIT BANK OF FRANKFORT v. STONE et al. (Circuit Court, D. Kentucky. June 4, 1898.) No. 275. Frank Chinn, for complainant. W. S. Taylor, Atty. Gen., for Samuel H. Stone and others. Ira & W. H. Julian, for city of Frankfort. James H. Polsgrove, for county of Franklin. Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. In an injunction suit brought by the Deposit Bank of Frankfort against the county of Franklin, in the Franklin circuit court, to prevent the collection of any taxes under the revenue act of 1892 in excess of those imposed by the Hewitt act (Act Ky. May 17, 1886), it was expressly adjudged on appeal by the court of appeals that the bank had, by its due acceptance of the terms of the Hewitt act, an irrevocable contract of exemption from taxation in excess of that imposed in the Hewitt act, and that the revenue act of 1892 violated this contract. In a similar injunction suit brought by the bank against the city of Frankfort, a decree in all respects similar was entered on the same ground. In accordance with our decision in the case of Bank of Kentucky v. Stone (just decided) 88 Fed. 383, we must therefore grant the motion for a preliminary injunction, and overrule the demurrer to the bill.

THE FAVORITE. (Circuit Court of Appeals, Sixth Circuit. May 12, 1898.) No. 576. In Error to the District Court of the United States for the Northern District of Ohio. Orestes C. Pinney, for plaintiff in error. Goulder & Holding, on brief for defendants in error. Dismissed for want of jurisdiction.

FLINT v. CHRISTALL. (Circuit Court of Appeals, Second Circuit.) Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 831.

FARMERS' BANK OF KENTUCKY v. STONE et al. (Circuit Court, D. Kentucky. June 4, 1898.) John W. Rodman and W. S. Pryor, for complainant. W. S. Taylor, for Samuel H. Stone, etc. Ira & W. H. Julian, for city of Frankfort. James H. Polsgrove, for county of Franklin. James F. Clay, for Henderson county. Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. This case is controlled by the points already decided. The Farmers' Bank, in prior adjudications with the county of Franklin, the city of Frankfort, and the city of Henderson, was conclusively adjudged to have an irrevocable contract under the Hewitt act, exempting it from any taxation in excess of that provided therein. There was no such adjudication, however, between the Farmers' Bank and either Scott county or Henderson county. It therefore follows from what has already been decided that as to Scott county and Henderson county the demurrers to the bill should be sustained, and the bill must be dismissed, while as to the other defendants the demurrers will be overruled, and the motions for a preliminary injunction granted.

FOLSOM v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 4, 1898.) No. 579. In Error to the Supreme Court of the Territory of New Mexico. Dismissed for want of jurisdiction.

FRANTZ v. WEIGAND. (Circuit Court of Appeals, Fifth Circuit. May 17, 1897.) No. 575. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. W. O. Hart, for plaintiff in error. Frank McGloin, for defendant in error. Dismissed pursuant to the twentieth rule.

GLYNN et al. v. KEYSER et al. KEYSER et al. v. GLYNN et al. (Circuit Court of Appeals, Fifth Circuit. May 24, 1898.) No. 652. Appeal and Cross Appeal from the District Court of the United States for the Northern District of Florida. J. P. Kirlin and John Eagan, for Dashper E. Glynn & Son. John C. Avery, for W. S. Keyser & Co. Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. The questions raised in this case are identical with those in Wood v. Keyser, 87 Fed. 1007, and Steamship Co. v. Keyser (just decided) 87 Fed. 1005, and for the same reasons the judgment of the district court is affirmed.

HOWISON v. ALABAMA COAL & IRON CO. (Circuit Court of Appeals, Fifth Circuit. December 21, 1896.) No. 541. In Error to the Circuit Court of the United States for the Northern District of Alabama. Alexander T. London, for plaintiff in error. John B. Knox and S. J. Bowie, for defendant in error. Dismissed pursuant to the twentieth rule.

INTERSTATE SAV., LOAN & TRUST CO. v. SHAW et al. (Circuit Court of Appeals, Sixth Circuit. May 12, 1898.) No. 579. In Error to the Circuit Court of the United States for the District of Kentucky. Michael G. Heintz, for plaintiff in error. E. C. Pyle, for defendants in error. No opinion. Affirmed.

JOHNSON v. CITIZENS' ST. R. CO. OF INDIANAPOLIS, IND. (Circuit Court of Appeals, Sixth Circuit. May 10, 1898.) No. 568. In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio. W. B. Sanders, for plaintiff in error. W. H. H. Miller, for defendant in error. No opinion. Affirmed.

LOUISVILLE BANKING CO. v. CITY OF LOUISVILLE. (Circuit Court, D. Kentucky. June 4, 1898.) No. 6562. Helm & Bruce, for complainant. Henry L. Stone, for city of Louisville. Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. This case presents the same questions as are presented in the case of Louisville Banking Co. v. Stone, *infra*, already disposed of, but involves the taxes for 1893 and 1894. The taxes for 1895, 1896, 1897, and 1898 were involved in the prior case. The order will be that the preliminary injunction prayed for shall issue, and that the demurrers to the bills be overruled.

LOUISVILLE BANKING CO. v. STONE et al.

SAME v. CITY OF LOUISVILLE.

(Circuit Court, D. Kentucky. June 4, 1898.)

Nos. 6,561 and 6,562.

RES JUDICATA.

Helm & Bruce, for complainant.

W. S. Taylor, Atty. Gen., for Samuel H. Stone, etc., board of valuation and assessment of the state of Kentucky.

Henry L. Stone, for city of Louisville.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. These cases present substantially the same questions as those already passed upon in the case of Bank of Kentucky v. Same Defendants, 88 Fed. 383. The complainant company was a corporation organized after the act of 1856, but before the Hewitt act. It duly accepted the provisions of the Hewitt act. After the passage of the revenue act of November, 1892, and the adoption of the ordinance by the city of Louisville imposing a license upon the gross receipts of banks doing business within its limits, a warrant was sued out by the city of Louisville, in its police court, against the Louisville Banking Company, for a failure to pay the license. This bank filed a petition for a writ of prohibition in the circuit court of Jefferson county against R. H. Thompson, the police judge, averring that the ordinance of the city of Louisville was void, as impairing an obligation of the complainant's contract with the state under the Hewitt act, and that any authority given to the city of Louisville to pass such ordinance by the revenue act of November, 1892, was likewise void, as impairing the obligation of the contract. The petition prayed that the police judge might be prohibited from taking jurisdiction of the proceeding against complainant for a violation of the ordinance. Issue was joined on this petition by the

defendant, the judge of the police court of the city of Louisville. The city of Louisville, though not a party in name, was in reality the party defendant, and appeared by counsel. Indeed, the proceedings were taken for the purpose of testing the validity of the license ordinance by agreement between the city attorney and the complainant bank. The Jefferson circuit court found the issues in favor of the defendant, and entered a decree dismissing the petition. Thereupon the complainant banking company caused an appeal to be taken in its name from the judgment of the Jefferson circuit court to the court of appeals, and to that appeal it made the city of Louisville and R. H. Thompson, the police judge, parties. In the court of appeals the cause was argued by the counsel for the city of Louisville. The court of appeals reversed the judgment of the Jefferson county circuit court (31 S. W. 1013), and in its opinion held that the ordinance of the city of Louisville was void, for the reason that the Louisville Banking Company had an irrevocable contract with the commonwealth upon its due acceptance of the terms of the Hewitt act, limiting the amount of taxes to which it was subject to those imposed by that act during its corporate existence. For the reasons already stated in the case of *Bank of Kentucky v. Same Defendants*, we think it conclusively established, as between the parties, by a former adjudication, that the complainant had an irrevocable contract, under the Hewitt act, with the commonwealth of Kentucky, by which no greater taxes than therein provided could be imposed upon it by the commonwealth, or under its authority. For the reasons stated in the same opinion, we think the complainant entitled to equitable relief to prevent a violation of that contract by the taxes assessed under the revenue act of 1892. An order for a preliminary injunction therefore must issue in these cases, and the demurrers to the bills must be overruled.

LOUISVILLE CITY NAT. BANK v. STONE et al. SAME v. CITY OF LOUISVILLE. (Circuit Court, D. Kentucky. June 4, 1898.) Nos. 6,565 and 6,566. Helm & Bruce, for complainant. W. S. Taylor, Atty. Gen., for Samuel H. Stone and others. Henry L. Stone, for city of Louisville. Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. These cases are controlled by the case of *Bank of Commerce v. City of Louisville*, 88 Fed. 398. On the principle of privity and res judicata laid down in that case, we grant the motion for a preliminary injunction, and overrule the demurrers to the bill.

LYONS v. OTERL. (Circuit Court of Appeals, Fifth Circuit. May 17, 1897.) No. 579. Appeal from the District Court of the United States for the Eastern District of Louisiana. Dismissed, pursuant to the twenty-third rule, for failure to print record.

PERRIS IRR. DIST. v. SAVINGS & TRUST CO. OF CLEVELAND, OHIO, et al. (Circuit Court, S. D. California. June 29, 1898.) No. 659. Wm. J. Hunsaker, for Savings & Trust Co. and others. Works & Lee, for Perris Irr. Dist.

ROSS, Circuit Judge. The cross bill in this case is substantially similar to that in the case of *Alessandro Irr. Dist. v. Savings & Trust Co. of Cleveland* (just decided) 88 Fed. 928. For the reasons given by the court for overruling the demurrer to the cross bill in that case, an order will be entered herein overruling the demurrer, with leave to the defendants to answer within 20 days.

RIVER MACHINE & BOILER CO. v. DUFFY et al. (Circuit Court of Appeals, Sixth Circuit. May 12, 1898.) No. 576. In Error to the District Court of the United States for the Northern District of Ohio. O. C. Pinney, for plaintiff in error. Dismissed for want of jurisdiction.

SOUTHERN RY. CO. v. AVERA. (Circuit Court of Appeals, Fifth Circuit. April 22, 1897.) No. 586. In Error to the Circuit Court of the United States for the Northern District of Georgia. R. T. Dorsey and Sanders McDaniel, for plaintiff in error. Dismissed pursuant to the twentieth rule.

THIRD NAT. BANK v. STONE et al. SAME v. CITY OF LOUISVILLE. (Circuit Court, D. Kentucky. June 4, 1898.) Nos. 6,573 and 6,574. Helm & Bruce, for complainant. W. S. Taylor, Atty. Gen., for Samuel H. Stone and others. Henry L. Stone, for city of Louisville. Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. These cases present the same question which arose in the case of Louisville Banking Co. v. Same Defendants (already decided) 88 Fed. 988. The suit against the city of Louisville relates to the taxes under the revenue act of 1892 for the years 1893 and 1894, and the suit against Stone and others and the city of Louisville relates to the taxes for 1895, 1896, 1897, and 1898. In the prohibition suit brought by the Third National Bank against the judge of the police court, to which the city of Louisville became a party on appeal, it was held by the court of appeals of Kentucky (31 S. W. 1013) that the Third National Bank, by its formal acceptance of the provisions of the Hewitt act, had acquired a contract right, irrevocable by the state, exempting it from all taxes except those provided under the Hewitt act, and that the license tax imposed by the city of Louisville under a statute of the state was therefore a violation of the contract, and void under the constitution of the United States. The demurrers to the bills are therefore overruled, and the motions for preliminary injunction against the defendants are granted.

THE THREE FRIENDS. (Circuit Court of Appeals, Fifth Circuit. February 1, 1897.) No. 563. Appeal from the District Court of the United States for the Southern District of Florida. No opinion. Taken to the supreme court of the United States before argument by writ of certiorari, and by that court reversed, and remanded to the district court. See 166 U. S. 1, 17 Sup. Ct. 495.

UNITED STATES v. BOWERSOCK et al. (Circuit Court of Appeals, Eighth Circuit. December 11, 1893.) No. 306. In Error to the Circuit Court of the United States for the District of Kansas. Solon O. Thatcher, for defendants in error. Dismissed for failure to print record, pursuant to the twenty-third rule.

UNITED STATES v. SALAMBIER. (Circuit Court of Appeals, Second Circuit.) Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 771.

VOGEMANN v. KEYSER et al. KEYSER et al. v. VOGEMANN. (Circuit Court of Appeals, Fifth Circuit. May 31, 1898.) No. 656. Ben. C. Tunison, for H. Vogemann. John C. Avery, for W. S. Keyser & Co. Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge. The issues in this case are the same as those in case No. 655, decided this day (*Schmidt v. Keyser*, 88 Fed. 799), and involving the construction of the "cesser clause," identical in language with that in case No. 655. The decree appealed from is affirmed.

WHITMIRE v. HUDSON et al. (Circuit Court of Appeals, Fifth Circuit. May 24, 1898.) No. 658. Appeal from the District Court of the United States for the Northern District of Florida. W. A. Blount and A. C. Blount, for appellant. B. C. Tunison, for appellees. Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PER CURIAM. This is a libel in personam to recover salvage for services in saving 550 sticks of timber adrift on the tide waters of Escambia Bay. The case is in all respects like that of *Whitmire v. Cobb* (just decided) 88 Fed. 91, and for the same reasons the decree of the district court is affirmed.

END OF CASES IN VOL. 88.

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